Theodore Roosevelt American Inn of Court
ADR: It's Not Just Another Litigation
The Power of Mediation to Find Solutions That Litigation Can't
Agenda—March 6, 2019

Panel/program intro/bios (6:00-6:05pm)
Led by Marilyn Genoa

Mediation vs. litigation (6:05-6:10pm) by Theo Cheng

Presentation of fact pattern (6:10-6:15pm) by Navpreet Natt

Joint mediation session:
Mediator's introduction (6:15-6:35pm) by Hon. Ira Warshawsky

Commentary on mediator's intro—led by Marilyn Genoa (6:35-6:45pm)

Attorney openings (6:45-6:55pm)

Commentary on openings—led by Theo Cheng (6:55-7:05pm)

Discussion between plaintiff/claimant and attorney (7:05-7:10pm)

Marilyn caucusing—effort at reaching agreement through mediation brainstorming with plaintiff/claimant and her attorney (7:10-7:15pm)

Discussion between defendant/respondent and attorney (7:15-7:20pm)

Caucus with defendant/respondent and attorney (7:20-7:25pm)

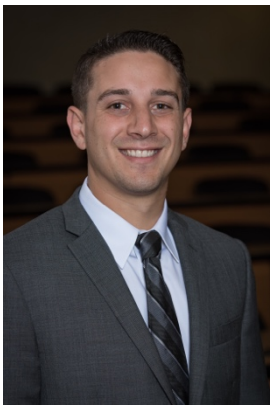
Commentary on caucuses—led by Jess Bunshaft (7:25-7:35pm)

Theo Cheng demonstrating impasse-breaking techniques, based on a monetary differences (discussion with defenant/respondent & attorney) (7:35-7:40pm)

Commentary on impasse-breaking, led by Hon. Ira Warshawsky (7:40-7:50pm)

CLIFF J. LAFEMINA

JD Candidate '21 | Maurice A. Deane School of Law at Hofstra University



Cliff LaFemina is a graduate from the University of Delaware with a Bachelor of Science in Sport Management, and a Master of Business Administration. He is currently pursuing a career in labor and employment law to assist with the fight against unfair labor practices, and foster collective bargaining amongst employers and employees.

Prior to his enrollment at the Maurice A. Deane School of Law at Hofstra University, Cliff worked as an Events Manager for the University of Delaware's Athletic Department, where he oversaw operations for several varsity sports programs, and planned events with outside organizations, such as Bands of America, Special Olympics, March of Dimes, and local high schools. After leaving the University of Delaware, he was an Events Manager for University Programs & Events, Office of the President at Columbia University. In this capacity, he was heavily involved with the planning and execution of University Commencement, the 25 Year Club Dinner, Community Breakfast, and Fireside Chats. He also assisted with event logistics for the World Leaders Forum, Heads of State Week, the Fun Run, the Trustees Dinners, the opening of the Manhattanville Campus, and the Honorary Degree Recipient Dinner. Cliff's experiences as an events manager led him to realize his passion for workers' rights, and pushed him to follow his lifelong dream of enrolling in law school.

Cliff is a member of the Hofstra Trial Advocacy Association, and Hofstra Dispute Resolution Society. He has aspirations to join more organizations throughout his law school career, such as Moot Court, and Bar Associations.

A native of New York, Cliff resides in Massapequa, New York.

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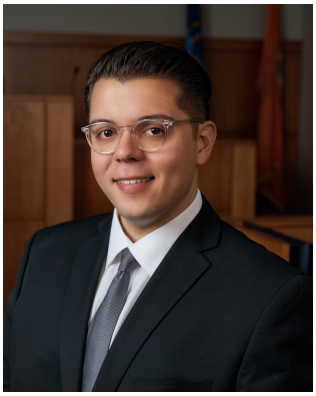
MAURICE A. DEANE SCHOOL OF LAW



Domenick J. Pesce
Law Student
dpesce3@pride.hofstra.edu

Education
Maurice A. Deane School of Law at Hofstra University, J.D. Candidate

Hofstra University - Honors College, B.A., m*agna cum laude*, Phi Beta Kappa

DOMENICK J. PESCE

Areas of Interest

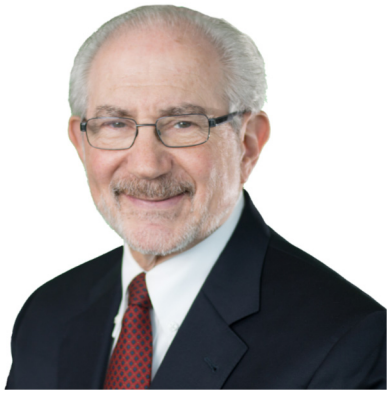
Criminal Law
Intellectual Property Law
Technology Law
Cybersecurity Law

Biography

Domenick graduated from Hofstra University, Honors College, where he majored in Political Science with minors in Philosophy of Law, Rhetorical Studies, and Italian. He currently is a 3L at the Maurice A. Deane School of Law at Hofstra University. At Hofstra Law, Domenick is the Editor-in-Chief of the Hofstra Labor & Employment Law Journal and President of the Federal Bar Association – Hofstra Law Division. He is also a researcher at the Hofstra Research Laboratory for Law, Logic and Technology (LLT Lab) and a student member of the Theodore Roosevelt American Inn of Court. Domenick also has over five years of experience working for Apple Inc. as a certified technician and trainer.

During the summer of 2017, Domenick was a judicial intern for the Honorable Helene F. Gugerty in Nassau County Court. This past summer he worked as a legal intern in the Public Corruption Bureau of the Nassau County District Attorney's Office. He is interested in criminal, intellectual property, technology, and cybersecurity law.

In the summer of 2019, Domenick will join the Nassau County District Attorney's Office as an Assistant District Attorney.



Hon. Ira B. Warshawsky

Of Counsel

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Garden City, New York 11530
(516) 741-6565
iwarshawsky@msek.com

Practice Areas

Litigation & Dispute Resolution

Professional Responsibility

Alternative Dispute Resolution

Education

Brooklyn Law School
J.D., 1969

Rutgers University
B.A., 1966

Memberships

American Bar Association

New York State Bar Association

New York Bar Foundation, Fellow

Nassau County Bar Association, Former Director; Community Relations & Public Education Committee, and Strategic Planning Committee, former Chairs

Nassau County District Court Judges' Association, Past President

Assistant District Attorneys Association of Nassau County, Past President

Jewish Lawyers Association

Nassau Academy of Law, Former Dean

Theodore Roosevelt American Inn of Court, Member and Past President

American College of Business Court Judges, Founding Member and Past President

Special Masters of Commercial Division, New York County

Admissions

New York State

Justice Ira B. Warshawsky, ret. is Of Counsel in the Litigation and Alternative Dispute Resolution practices at Meyer, Suozzi, English & Klein, P.C. in Garden City, Long Island, N.Y. Since joining the firm, the judge has handled mediations with a concentration in multiple areas including construction, personal injury and business disputes. The Judge serves not only as an advocate, representing clients in commercial litigation, but also as a mediator, arbitrator, litigator, private judge, special master and referee, especially in the area of business disputes and the resolution of electronic discovery (E-Discovery) issues. The Judge is also a member of NAM's arbitration and mediation panels. Judge Warshawsky was a distinguished member of the New York judiciary for 25 years. Immediately prior to joining Meyer Suozzi, he served as a Supreme Court Justice in one of the State's leading trial parts -- the Commercial Division -- where he presided over all manner of business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases.

Judge Warshawsky started his career in public service as a Legal Aid attorney in 1970 when he was Assistant Chief of the Family Court branch in Queens County. He served as a Nassau County Assistant District Attorney in the District and County Court trial bureaus from 1972 to 1974. Following these four years of prosecution and defense work he became a law secretary, serving judges of the New York State Court of Claims and County Court of Nassau County. In 1987 he was elected to the District Court and served there until 1997. In 1997 he was elected to the Supreme Court of the State of New York where he has presided in a Dedicated Matrimonial Part, a Differentiated Case Management Part and sat in one of the county's three Dedicated Commercial Parts until 2011.

Judge Warshawsky has been active in numerous legal, educational and charitable organizations during his career. The Judge recently served as an expert in New York Law in the Grand Court of the Cayman Islands. He has also served as a lecturer in various areas of commercial, civil and criminal law, most recently in the area of e-discovery and its ethical problems. He frequently lectures for the National Institute of Trial Advocacy (NITA) at Hofstra and Widener Law Schools. The Judge currently serves as a contributing editor of the *Benchbook for Trial Judges* published by the Supreme Court Justices Association of the State of New York. He has served as a member of the Office of Court Administration's Civil Curriculum Committee. In 2010, while still on the bench, he was named the official representative of the New York State Unified Court System to The Sedona Conference®, a leading organization

credited with developing rules and concepts which address electronically stored information in litigation. The judge is currently a member of the Advisory Board of The Sedona Conference.

As a judge in the Commercial Division of the Supreme Court, he authored several informative decisions dealing with the discoverability and cost of producing electronic materials as well as determining “fair value” in corporate dissolution matters. He has presented numerous seminars on electronic discovery to practicing lawyers through the ABA, the NYSBA, the Nassau Bar Association and private corporate law forums.

In 1996 Judge Warshawsky was the recipient of EAC's Humanitarian of the Year Award, in 1997 he received the Nassau County Bar Association President's Award, in 2000 he received the Former Assistant District Attorneys Association's Frank A. Gulotta Criminal Justice Award and in 2004, the Nassau Bar Association's Director's Award. He is also past president of the Men of Reform Judaism, the men’s arm of the Union of Reform Judaism, the parent body of the Reform movement of Judaism. In 2013, 2015, and 2016, Judge Warshawsky was voted as one of the top 10 Arbitrators in a *New York Law Journal* reader’s poll. In 2016, he was also named an “ADR Champion” by the *National Law Journal*.

In 2018, Judge Warshawsky was named ADR Champion by The National Law Journal. In 2017, he was given a ProBono Award at the Nassau County Bar Association’s Access to Justice for being one of Nassau’s attorneys to provide the most pro bono hours of service in 2016.

NYDRC
New York
Dispute Resolution Center, Inc.

JESS A. BUNSHAFT, ESQ – PRINCIPAL
MARILYN K. GENOA, ESQ – PRINCIPAL

12 JAEGGER DRIVE
OLD BROOKVILLE, NY 11545
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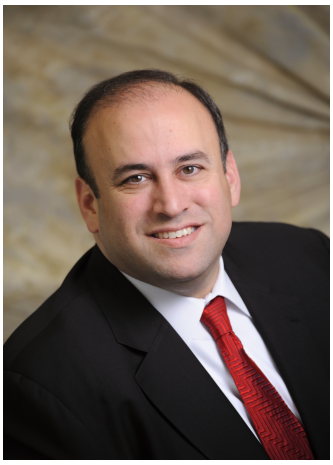

Jess Bunshaft is one of the principals of the New York Dispute Resolution Center, bringing years of mediation experience to the practice. Added to this is his experience as a trial lawyer, trying major cases in tort & civil rights matters in both state and federal courts.

Jess also has worked as a hospital & healthcare system Vice President, Executive Vice President of one of the largest not-for-profit organizations in New York, and, most importantly, as a professional mediator and neutral, trained, experienced and highly skilled in the practice of mediation.

Recognized for his skill in mediation, Jess:

- Created and led in-house employee relations mediation programs, resolving hundreds of employee-management disputes for over 14 years
- Has extensive experience in employment law, tort actions, civil rights matters, business management and commercial litigation
- Has worked as an employee advocate
- Managed hospital/healthcare organizations throughout the New York metro area
- Has led programs in mediation skills training
- Co-chairs the Alternative Dispute Resolution Committee of the NCBA
- Has taught law students studying mediation, most recently serving as mediator for the mediation advocacy program at the St. John's University School of Law and for the ABA mediation advocacy competition at Cardozo Law School
- Is co-chairing the 2019 NYSBA/NCBA Advanced Commercial Mediator Training program

Jess also is an arbitrator for Part 137 fee dispute arbitrations in New York and Bronx counties and is a FINRA arbitrator.

With extensive training and over 14 years of experience in mediation, over 20 years of corporate management experience, as well as having served as Nassau County's Senior Trial Attorney in Tort & Civil Rights Litigation, combined with 27 years of legal practice overall in a diverse array of specialties, including personal injury, civil rights, labor & employment law, and corporate litigation, Jess brings a broad base of experience and skill now focused on helping parties resolve a variety of matters.

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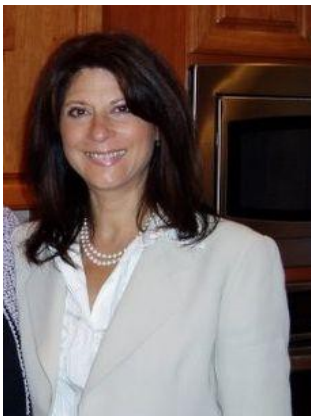

Marilyn K. Genoa is a principal of New York Dispute Resolution Center, Inc., a boutique dispute resolution firm, as well as a principal in the law firm of Genoa & Associates, P.C., where she concentrates in the areas of real estate and closely-held and family owned business representation. She is a member of the Commercial Mediation Panel, Nassau County Commercial Division, the Nassau County Bar Association's Mediation and Arbitration Panels, and was appointed to the maiden Eastern District of New York Storm Sandy Mediation Panel. She serves as an Arbitrator under the New York State's Part 137 Attorney's Fee Dispute Resolution Program and a Mediator for Landlord-Tenant disputes in District Court, Nassau County.

The elected Village Justice for the Village of Old Brookville, Marilyn is the President-Elect of the Nassau County Magistrates Association. Prior to being elected Village Justice, she was a Trustee of the Village and a former Deputy Police Commissioner for the Old Brookville Police Department. Having served two terms as a Director of the Nassau County Bar Association, Marilyn sits on its We Care Advisory Board and is a member of the House of Delegates of the New York State Bar Association.

The current Co-Chair of the NCBA ADR Committee, Marilyn was the founding Chair of the Advisory Council for the Mediation & Arbitration Panels of the Nassau County Bar Association, and the Chair of the NCBA ADR Committee at the time the present Mediation and Arbitration Panels were reconfigured. During her three year tenure as ADR Chair she oversaw the revision of the Panels' structure and Rules. Marilyn has served as Chair of the NCBA Business and Corporation Committee as well its Animal Law and House Committees. She has co-chaired the Nassau County Bar Association's Mock Trial Program for the past 12 years.

A past president of the Theodore Roosevelt American Inn of Court and of Yashar, the Attorneys' and Judges' Chapter of Hadassah, she continues to actively serve on the Board of Directors of both organizations, as well as on the Board of the Safe Center LI (formerly the Nassau County Coalition Against Domestic Violence).

Marilyn is admitted to practice in the Courts of the State of New York, the United States District Courts for the Eastern and Southern Districts of New York, and the Supreme Court of the United States of America. She received her law degree, with honors, from Hofstra University School of Law, her B.A. from Boston University, and her MSW from Adelphi University. A certified Mediator, she has received extensive training in the area of Mediation over the past fifteen years, and is a frequent lecturer in the areas of: mediation; real estate; the purchase and sale of businesses and of real property; and contract law. Well regarded for her fairness, diligence and efficiency, as the former CEO of a national manufacturing and distribution company with more than twenty five years of experience representing clients in the areas of real estate and corporate matters, Marilyn's pragmatic approach to problem solving has effectively resolved difficult and complex situations.

Representative Matters

- Business/Commercial: Breach of contract, breach and dissolutions of partnerships, limited liability and shareholder agreements; breach of fidiciary duty; fraud. Over 29 years handling a broad array of business and real estate matters, for both individuals and business entities, including resolution of disputes both in and out of court.
- Successfully defended numerous multi-million dollar claims against a financial institution.
- Environmental Law: Environmental Pollution, CERCLA, and DEC. Successfully settled myriad environmental actions involving pollution of shopping centers and surrounding properties.
- Real Estate Law: Zoning matters; real estate partnership disputes; condominium and cooperative association disputes.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Michael Cardello III
Partner
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MICHAEL CARDELLO III

Practice Areas

Commercial Litigation
Alternative Dispute Resolution
Bankruptcy

Michael Cardello III has been a partner with the firm since 2006. He currently Co-Chairs the firm's Litigation practice group and serves on the firm's Management Committee. Mr. Cardello concentrates his practice in business and commercial litigation. Prior to joining the firm in 1997, he served as a Law Clerk to the Honorable Arthur D. Spatt, United States District Court for the Eastern District of New York.

Mr. Cardello represents large and small businesses, financial institutions and individuals in Federal and State Courts in complex commercial matters. He has a wide-range of experience that includes trials and appellate work in the areas of corporate disputes, shareholder derivative actions, dissolutions, construction disputes, equipment and vehicle leasing disputes and other complex commercial and business disputes.

Mr. Cardello also serves as a Court-Appointed Discovery Referee and Special Referee by various courts to oversee all aspects of the discovery process in complex commercial cases. From 2005 through 2008, Mr. Cardello oversaw all aspects of discovery in Delta Financial Corp. v. Morrison, in which he rendered many written decision related to discovery, e-discovery and privilege issues and presided over sixty-five depositions. From 2009 through 2015, Mr. Cardello served as Special Referee in a very large multi-party construction defect case captioned Archstone v. Tocci Building Corporation of New Jersey. During his appointment, Mr. Cardello issued numerous decisions regarding complex e-discovery issues as well as issuing decisions on other non-dispositive motions. From 2012 to 2016, Mr. Cardello served as the Special Referee in the related insurance coverage action to the Archstone construction defect case, captioned QBE Insurance Corporation v. Adjo Contracting Corporation. During his tenure, Mr. Cardello issued numerous decisions and rulings in order to prepare the case for trial. Mr. Cardello was also involved in the settlement process, which lead to a resolution.

From 2013 to 2016, Mr. Cardello served as the Special Referee to oversee the dissolution of a law firm and the wind up of its affairs. During his appointment, Mr. Cardello dealt with many legal issues and was successful in separating the law firm into two firms. On consent of the parties, he has presided over a trial on one unresolved issue related to the wind up which resulted in a settlement. He is currently appointed to a number of cases as Discovery Referee and Special Referee by Justices of the Supreme Court for the State of New York.

Mr. Cardello is also approved by the Officer of Court Administration in the State of New York to serve as a Receiver and has been appointed by the Court as Receiver to oversee the dissolution and wind up of the affairs of businesses and for the collection of rents for commercial properties. Mr. Cardello served as a Court Appointed Receiver for a 250,000 square foot office building that was the subject of a commercial foreclosure. He also mediates complex commercial litigation cases pending in the Commercial Division of the Supreme Court of the State of New York.

Mr. Cardello is the former Chair of the Federal Courts Committee and the Commercial Litigation Committee of the Nassau County Bar Association. Mr. Cardello previously served on the Judiciary Committee of the Nassau County Bar Association and is also a member of its Alternative Dispute Resolution Committee. He is also the District Leader for the 10th Judicial District for the Commercial and Federal Section of the NYSBA. In addition, he is a participant at the Sedona Conference and also frequently lectures on mediation, discovery, trial practice, equipment and vehicle leasing issues and e-discovery.

Education

Hofstra University, J.D.
Associate Editor, Hofstra Law Review
Hofstra University, M.B.A. (Finance)
Hofstra University, B.B.A. (Marketing)

Admissions

Mr. Cardello is admitted to practice law in New York. He is also admitted to practice in the Eastern and Southern Districts of New York and the United States Court of Appeals for the Second Circuit.

Affiliations

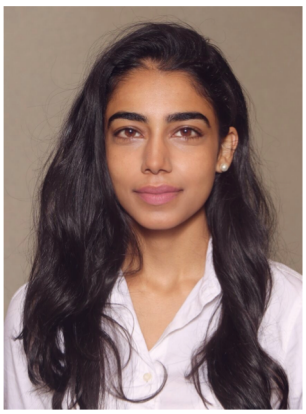
Mr. Cardello serves on the EDNY Litigation Advisory Committee, as well as on the Nassau County Bar Association's WE CARE Fund Advisory Board. In addition, he also serves as Chair of the Board of Directors for the Metro New York/Connecticut Chapter of the National Vehicle Leasing Association. Mr. Cardello also serves on the Board of Directors of the Catholic Lawyers Guild of Nassau County. Mr. Cardello is the former President (2017-2018) of the Theodore Roosevelt American Inn of Court. He serves as a fellow of the Academy of Court-Appointed Masters and on the Board of Directors for the Long Island Council on Alcoholism and Drug Dependence.

Recognitions

2018-New York Super Lawyers®
2017-New York Super Lawyers®
2016-New York Super Lawyers®

Navpreet K. Natt

JD Candidate '21 | Hofstra University Maurice A. Deane School of Law



Navpreet “Navi” Natt is a graduate from Hofstra University with a B.S. in Health Sciences, and a minor in Chemistry with a strong concentration in pre-medical studies. She began her studies and professional life focusing dynamically on combining healthcare and entrepreneurship. Navi's current professional pursuits in law and business stem from her commitment to innovation and social change.

Prior to her enrollment at the Maurice A. Deane School of Law at Hofstra University, Navi was Partner at WB&B Executive Search, a retained executive search firm with a focus on diversity and inclusion. As the first homegrown and only female partner of the firm in its 40+ year history, she was trusted by leadership as the primary client-facing contact for engagement management. She provided counsel to corporate clients consisting of senior leadership across multiple verticals and industries regarding talent acquisition strategy in alignment with the companies’ missions. Having been with WB&B for five years, she added a cross-generational value to the firm by helping tap into emerging talent groups. She established and managed relationships with top corporations including Boeing, General Motors, IBM, OhioHealth, Prudential, Tiffany & Co., and United Technologies.

Currently, Navi is involved in various organizations at the law school such as the Dean's Student Advisory Council, Federal Bar Association, and Dispute Resolution Society. Additionally, Navi is spearheading a student organization that speaks to her fundamental values and which focuses on developing mindfulness and professional responsibility within the practice of law.

A native of New York, Navi resides in Queens, New York.

Theodore K. Cheng

Arbitrator and Mediator

Commercial, Intellectual Property, Technology,
Entertainment, and Labor/Employment Disputes

ADR Office of Theo Cheng
tcheng@theocheng.com
www.theocheng.com

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property (IP), technology, entertainment, and labor/employment disputes. He has conducted over 500 arbitrations and mediations, including business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and IP infringement contentions. Mr. Cheng has been appointed to the rosters of the American Arbitration Association (AAA), the CPR Institute, Resolute Systems, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He serves on the AAA's Council and the Board of the New Jersey State Bar Association Dispute Resolute Section. He is also the President of the Justice Marie L. Garibaldi American Inn of Court for ADR, the Chair-Elect of the New York State Bar Association (NYSBA) Dispute Resolution Section, and the Secretary of the Copyright Society of the U.S.A. He was also recently inducted into the National Academy of Distinguished Neutrals. The *National Law Journal* named him a 2017 ADR Champion.

Mr. Cheng has over 20 years of experience as an IP and general commercial litigator with a focus on trademarks, copyrights, patents, and trade secrets. He has handled a broad array of business disputes and counseled high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, fashion, food and hospitality, retail, and financial services. In 2007, the National Asian Pacific American Bar Association named him one of the Best Lawyers Under 40.

Mr. Cheng received his A.B. *cum laude* in Chemistry and Physics from Harvard University and his J.D. from New York University School of Law, where he served as the editor-in-chief of the Moot Court Board. He was a senior litigator at several prominent national law firms, including Paul, Weiss, Rifkind, Wharton & Garrison LLP, Proskauer Rose LLP, and Loeb & Loeb LLP. He was also a marketing consultant in the brokerage operations of MetLife Insurance Company, where he held Chartered Life Underwriter and Chartered Financial Consultant designations and a Series 7 General Securities Representative registration. Mr. Cheng began his legal career serving as a law clerk to the Honorable Julio M. Fuentes of the U.S. Court of Appeals for the Third Circuit and the Honorable Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania.

Mr. Cheng frequently writes and speaks on ADR and intellectual property issues. He has a regular column called *Resolution Alley* in the *NYSBA Entertainment, Arts and Sports Law Journal*, which addresses the use of ADR in those industries. He also writes the quarterly column *The ADR Mosaic* in the Minority Corporate Counsel Association's *Diversity & the Bar Magazine*, which addresses ADR and diversity issues.

The Tragic Story of Jane Seemore

Jane Seemore (62 years old, 5' 2" and very thin and frail) worked for the Myopic Eyeglass Manufacturer, Inc. for 25 years. Myopic is located in New Orleans, Louisiana. She rose through the ranks as an assistant in the Shipping Department into Sales, where she was a rising star, and finally over the years into Customer Relations. Myopic manufactures and sells a diverse line of eyewear, originally to major department stores and then as time changed, direct to the consumer through the internet.

As it happens, not all of the Myopic's eyewear arrived at the customer in pristine condition. Jane, and a small group of other employees, bore the task of handling the customer complaints about scratched lenses, broken side pieces and incorrect order fulfillment. Due to her long history with Myopics, Jane knew that almost all these problems could be traced to poor management and mishandling of the product in shipping.

Shipping was managed by a 35 year old man from South Carolina, who had attended Clemson University, and all the employees in shipping were men.

Jane was born and raised in Alabama, had attended Alabama University, and spoke with a rich southern accent.

Jane's job included listening to the customers complaints, calming them down, maintaining the client relationship with Myopic, tracking the product through the Shipping Department and processing a refund or replacement glasses.

As the number of complaints about the glasses mounted, so did Jane's trips back into the Shipping Department. Each time she would go into Shipping she was greeted by cat calls, "here comes the old witch, at it again; her broom is bigger she is". They nicknamed her Calamity Jane. And said she looked like a concentration camp survivor. She frequently became frustrated by

Shipping's stonewalling her efforts and saying to her face that they could not understand what she was saying (due to her accent). They said she was as incompetent as an Alabama quarterback, and she should get back on her broom and get the hell out of Shipping. Jane never complained about this treatment to upper management nor had she reported up the management chain of her suspicions about the cause of the increasing number of returns. [She had witnessed shipping department employees playing football with the small boxes that contained the eyeglasses]. She liked to do things on her own, didn't want to get anyone in trouble but did want to solve the problems for the sake of Myopic with whom she had spent over a third of her life.

Concurrently, upper management was receiving complaints about her telephone skills from customers who could not understand what she was saying. The more frustrated she became with their phone complaints, the more difficult she became to be understood by the caller.

Finally, upper management, Mr. James Foresight, V.P. of Sales & Customer relations called Jane into his office. He told her she could no longer continue working for Myopic; she was detrimental to the working environment of the company and she had been terminated.

He handed her a cardboard box in which she could place her personal items, obtained her key card, cut in half before her eyes and called security to escort her to her desk and out of the building.

Security, Jesse "Tall Boy" James (Jesse was 6'7") followed Jane to her cubicle, watched her pack up and then escorted her out of the office before all of her, now former, colleagues who took pictures of the "perp" walk. She was given a severance package of a day's pay for each year she worked at Myopics. Her medical insurance was terminated that day and she was instructed about Cobra coverage.

Unbeknownst to Mr. Foresight and Myopic Management, Jane had been suffering from anorexia for many years, treatment for which was not covered by Myopic's bare bones medical insurance policy. She also was too embarrassed to talk about it and her work situation only exacerbated the problem. Her parents were survivors of Auschwitz.

Jane's husband was a drop-out of Gamblers' Anonymous and had lost the family home when he bet big time on the Alabama-Clemson's football game this past January.

Mr. Foresight seems to have forgotten when he terminated Jane that all employees were subject to the terms of a mediation/arbitration agreement.

That before they could be terminated, they had the right to avail themselves of mediation through the New Orleans Bar Association's Mediation and Arbitration Program.

Jane did remember. Her first stop after being escorted out the door was the law firm of Bunshaft, Bunshaft and Bunshaft.

There actually is only one Bunshaft, Jess, but he liked the sound of the three names.

Jess Bunshaft took her case and filed a claim with the New Orleans Bar's Mediation & Arbitration Program, claiming wrongful termination, age discrimination, and an additional claim under the Americans with Disabilities Act, based upon her anorexia. He promised Jane, at minimum, a $500,000 pay out of which he would only take a 50% fee.

Myopic hired outside counsel, Domenick Pesce, a Long Island lawyer who intended to make short work of this matter, so he could return to Long Island to watch Hofstra basketball win again.

NEW YORK STATE
Unified Court System

ADR Programs in the NYS Unified Court System

- **Attorney-Client Fee Dispute Resolution Program (Statewide):** court rules allow clients to resolve their disputes over fees with their lawyers through arbitration. Some jurisdictions offer mediation as well (1st and 12th JDs). **15 cases mediated in 2017.**
    - Arbitration services are provided by volunteer arbitrators trained by New York State Unified Court System's ADR Office in collaboration with local courts and bar associations.
    - **Approximately 1089 cases/year** (average amount in dispute $15, 862)
    - Annual reports: http://www.nycourts.gov/admin/feedispute/annualreports.shtml

- **Community Dispute Resolution Centers** provide free or low-cost mediation and other ADR services to courts and communities throughout New York State.
    - CDRCs operate throughout New York in 62 counties, helping nearly 100,000 in more than 28,000 cases a year.
    - CDRCs serve family courts, surrogate's courts. criminal courts, city courts, town and village Courts. Small claims, custody and visitation, housing, and criminal matters are the most common matters addressed using CDRCs.
    - Offer training and supervised apprenticeship opportunities to volunteer mediators
    - See http://www.nycourts.gov/ip/adr/cdrc.shtml

- **Summary Jury Trials (SJTs)**[1]: one day jury trial that combines arbitration with a structure of trial; participation is voluntary; Supreme Court Justice Lucindo Suarez presents on SJTs and coordinates the statewide program. **520 cases a year throughout New York State.** 50-60 carriers participate. 80% resolved before trial; those that went to trial, 80% resolved without a decision. 95% of the SJTs are in Supreme Courts:
    - https://www.nycourts.gov/courts/12jd/BRONX/civil/pdfs/THE%20SUMMARY%20JURY%20TRIAL%20PROCESS.pdf (Bronx County)
    - https://www.nycourts.gov/COURTS/2jd/KINGS/Civil/summaryjurytrialrules.shtml (Kings County)
    - http://courts.state.ny.us/courts/1jd/supctmanh/SJT%20procedures7-28-09.pdf (NY County)
    - https://www.nycourts.gov/courts/11jd/supreme/civilterm/sjt_rules_packet.pdf (Queens County)

[1] A Summary Jury Trial (SJT) is a binding, one-day jury trial with relaxed rules of evidence similar to arbitration, except that a jury decides factual issues and renders a verdict as a jury would in a traditional trial. Summary Jury Trials have been used in federal district courts and by at least 17 courts in New York State. These trials have resolved a variety of commercial disputes, negligence and medical malpractice actions, product liability suits, and anti-trust and fraud cases.

- https://www.nycourts.gov/courts/13jd/rules/SJT.pdf (Richmond County)
- http://www.nycourts.gov/courts/10jd/suffolk/SJT.shtml (Suffolk County)
- https://www.nycourts.gov/courts/9jd/PDFs/SJTRules.pdf (Westchester County)
- http://www.courts.state.ny.us/courts/8jd/pdfs/SJTmanual3.pdf (8th Judicial District)

In New York City:

- **Collaborative Family Law Center (citywide)** offers free divorce mediation for qualifying couples in New York City through a partnership with law school divorce mediation clinic. **3,600 persons helped. Of the 115 cases referred to mediation, 95 cases went to mediation at the CFLC. 75 cases were mediated to a successful resolution in 2017.**
  - See http://www.nycourts.gov/ip/collablaw/index.shtml

Surrogate's Court

- Judge Rita Mella encourages parties in appropriate cases to try on-site mediation, through a roster or through NY Peace Institute (CDRC).

New York City Family Court

- **NYC Family Court** offers free mediation services in all 5 boroughs for parenting issues in custody and visitation cases. Mediators are paid by the court. **537 referrals in 2017**, up from 408.
  - See http://www.nycourts.gov/courts/nyc/family/mediation.shtml
  - Free mediation is also offered during evening hours in Manhattan and Brooklyn through collaboration with local CDRC (late 2018-early 2019)

Civil Court of the City of New York

- **NYC Civil Court** Small Claims Mediation Program (in each borough): CDRC volunteer mediators and law students under faculty supervision mediate small claims matters.

- **NYC Civil Court** Small Claims Arbitration Program – voluntary arbitration where award is binding and final, using volunteer arbitrators. **11,805 arbitrations in 2017.**

- **NYC Civil Court** Personal Appearance Part; volunteer CDRC mediators help resolve civil cases.
  - See http://www.nycourts.gov/COURTS/nyc/civil/beforeyoustart.shtml

New York City Criminal Court

- **New York City Criminal Court** refers certain disputes to Community Dispute Resolution Centers – between neighbors, acquaintances, family members, landlords and tenants, or consumers and merchants.

Kings County

- Refers Civil Court, Small Claims, and Criminal (Misdemeanors) to CDRC.

Supreme Court, Kings County

- Kings County Supreme Court Commercial Division: referred **4 cases for mediation** to Judicial Hearing Officer.
- Kings County Supreme Court Matrimonial Mediation Pilot: refers parties in two parts to presumptive mediation with opt out (beginning 2019)

Supreme Court, New York County

- **NY County Supreme Court Commercial Division ADR Program** – a mediation program for Commercial Division cases referred by Commercial Division Justices; trained and experienced mediators on court roster meet with attorneys and parties, review facts and legal issues, facilitate discussions, and explore settlement possibilities. **117 cases referred in 2017.**
    - See http://www.nycourts.gov/courts/ComDiv/NY/ADR_overview.shtml

- **NY County Non-Division Mandatory Mediation Pilot Project** – early mediation for certain commercial contract cases filed outside the Commercial Division; counsel for parties attend a preliminary meeting with a Senior Settlement Coordinator, and resolve targeted discovery issues in aid of mediation. After targeted discovery, attorneys and clients proceed to mediation using mediators from the NY County Commercial Division's mediation panel, before the attorneys return to court. **126 cases referred in 2017. 117 mediated. 99 completed, 59 settled.**
    - See http://www.nycourts.gov/courts/ComDiv/NY/ADR_overview.shtml

- **NY County Non-Division Commercial Mediation:** commercial cases not filed in the Commercial Division are now eligible for referral to the ADR Program (effective May 2016). **86 cases referred in 2017**

- **NY County Supreme Civil** offers free Matrimonial Neutral Evaluation Program (MNEP) using a roster of trained and experienced matrimonial practitioners. **35 cases were referred to the MNEP in 2017.**
    - See http://www.nycourts.gov/courts/1jd/supctmanh/Matrimonial_NEP_menu.shtml

- **NY County Supreme Civil** offers a Matrimonial Mediation Program where mediators are available for parenting and economic matters in divorce cases. Parties pay after the first 90 minutes free.

- **In House ADR in NY County**:
    - **NY County Supreme Civil** provides parties in appropriate cases with opportunities to meet with a staff Senior Settlement Coordinator to resolve pre-note of issue cases, including parenting and economic issues in divorce, guardianship cases, and general non-Commercial Division cases. Court staff Family Counseling and Case Analyst assists with parenting disputes.
    - **Early Settlement Conferences ("ESC1" and "ESC2")**: conferences in certain case types conducted after filing of note of issue; if case doesn't settle, it goes to "last clear chance conference" or to J-Med and given trial date. Pre-Note of issues cases sometimes referred, too.
    - **NY County J-Med Part:** Senior Settlement Coordinator and a Judge see every post-note case, EXCEPT Commercial Division, and matrimonial cases.
        - J-Med sees every post-note case within 4 months of filing of the note of issue.
        - **1200 cases resolved in J-Med in 2017**
        - Commercial Division justices can also send cases to the J-Med part.
        - Note: even cases with a motion can go to the J-Med part.
        - Summary Jury Trials: Limited right to appeal. Cuts trial time, limits the issues.
    - Refers to JHO for resolution of select commercial matters.

Appellate Division, First Department Pre-Argument Mediation Program:

- Court staff-program director and 30 experienced practitioner-volunteers received 550 referrals to the program.
- http://www.nycourts.gov/courts/AD1/committees&programs/specialmasters/index.shtml

Queens County

- Refers Civil Court, Small Claims, and Criminal (Misdemeanors) to CDRC.

Supreme Court, Queens County

- **Commercial Division ADR Program:** voluntary; **18 cases were referred in 2017.**
- **Matrimonial Mediation Program:** voluntary; **9 cases referred in 2017.**
- See http://www.nycourts.gov/courts/11jd/supreme/civilterm/adr/index.shtml

Richmond County

- Refers Civil Court, Housing, Small Claims, and Criminal (Misdemeanors) to CDRC.

Supreme Court, Richmond County

- Settlement conferencing in tort cases utilizing a Court Attorney Referee and JHO.

Outside of New York City:

- **Permanency mediation (4th, 5th, 6th, 8th Judicial Districts): 168 cases referred in 2017; of cases mediated, 73% resolved.**

3rd Judicial District

- Refers Family Court, City Court, Town and Village Court cases to CDRC.
    - Albany Family Court Judge has mediation-trained court attorney who conducts weekly, voluntary day-long conferences in select cases. Family Court Judge also refers to local CDRC, scheduling cases from them the bench.
- Ulster County Supreme Court: mediation-trained court attorney settling many matrimonial cases

4th Judicial District

- Refers Family Court, Supreme (Matrimonial), City Court, Town and Village Court cases to CDRC.

5th Judicial District:

- Refers Criminal Court (misdemeanor), Family, Town and Village Court and Small Claims cases to CDRC.
- Offer parties access to trained neutral evaluators for commercial, personal injury, general civil, and matrimonial cases.

6th Judicial District:

- Refer Family Court, City Court (Housing and Small Claims), Town and Village, Supreme (Matrimonial) cases to CDRC.
    - Pilot program involving select Family Court judge refers parties early to local CDRC to resolve custody and visitation matters out of court, obviating need to return to court.

7th Judicial District:

- Free voluntary mediation program using court staff attorney, once RJI has been filed. **201 referrals to mediation in 2017. About 20 commercial division cases.**
    - Judges encourage parties to go to mediation in appropriate cases.
    - http://www.nycourts.gov/courts/7jd/includes/content/7JDMediationProgram.pdf
- Refers Family Court, City Court, Town and Village, Supreme (Matrimonial) cases to CDRC.
    - Pilot program involving select Family Court judges refers parties early to local CDRC to resolve custody and visitation matters out of court, obviating need to return to court.

8th Judicial District:

- **Martin P. Violante ADR Program** comprehensive ADR program offers early neutral evaluation, late neutral evaluation, mediation, parent coordination, arbitration and summary jury trial. This program covers general civil, commercial, divorce, and parenting issues in Family Court cases. Staff "in house" ADR program: **referred 916 cases in 2017.**
- See http://www.nycourts.gov/COURTS/8jd/adr.shtml
- Refer Family Court, City Court (Housing and Small Claims), Town and Village Court cases to CDRC.

9th Judicial District:

- Westchester County Supreme Court Commercial Division Mediation Program: **15 cases referred in 2017**
- Westchester County Supreme Court-Civil: **5 cases referred to mediation in 2017**
  - See http://www.nycourts.gov/courts/9jd/CivilMediation.shtml
- Westchester County Supreme Court Matrimonial Mediation Program
  - See http://www.nycourts.gov/courts/9jd/Matrimonial.shtml
- Rockland County Supreme Court Matrimonial ADR Program
  - See http://www.nycourts.gov/courts/9jd/Rockland/generalCivilMediation/Rockland_adr_rules.pdf
- Refers Family Court, City Court, Town and Village, and Small Claims cases to CDRC.

10th Judicial District:

- Refers Family Court, City Court, Town and Village, and Small Claims cases to CDRC.
- Nassau County Family Court offers free, on-site mediation for custody/visitation and support disputes.
- Nassau County Supreme Court ADR Programs:
  - Commercial Division Mediation Program- **23 cases referred in 2017.**
  - Volunteer mediator-neutral evaluators are available for civil cases after a preliminary conference or when referred by a Judge. **591 cases referred in 2017.**
  - Voluntary, binding arbitration is available for tort cases
  - Matrimonial Center has a roster of parenting coordinators, mediators, and neutral evaluators; http://www.nycourts.gov/COURTS/10JD/nassau/mat-mediation.shtml
  - Matrimonial Center has "in house" staff mediator; **approximately 120 cases referred a year.**
  - Matrimonial Center operates a Special Master Neutral Evaluator Program: **approximately 35-40 cases referred a year to a roster.**
- Suffolk County Supreme Court ADR Programs:
  - Commercial Division Mediation Program- **15 cases referred in 2017.**

- Matrimonial Mediation Pilot:
  - Senior settlement coordinator assists in resolving matrimonial cases.
  - Parties referred to presumptive mediation with court staff neutral (late 2018)

Appellate Division, First Department Pre-Argument Mediation Program:

- Special master (court staff-program director) and thirty experienced practitioner-volunteers received **550 referrals to the program in 2017**.
- http://www.nycourts.gov/courts/AD1/committees&programs/specialmasters/index.shtml

Appellate Division, Second Department Civil Appeals Management Program (CAMP):

- CAMP administrator works with Special Referees, former Appellate Division justices who mediate
- http://www.nycourts.gov/courts/ad2/camp.shtml

Appellate Division, Third Department Civil Appeals Settlement Program (CASP):

- Hearing officer facilitates settlement or limitation of issues.
- http://www.nycourts.gov/ad3/casp/index.html

Resolution Alley
All About Baseball Arbitration

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

"Baseball arbitration." Oftentimes, uttering that phrase can generate of blank stares, funny looks, or questions like:

- Is that a process used to resolve disputes over the ownership of baseballs?
- Is it a way to characterize a dispute being handled by teams of lawyers on both sides?
- Is it a reference to another variation of "baseball poker" (itself a variation on seven card stud)?
- Is it another way to call what umpires do?
- Is it the title of the upcoming Kevin Costner movie?

Admittedly, it sounds like some kind of mash-up of sports and law, but with no obvious connection. However, those well versed in the world of professional sports know that "baseball arbitration" has a well-defined and specific understanding. It is a phrase that describes an alternative dispute resolution process that has further developed into a general arbitration technique. Perhaps even more surprising, it actually has a role to play in mediations as well.

"In this kind of arbitration, the arbitrator's discretion, which ordinarily would be quite broad, is markedly circumscribed, limiting the arbitrator's ability to arrive at a final award."

Baseball arbitration (also known as final offer arbitration) is a type of arbitration—a process for resolving disputes involving a disinterested third-party neutral decision-maker—in which each party to the arbitration submits a proposed monetary award to the arbitrator, which is sometimes referred to as a "final offer." After conducting an evidentiary hearing, the arbitrator is then empowered to select an award limited to one of the proposed awards previously submitted by the parties, without the authority to make any modifications to those proposals. In this kind of arbitration, the arbitrator's discretion, which ordinarily would be quite broad, is markedly circumscribed, limiting the arbitrator's ability to arrive at a final award. In baseball arbitration, even if the evidence or the equities warrant, the arbitrator does not retain the discretion to issue an award outside of the parties' proposals; rather, the arbitrator's discretion in arriving at a final award is limited to choosing among the final offers submitted by the parties.

"As parties make reasonable offers and demands to each other, they evaluate what they receive from the other party and concomitantly re-evaluate their own offers or demands in light of what they expect an arbitrator to award as the most reasonable in the circumstances of the case."

There are significant advantages to employing baseball arbitration as a dispute resolution process. Namely, it fosters voluntary settlements by the parties before the evidentiary hearing and generally results in greater party satisfaction with the arbitration process because of the somewhat greater control over the process that parties can exercise in terms of making their proposals. All of this results from the fact that parties are incentivized to make reasonable offers and demands to each other (before submitting their final offers to the arbitrator) because they know that an unreasonable offer or demand has less likelihood of being selected by the arbitrator as the final award. As parties make reasonable offers and demands to each other, they evaluate what they receive from the other party and concomitantly re-evaluate their own offers or demands in light of what they expect an arbitrator to award as the most reasonable in the circumstances of the case. In fact, in baseball arbitration, the arbitrator is obligated to select one of the final offers submitted by the parties, irrespective of whether the arbitrator believes that one of them (or even both of them) is objectively unreasonable.

As further explained in an article published in the *Seton Hall Journal of Sports and Entertainment Law*:

> When each party feels pressured to make a more reasonable offer, the parties are brought together toward a middle ground, which promotes settlement prior to an arbitration hearing.…Although the purpose of final-offer arbitration is

> to avoid an arbitration hearing, it is the presence of the final-offer arbitration process that promotes good faith bargaining and drives the negotiations toward settlement, not the negotiations themselves.…The parties not only save the time and expense of a hearing, but also seek a compromise in order to prevent the arbitrator from selecting the other party's final offer. The parties also benefit from avoiding the adversarial nature of a lengthy hearing.[1]

For example, if a party takes the extreme approach of over-valuing its claims, rather than assessing them a reasonable value, it faces the significant risk that its final offer to the arbitrator will not be adopted, and that it will, in the end, receive nothing. Similarly, if a party takes a "no pay" approach in the face of claims that may have some merit, it risks an award in favor of the other party who puts forward a more reasonable proposal, albeit favorable to it. It is this final risk analysis of an "all or nothing" award that compels the parties to consider seriously the benefits of a negotiated settlement and the value submitted in their final offers to the arbitrator.

"Generally, in Major League Baseball, the player and team each submit a single number representing the player's proposed salary for the upcoming season to a panel of three arbitrators."

In one variation of baseball arbitration called "night baseball arbitration," the final offers submitted by the parties are kept confidential even from the arbitrator. Upon delivering the decision, the proposal that is mathematically closest to the arbitrator's decision is delivered as the final award. More often than not, night baseball arbitration is chosen as a dispute resolution process only when the parties hold a strong belief about the reasonableness of their submitted proposals.

As the name suggests, baseball arbitration as a method for resolving disputes arose from the world of professional sports leagues and was pioneered (and the name coined) in the context of arbitrating player-team salary disputes.[2] Generally, in Major League Baseball, the player and team each submit a single number representing the player's proposed salary for the upcoming season to a panel of three arbitrators. At the evidentiary hearing, the two sides submit a signed and executed agreement to the arbitration panel with a blank space left for the salary figure. The player and team each also have the opportunity to present their case and a rebuttal to the panel, after which the panel chooses one of the two numbers as the player's salary. As Daniel S. Greene explained in his posting on *The Entertainment, Arts and Sports Law Blog*, the National Hockey League also employs a variation of this final offer arbitration process to resolve player-team salary disputes.[3]

"Depending on the specific circumstances, one could also imagine utilizing baseball arbitration in more complex matters, such as intellectual property or entertainment disputes if the real issue in dispute involves only lost sales or lost profits."

The final offer technique established under the sports league salary arbitrations is increasingly being used in other contexts and particularly works well when the only real issue in dispute involves a subjective evaluation of value, such as the value of a professional sports athlete to a team or the value of pain and suffering from an injury. Thus, baseball arbitration can often be used to resolve personal injury cases, wage-and-hour disputes,[4] and any number and variety of commercial disputes and transactions where liability is not seriously contested in the context of garden variety breach of contract claims, book account cases, and collections matters.[5] Depending on the specific circumstances, one could also imagine utilizing baseball arbitration in more complex matters, such as intellectual property or entertainment disputes if the real issue in dispute involves only lost sales or lost profits.

Based upon feedback from the international and domestic business community, the American Arbitration Association (AAA) and its international division, the International Centre for Dispute Resolution (ICDR), also created a specific set of supplementary rules called "Final Offer Arbitration Supplementary Rules," which became effective on January 1, 2015. These rules are referred to as "Baseball Arbitration Supplementary Rules" or "Last Best Offer Arbitration Supplementary Rules," and they embody and set forth the classic baseball arbitration dispute resolution process and can be used with the ICDR's International Arbitration Rules or other rules of the AAA. The specific mechanics of the rules echo the advantages of baseball arbitration, noting that a

> [K]ey aspect of formalizing these rules was to better define and build a more complete and predictable final offer arbitration process. Many companies could simply insert a phrase that calls for final, baseball, or last best offer arbitration, but such abbreviated language necessarily omits many important considerations that are incorporated into these procedures. For example, these rules provide

detail about when and how the final offer exchanges will be made so that no party can gain an unfair negotiating advantage. These rules also describe what the final offers should and should not include and when the tribunal can open the final offers. These rules essentially establish a final offer process framework from the first preliminary offer through final award.

Although the rules do not specifically provide for variations from the classic baseball arbitration process, they permit the parties to modify the procedures by written agreement.

"Thus, despite its seeming inapposite nomenclature, baseball arbitration even has a place in the mediation context and serves as a potentially useful component in a mediator's toolbox."

Baseball arbitration can also be used in the mediation context as an impasse-breaking technique. In many mediations, regardless of subject matter, parties often negotiate over a monetary component to their potential resolution, transmitting offers and demands to each other, most times through the mediator. Those negotiations will ostensibly bring the parties' respective proposals closer together, but there may still be a gap. That gap can oftentimes be small enough that a potential resolution is in sight, but also large enough that the parties reach a possible impasse in the negotiations.

As a technique for closing this gap, the mediator could propose that the parties each provide the mediator with their final (or best and last) proposal and then agree to permit the mediator, perhaps after brief presentations of any evidence or argument about the contested issues relating to the monetary component, to choose between one of the parties' proposals, thereby resolving that portion of the overall resolution.[6] Thus, despite its seeming inapposite nomenclature, baseball arbitration even has a place in the mediation context and serves as a potentially useful component in a mediator's toolbox.

The phrase "baseball arbitration" has both a long history and tradition based in the professional sports leagues, as well as applicability to many other modern disputes in both the arbitration and mediation contexts.

Endnotes

1. *See, e.g.*, Benjamin A. Tulis, "Final-Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications," Seton Hall J. Sports and Entm't. Law, Vol. 20, Issue 1 at 89 (2010).
2. *See* Jeff Monhait, "Baseball Arbitration: An ADR Success," Harvard J. of Sports and Entm't. Law, Vol. 4 at 112 (2013) ("MLB salary arbitration employs a format commonly known as 'high-low arbitration' or 'final offer' arbitration. The player and team each submit a single number to the arbitrator. After a hearing during which the player and team each have the opportunity to make a presentation, the arbitrator chooses one of the two numbers as the player's salary for the upcoming season.").
3. *See* Daniel S. Greene, "National Hockey League Salary Arbitration: Hockey's Alternative Dispute Resolution," The Entm't, Arts and Sports Law Blog (July 12, 2015), *available at* http://nysbar.com/blogs/EASL/2015/07/nhl_salary_arbitration_hockeys.html.
4. Baseball arbitration is, in fact, part of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-16, which governs arbitration of certain public employee salary negotiation disputes.
5. The New Jersey State court system recently considered, but ultimately rejected, a final offer arbitration pilot program intended to study its impact on the courts' existent mandatory non-binding arbitration procedures. Only non-auto, non-Lemon Law personal injury cases were to be selected to participate in that pilot program.
6. This technique should not be confused with another impasse-breaking technique called a mediator's proposal, in which the mediator proposes a specific monetary amount to the parties and asks them to either accept or reject the proposal. Only if both parties accept the proposal will the mediator announce to them that a resolution has been reached at the monetary amount in the proposal. Otherwise, an impasse is declared, at least as to that component of the resolution.

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An Overview of Commercial Division Innovations

In the Commercial Division of the New York State Supreme Court

Since its creation in 1995, the Commercial Division of the New York State Supreme Court has transformed business litigation in New York and made the State a preferred venue for complex business disputes. Renowned as one of the world's most efficient venues for the resolution of commercial disputes, the Commercial Division has adopted in the past few years the following innovations proposed by the Commercial Division Advisory Council as part of its pursuit of continual improvement.

Assignment to the Commercial Division

- **Earlier case assignments:** A party has 90 days from service of a complaint to seek assignment to the Commercial Division.
- **Increased monetary thresholds:** In New York County, the jurisdictional threshold is now $500,000. In other regions, the threshold now ranges from $50,000 to $200,000.
- **Sample forum selection clause:** Contracting parties may use a sample forum selection clause that selects the Commercial Division as the choice of forum.
- **Sample choice of law clause:** Contracting parties may use a sample choice of law clause expressing their consent to having New York law apply to their contract, or any dispute under the contract.
- **Revised eligibility criteria:** Domestic arbitration actions must meet the applicable monetary threshold in order to be heard by the Commercial Division; disputes regarding home improvement contracts for residential properties were added to the list of matters ineligible to be heard by the Commercial Division.

Efficient Discovery Procedures

- **Discovery proportionality:** The Preamble to the Commercial Division Rules was amended to confirm that principles of proportionality apply to discovery.
- **Optional accelerated adjudication:** Parties may consent to streamlined procedures designed to make the case trial-ready within nine months.
- **Limits on depositions:** The number of depositions taken by plaintiffs, defendants, or third-party defendants is presumptively limited to ten, and depositions are presumptively limited to seven hours per deponent.
- **Limits on interrogatories:** Interrogatories are presumptively limited to 25, including subparts, and are further limited during discovery to names of witnesses, computation of damages, and identification of documents. Contention interrogatories may be served only at the conclusion of discovery.
- **Simplified privilege logs:** Parties may use categorical designations rather than individual listings of privileged documents. A litigant who insists on a document-by-document listing may be ordered to bear the cost.
- **More robust expert disclosures:** Expert disclosures are to be accompanied by a written report and must be completed no later than four months after the completion of fact discovery. Experts are now expressly subject to deposition.
- **Entity depositions:** The deposition notice or subpoena issued to an entity may include a list of matters on which the entity will be questioned, and if the notice does not identify a specific individual to testify on the entity's behalf, the entity must designate the specific individual(s) no later than 10 days before the deposition. If the notice does identify a specific individual to testify, the entity can counter-designate someone else. The individuals designated must testify about information known or reasonably available to the entity, and such testimony shall be usable against the entity by any adverse party.

- **More tailored responses to document requests:** Boilerplate objections are not permitted. Parties must state whether their objections pertain to the specific documents requested and identify the types of documents being withheld.
- **Quick resolution of discovery disputes:** Prior to filing a discovery dispute motion, parties must consult in good faith, and each party may submit to the court a three-page letter outlining the dispute for immediate resolution.
- **Memorialization of discovery conference resolutions:** For in-court discovery conferences, parties may either prepare a writing incorporating the resolutions reached at the conference and submit it to the court to be so-ordered or arrange for all resolutions to be dictated into the record. For telephone discovery conferences, parties may submit a stipulated proposed order memorializing the resolution of the discovery issues.
- **Proportionality when seeking ESI from nonparties:** Before seeking electronically stored information ("ESI") from nonparties, parties must consider proportionality factors including burden, cost, importance, and availability of the ESI.

Model Forms

- **Model preliminary conference order form:** The presiding judge can utilize an optional preliminary conference order form, which contains a model confidentiality agreement, procedures for e-discovery preservation and production, and commitments to discuss expert disclosures and alternative dispute resolution.
- **Model compliance conference stipulation and order form:** The presiding judge can utilize an optional compliance conference order form, which includes discovery deadlines. If a deadline is missed, parties must explain why the deadline was not met and propose a new date for completion. The form was revised on January 1, 2018 to reflect recent Commercial Division rule changes relating to discovery and other matters.
- **Model status conference stipulation and order form:** The presiding judge can utilize an optional status conference order form designed to identify the final discovery matters that need to be completed before the Note of Issue is filed. The form also requires an explanation from counsel if alternative dispute resolution efforts have not begun by the time of the status conference. The form was revised on January 1, 2018 to incorporate recent changes in Commercial Division rules and practice. Among other changes, the form sets forth a new section on expert discovery and provides for greater specificity on a range of topics in the discovery process.
- **Standard form of confidentiality order:** At the election of the presiding judge, the standard form of confidentiality order will govern the parties' exchange of confidential information, including the mechanism for e-filing confidential documents.

Reduce Delay During Proceedings and Encourage Settlement Discussions

- **Direct testimony by affidavit:** The Court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form.
- **Time limits on trials:** The Court may rule on the total number of trial hours permitted for each party after submission of requests by the parties.
- **Settlement conference before different judge:** A formal mechanism allows parties to jointly request that a justice other than the justice assigned to their case hear a settlement conference.
- **Summary jury trial stipulation:** Parties may stipulate to a binding jury trial with relaxed rules of evidence and limited time for jury selection and case presentation.
- **Staggered court appearances:** Judges will assign specific time slots for hearings to increase efficiency and decrease lawyers' waiting time.
- **Temporary restraining orders:** An applicant for a temporary restraining order is now required to give notice, including copies of all supporting papers, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

- **Bookmarks for e-filed documents:** Each electronically filed memorandum of law, affidavit, and affirmation must include "bookmarks" that list the document's contents and facilitate easy navigation by the reader within the document.
- **Sanctions for attorney delay tactics:** The Preamble to the Commercial Division Rules was amended to caution attorneys that the Commercial Division will not tolerate dilatory tactics and may impose sanctions.
- **Settlement-related disclosures:** Parties must discuss a voluntary and informal exchange of information that would aid early settlement during their meet-and-confer prior to the preliminary conference.
- **Consultation regarding expert testimony:** The Court may direct that counsel for the parties consult to identify those aspects of their experts' anticipated testimony that are not in dispute and to reduce any resulting agreements to a written stipulation.
- **Large Complex Case List:** A Commercial Division Justice in New York County may designate a case for the "Large Complex Case List" if the amount in controversy exceeds $50 million or the case presents matters of sufficient complexity and importance. Justices presiding over such cases may, in their discretion, apply procedures and make available to the parties such court resources as may be available (including but not limited to special referees with expertise in discovery, special mediators, settlement judges, interface options with extranets and electronic document depositories, and hyperlinked briefs) commensurate with the requirements of active case management of the largest and most complex matters in the Commercial Division.
- **Certification relating to alternative dispute resolution:** Counsel for each party must submit to the Court at the preliminary conference and each subsequent compliance or status conference a statement certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms and stating whether the party is presently willing to pursue mediation at some point during the litigation. In all cases in which the parties are willing to pursue mediation, the preliminary conference order will provide a date by which a mediator will be identified by the parties.

Prepared by the Commercial Division Advisory Council, which was formed by the Chief Judge of the State of New York in 2013 to advise on an ongoing basis about all matters involving and surrounding the Commercial Division of the Supreme Court of the State of New York. The Commercial Division Advisory Council expresses its profound gratitude to the judiciary, the bar, and the business community for their thoughtful consideration of these proposals as well as to the Administrative Board of the Courts for adopting the proposals.

Last updated: February 6, 2018.

Commercial Division ADR Related Rules (Statewide)
http://www.nycourts.gov/rules/trialcourts/202.shtml#70

Rule 3. Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case.

(a) At any stage of the matter, **the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.** Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court. [Emphasis added]

(b) Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice. If the request is granted, the assigned justice shall make appropriate arrangements for the designation of a "settlement judge."

Note: 2018, new addition to Rules 10 and 11

http://www.nycourts.gov/courts/comdiv/whatsnew.shtml

http://www.nycourts.gov/rules/comments/orders/AO%20202.pdf

Rule 10. Submission of Information; Certification Relating to Alternative Dispute Resolution

At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case. Counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that **counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during the litigation**. [Emphasis added]

Rule 11. Discovery

(a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be

identified by the parties for assistance with resolution of the action; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

(b) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.

(c) The preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case. Additionally, the court should consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d.

(d) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

CHAPTER TWO

STARTING HERE, STARTING NOW: USING THE LAWYER AS IMPASSE BREAKER DURING THE PRE-MEDIATION PHASE

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[2.0] I. INTRODUCTION

Success always comes when preparation meets opportunity.[1]

Negotiations have reached an impasse, and mediation may be the next step. Or, litigation is proceeding, and mediation is strongly recommended as the next step. But is it the right step? In large part, whether or not mediation would be the right step depends on the attorneys involved in the case. For those attorneys who are hell-bent on stonewalling the mediation, this mediator concedes your victory. Mediation is not the right step for your case. After all, an unspoken reality about mediation success is that most cases will settle in mediation only if all the attorneys involved want the case to settle. However, if the attorneys on the case belong to the increasing number of resolution-sophisticated attorneys who are motivated to settle, mediation may be the right step.

This chapter will explain how, during the pre-mediation phase, the time between contracting with the mediator and actually convening for mediation, mediators may guide those settlement-motivated attorneys to overcome impasse and resolve their case in mediation. From the first phone call, pre-mediation opportunities abound for astute mediators to support savvy attorneys to overcome negotiation impasses. *What* is the impasse? *Why* is the impasse preventing settlement? *How* might all the parties, lawyers and mediators collaborate to overcome the impasse? This chapter will highlight the pre-mediation opportunities for mediators to help attorneys and their clients develop collaborative, coordinated and effective advocacy approaches during three critical events in the pre-mediation phase: the first phone call, the client preparation and the briefing paper.

[2.1] II. THE FIRST PHONE CALL: DEVELOPING THE FOUNDATION

The phone rings. Lucky you. You have been selected as the mediator on a challenging new case. After the attorney assures you of his commitment to resolving the matter at hand, you ask the attorney three seminal questions: First, *what is this conflict really about?* Second, *what is preventing this case from settling?* Third, *what would have to happen for this case to settle?* Let's understand the rationale behind each of these three inquiries and their import in helping overcome impasses.

1 Quotation attributed to Henry Hartman.

[2.2] A. What Is This Conflict Really About?

Beyond the stated legal conflict, *what else is the conflict about?* Rarely is a conflict just about the law. Many presenting conflicts may be set in a legal framework solely because the clients expect that lawyers solve only legal conflicts. However, from the client's perspective, the conflict may also be about social, emotional, economic, moral, political or religious issues.[2] From the first phone call, mediators have the opportunity to help attorneys expand their conceptualization of the presenting legal conflict to help define the actual conflict to be resolved.

What is the conflict about? This query also provides an opportunity for the client and attorney to clarify their understanding of the conflict and synchronize their settlement efforts.[3] Settlement efforts may be misdirected if attorneys focus their attention on clarifying only the legal issues when the case is also about other valued issues beyond the asserted legal claim.[4] Moreover, generated resolutions based solely on a legal claim may prove unresponsive to a client's interests. Thus, understanding all the dimensions of the conflict is a critical first step in helping lawyers to work effectively with their clients to define the actual problem to be solved.

[2.3] B. What Is Preventing This Case From Settling?

The second inquiry invites the attorney to proffer what has prevented this case from settling. This is about identifying and analyzing impasses.[5] For many attorneys, this is a different way of looking at the conflict beyond identifying the elements of a cognizable claim. The challenge is identifying the impasses for this particular case so that you can employ appropriate interventions to overcome the impasse.

2 *See* Christopher W. Moore, The Mediation Process 26 (Jossey-Bass 1986).

3 *See* ABA Model Rules of Prof'l Conduct R. 1.2 (2010) ("A lawyer shall abide by a client's decision whether to settle a matter."); *see also* ABA Model Rules of Prof'l Conduct R. 1.4 (1983) ("A lawyer shall keep the client reasonably informed about the status of the matter."); *see also* ABA Model Rules of Prof'l Conduct R. 2.4 (1983) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them."). *See generally* Robert H. Mnookin, Beyond Winning: Negotiating to Create Value in Deals and Disputes (Harvard Univ. Press 2000).

4 *See* Model Rules of Prof'l Conduct R. 2.1 (2010) (stating that a lawyer may refer to a client's moral, economic, social, and political values in rendering advice).

5 *See* Moore, *supra* note 2, at 6 (describing mediation as a process initiated by parties, usually after realizing that they can no longer resolve the conflict on their own).

There are different types and causes of impasses. Christopher W. Moore's "Wheel of Conflict" is a framework that characterizes the different types of impasses, including data conflicts caused by insufficient, poor quality or different interpretations of information;[6] interest impasses that may be caused by lack of understanding of the substantive, procedural or psychological interests of themselves or the other party;[7] structural impasses caused by destructive, inefficient or unequal power and authority allocation;[8] relationship impasses caused by intense emotion, stereotyping, misunderstandings and/or a pattern of negative interactions;[9] and value conflicts caused by incompatible and intolerant value differences.[10]

Even those who may be unfamiliar with Moore's conceptualization of impasses are still able to identify the impasses that prevent the case from settling. It just requires a look at the conflict from a different vantage point. Some frequent responses to the question *What is preventing this case from settling?* include the following:

- The parties have never even met to try to negotiate a resolution.
- A complaint was just filed.
- The parties hate each other and can't be in the same room.
- The other side doesn't want to offer a realistic price that is in line with the business appraisal my client has.
- My client is confident that the case law is on her side; the judge will favor her argument and award her due justice.

All expressions of impasse, and all able to be overcome.

[2.4] C. What Would Have to Happen for the Case to Settle?

The third question is, *What would have to happen for the case to settle*? This proactive perspective refocuses the attorney from positional advocacy to settlement advocacy. The attorney is encouraged to begin thinking

6 *See id.* at 27; *see also* Christopher W. Moore & Peter J. Woodrow, Handbook of Global and Multicultural Negotiation 393 (Jossey-Bass 2010).

7 *See* Moore, *supra* note 2, at 27.

8 *See id.*

9 *See id.*

10 *See id.*

about the impasse interventions, settlement initiatives and advocacy strategies needed to help overcome the impasse. The question also shifts each side from the blame game ("You wronged my client") to a collaborative problem-solving effort that focuses on how we are going to solve the problem.

If we understand that the impasses that have prevented the case from settling are not isolated events but part of the dynamics of a conflict, we appreciate that each type of impasse requires a customized intervention that addresses the dynamics of the conflict.[11] By way of illustration, imagine that during a business buyout negotiation between two partners, negotiations came to a screeching halt when the purchasing partner submits a business appraisal that is significantly below the valuation by the selling partner. Lawyers skilled in overcoming impasses will appreciate that an impasse is multi-dimensional and involves more than securing a better price. In order to overcome the impasse, it likely will be helpful to address the emotional issues of the selling partner relinquishing the business, the partners' relationship with each other, and the values each partner would attach to calculating a fair buyout. All are part of the dynamics of the conflict that attorneys need to know to help their clients resolve the impasse and make the deal.

[2.5] III. THE BRIEFING PAPER: AN IMPASSE-BREAKING TOOL

An often misused tool, the pre-mediation briefing paper is settlement focused, not position focused like traditional court advocacy submissions. Although attorneys have traditionally used the pre-mediation paper as an advocacy piece to convince the mediator of the merits of their case, the briefing also provides a welcome opportunity for each attorney to consider the possible impasses and to propose workable strategies to overcome the impasses. *Given your understanding of the conflict, how might both sides and the mediator work together to overcome the impasses to settlement?* Hallmarks of effective briefing papers are reasonableness, collaboration and transparency.

Mediators can encourage attorneys to use briefing papers as an impasse-breaking tool by educating attorneys about how pre-mediation impasse analysis is likely to contribute to mediation success and by asking attorneys to include specific information relating to impasse analysis in their briefing papers. As a settlement-focused tool, briefing papers

11 *See id.*

should not only include relevant legal information such as the legal claim, relevant law, and the procedural history of the claim, but also an essential impasse analysis of the presenting conflict. As part of their impasse analysis, mediators should also request that attorneys consider in their impasse analysis not only their client's perspective, but also the perspective of the other side. Mediators who invite attorneys to consider both sides' perspectives as part of impasse analysis are promoting the development of a collaborative, problem-solving approach among all involved.

Beyond the legal claim, what else is this conflict about? What offers, counteroffers or other attempts of settlement have been made by either side? Why do you think that these settlement attempts have been ineffective? In order of priority, what are the interests that are important to your client? From your client's perspective, what do you suspect are the interests of the other side in order of priority? What are the possible areas of agreement? What are the possible impasses? From your perspective, what information or events would have to happen for the case to settle? How might the mediator help in overcoming the impasses?

Consistent with using the briefing paper as an impasse-breaking tool, mediators should also educate attorneys about the value of sustaining a realistic, measured tone in drafting the briefing paper. Of course, attorneys can still advocate for their clients' interests. However, there is also value in acknowledging your understanding of the other side's perspective. Attorneys who include in the briefing paper a realistic recitation of the facts are signaling to both the mediator and the other side that they are settlement focused. Yes, some attorneys are reluctant to give up their positional advocacy style because, for them, that is what good lawyering is all about. Others find it challenging to find the right balance between client advocacy and impasse-breaking strategies, questioning if the two approaches are compatible. However, with support from the mediator, attorneys soon understand that using a realistic, measured tone in the impasse analysis of the briefing paper is a large part of effective client advocacy.

Because mediation is a client-focused process, and clients are considered the conflict experts about their problem, then, logically, the mediator should also encourage attorneys to collaborate with their clients in preparing the briefing paper. The preparation of a briefing paper provides an opportunity for the attorney and client to revisit the presenting conflict, identify the impasses, and reconsider how they might be overcome.

Consistent with getting a collaborative, problem-solving commitment from all involved, mediators should encourage attorneys to share their completed briefing papers with each side.[12] If we are truly using the briefing paper as an impasse-breaking tool, it is advantageous for each side to exchange briefing papers because quality information is the lubricant of impasse breaking. Although this is a welcome invitation to some attorneys, others may recoil out of fear of disclosing confidential information. One way to overcome that impasse is to suggest that parties redact confidential information on the paper given to the parties.

[2.6] IV. THE CLIENT: THE CONFLICT EXPERT AND IMPASSE BREAKER

Clients play a central role in overcoming impasses.[13] From the first phone call with the attorneys and continuing through the mediation, mediators should reinforce the importance of including clients in all phases of the mediation—including the pre-mediation phase. After all, clients are the personal owners of the conflict. If given the opportunity, clients may also be the experts on how to identify impasses, suggest options to overcome the impasses, and solve their conflicts. Furthermore, attorneys and clients want to ensure that their interests and strategies are synchronized so that the attorney/client relation does not become one more impasse that needs to be overcome.[14]

[2.7] A. Education

Educating the client about mediation and how it differs from court is a predicate to having the clients meaningfully participate in the mediation as an impasse breaker. As a client-centered forum with an informal structure, mediation allows clients more freedom and flexibility in the way they talk about the conflict. Unlike court, where the telling and retelling of their version of the conflict anchors clients in the rightness of their facts, mediation encourages clients to tell their version of the conflict with an expanded scope, beyond what is legally relevant. In fact, that which is not legally relevant may be very relevant to overcoming impasse in medi-

12 *See* Dr. Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers Are Reshaping the Practice of Law*, 2008 J. Disp. Resol. 61, 67 (2008).

13 *See generally id.*; Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 Ohio St. J. on Disp. Resol. 437 (2008).

14 *See generally* Robert H. Mnookin, Beyond Winning: Negotiating to Create Values in Deals and Disputes (Harvard Univ. Press 2000).

ation. In mediation, tentativeness, humility, and the acknowledgment of the merits of another's point of view might advance, rather than deter, a client's interests. Moreover, mediation's broader scope of discussion beyond the law makes it more likely that the participants will be able to address not only the legal issues but also the non-legal issues that may be important to them. As an added bonus, mediation participants will have the freedom to fashion a menu of remedies beyond the limited remedies of court.

As part of preparing their clients to think about overcoming impasses in mediation, lawyers may want to ask them interest-generating questions about their substantive, psychological, and procedural interests:[15] *From your perspective, what does this conflict mean to you? What does justice mean to you? What would be fair?*

[2.8] B. Teamwork Between Lawyers and Clients Is Critical in Overcoming Impasses

Lawyers need to explain to their clients that effective advocacy in mediation is about asserting their clients' interests while empathizing with the other side. Assertiveness and empathy are not incompatible[16] and may help overcome impasses and secure more of what is important to a client. Lawyers may want to clarify that aggressiveness, contrary to the media's portrayal, is not only ineffective in mediation but may also create further barriers to settlement.[17] Effective attorney/client partnerships involve ongoing recalibrating and refocusing.

[2.9] V. CONCLUSION

During the pre-mediation phase, mediators play an invaluable role in focusing attorneys' efforts on identifying and overcoming the impasses. After all, impasses brought the parties to mediation. Astute mediators understand that it would be a waste of an invaluable pre-mediation opportunity to wait until parties physically convene for the mediation. Yes, starting here, starting now.

15 *See* Christopher W. Moore, The Mediation Process 35 (Jossey-Bass 1986).

16 *See generally* Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *The Tension Between Empathy and Assertiveness*, 12 Neg. J. 217 (1996).

17 *See generally* Robert H. Mnookin, Beyond Winning: Negotiating to Create Value in Ideals and Disputes (Harvard Univ. Press 2000).

CHAPTER THREE

AVOIDING IMPASSE:
A MEDIATOR'S RULES TO LIVE BY

Hon. Barbara Byrd Wecker

[3.0] I. RULE 1: NEVER GIVE UP, NEVER GIVE UP, NEVER GIVE UP![1]

Well, almost never.

[3.1] II. RULE 2: PEOPLE SKILLS COUNT

A skilled lawyer-mediator has two assets: legal acumen and people skills. Remember both of those assets. The second is probably more important than the first in preventing impasse. All else follows from Rule 1 and Rule 2.

[3.2] III. RULE 3: PREPARE FOR A SUCCESSFUL MEDIATION

"Well begun is half done."[2] A successful mediation begins with the mediator's and the parties' preparation, which should include

1. an initial telephone conference between the mediator and counsel for all parties to learn the background of the current dispute, to go over the ground rules to be followed, to identify the intended participants and to secure the participation of the actual decision makers;

2. a confidential conversation with counsel for each party prior to the first session in order to gain some perspective on the dispute, the state of mind and immediate needs of each party, and some insight into the personalities and cultures involved; and

3. a confidential, written mediation statement from each party prior to the first meeting.

[3.3] IV. RULE 4: CREATE A PARTNERSHIP WITH THE PARTIES

Begin with all parties and counsel around a table. This is your first opportunity to establish trust in you as an impartial, objective facilitator and partner in the search for a satisfactory resolution of their dispute.

1 These rules apply to mediations among any number of parties, and we assume that each party is represented by counsel who will participate in the mediation.

2 Aristotle, in *Bartlett's Familiar Quotations* 88, Emily Morison Beck, ed. (15th ed., Little Brown 1980).

Assure the parties of the confidential nature of their communications to you and the evidential privilege applicable to the entire process. By your manner and tone, give the parties reason to trust you with their confidences and to be optimistic about your ability to help them. Although each case will be different, this is probably not the time for each of the parties or attorneys to state their positions or the history of their dispute. Indeed, consider carefully whether there is *anything* to be gained by inviting each party to do so, or whether such a process is likely to add to existing ill will and harden the parties' stances toward each other.

[3.4] V. RULE 5: REINFORCE THE PARTIES' DESIRE TO REACH AGREEMENT

Discuss the advantages of a mediated resolution. Explain that statistically, the parties are likely, in the end, to settle their case (or dispute), but if that does not happen until the eve of a trial, or even literally on the courthouse steps, they will have spent much more time, money, and emotional energy and find themselves under far more time pressure than they face now. Explain that they have an opportunity *now* to achieve a win/win, where otherwise they face a win/lose or a lose/lose. Point out that some of the remedies and elements of a settlement that can be had by agreement will not be available in a court judgment. It does not matter that the parties may have heard these points from their own attorneys; it matters that, together, they hear these things from the mediator. Congratulate the parties on undertaking mediation.

[3.5] VI. RULE 6: LISTEN TO THE PARTIES

In the initial private discussions or caucuses with each side, listen more than you speak. Listen carefully and thoughtfully. Follow the party's lead. Listen to the party's story—not just the lawyer's version—and hear that party with an open mind. Refrain from forming, much less voicing, your own judgments at this early stage. Remember, if the mediation is to succeed, conversations with the mediator will take the place for each party of a day in court. Allow each party to have that day in court with you. Save your evaluations for later (see Rule 9).

[3.6] VII. RULE 7: DO NOT LET ANY PARTY DRAW A LINE IN THE SAND

Do not convey from one party to another a statement like "This is our last offer; they can take it or leave it" or "We won't budge another inch."

(But see Rule 9.) And never accept the tough-guy/tough-girl posture: "We'll just go to trial and let the judge (or jury) decide."

[3.7] VIII. RULE 8: DO NOT ACCEPT "WE HAVE NOTHING TO LOSE"

Remind each side that there is always something to lose—not only the actual decision of a trial court, but the legal (and perhaps experts') fees, to say nothing of the time and energy they will spend on the lawsuit instead of on more productive business, family, and personal interests. Also remind each side of the benefits of a private, confidential resolution, avoiding a public dispute and a public decision that will become known by employees, clients, customers, competitors, and potential partners in the relevant business or professional community.

[3.8] IX. RULE 9: DO NOT BE AFRAID TO PROVIDE A DOSE OF REALITY

After listening carefully to each party separately and non-judgmentally, do not be afraid, at the right time, to tell a party when you are convinced that a position on any aspect of the dispute is weak, either factually or legally. One aspect of your role as a mediator is to assist each party in evaluating the risks of going forward in the litigation. Another aspect may be to help an attorney move the client to a more realistic view of the matter. Finally, the reality may include a sense of the limits of what is available from another party.

[3.9] X. RULE 10: NEVER DECLARE AN IMPASSE

Always show the parties there are ways to move forward, even if one or more have expressed a pessimistic view of the prospects for agreement. Allow each party to consider hypothetical solutions to hypothetical conditions that the mediator poses to each. This approach avoids a party's fear that to consider additional or alternative proposals is to negotiate against itself. It is also useful for avoiding inadvertently revealing a confidential position. Remind each party that this is a partnership (see Rule 4), and that considering new proposals will help you, the mediator, to find common ground.

[3.10] XI. RULE 11: IF AN IMPASSE DOES THREATEN, CONSIDER A FRESH START

- Renew the trust-building efforts that began the mediation, which may include giving each party an opportunity to retell her or his story to the mediator.

- Consider with each party how its offers and positions up to this point are likely to have been perceived by the other(s).

- Reconsider with each party the strengths and weaknesses of its own as well as every other party's case. Review with each party the evidence and the witnesses that will be available to prove its claims or defenses, along with a realistic assessment of potential weaknesses in its proofs.

- Consider with each party whether there is any "smoking gun" or "bombshell" it may be holding back, and if so, whether this would be a constructive time to reveal it to the mediator and possibly to the other party. Consider also the possibility of similar revelations on the other side.

[3.11] XII. RULE 12: GIVE EACH PARTY THE CONFIDENCE TO CONTINUE

If the parties have expressed that they are either unwilling or unable to move further, let each party know that you will not permit its willingness to continue the discussion to communicate either weakness or a commitment to "give more" or "take less," but merely faith in the mediator's assessment that it is worth continuing the conversation. To that end, the mediator can promise not to communicate either party's willingness to continue unless and until all parties have agreed. That way, neither party gains an actual or perceived advantage, and each party can feel secure with that knowledge.

[3.12] XIII. RULE 13: RECOGNIZE WHEN IT'S TIME TO TAKE A BREAK

Don't let anger, hurt or other emotions derail the process or block progress. If you see that happening, propose a break—hours or days—in which to cool off, reassess, and reconsider. Before such a break, persuade the attorneys—separately or together—of the mediator's view that there is still potential for resolution, assuming there is (and there almost always

is). Get their commitment to stay in touch with the mediator and with each other, preferably within an agreed-upon time frame.

[3.13] XIV. RULE 14: USE THE BREAK CONSTRUCTIVELY

Before the break, determine whether there are facts, documents or other information (such as the actual availability of any party's expected witnesses) that may affect the party's needs and flexibility, and that should be confirmed or exchanged. Leave the attorneys with the suggestion that they use the break to do the following:

- Find out whether there are changed conditions or new stumbling blocks to resolution, such as pending contracts or transactions, job opportunities for a departed employee, or the actual financial condition of a party, any of which may affect its own needs or its ability to meet terms needed by the other.

- Find out whether anyone who is not present at the mediation is advising each party and consider whether to bring any such person into the process. This is a variation on the theme of bringing in any final decision maker (such as a senior insurance manager) who, despite the mediator's and the advocate's initial best efforts, has remained available only by telephone.

[3.14] XV. RULE 15: CONSIDER A SECOND ROUNDTABLE BEFORE A BREAK

Before concluding a mediation session where separate caucuses have occupied most of the time, consider another roundtable. At that point, the mediator can summarize the concerns that have been voiced—and in, appropriate cases, the last offers that have been conveyed. Among other benefits, this insures that all parties leave the session with an accurate history of the day's efforts. It also allows the parties to hear together, once again, in the context of all that has transpired, the advantages of a mediated agreement. Assuming that you, as the mediator, have been thinking outside the box from the start, and have floated various suggestions to the parties during those separate caucuses, this may be a good time to voice creative possibilities with a clear acknowledgment that neither side has proposed such solutions, but that the mediator is offering them as food for thought toward a resolution.

[3.15] XVI. RULE 16: KEEP IN TOUCH

Always keep in contact with the attorneys. Use the break to keep in touch with them. Follow up every session with a telephone call to each attorney, and make further calls at appropriate intervals.

[3.16] XVII. RULE 17: FEWER THAN ALL PARTIES CAN SETTLE IN MEDIATION

If it becomes apparent that one or more parties in a multi-party case are unable or unwilling to enter into a settlement, but two or more parties are willing and able to do so even without the participation of the others, be open to assisting the willing parties to reach such an agreement.

[3.17] XVIII. RULE 18: CONSIDER A PARTIAL OR TEMPORARY AGREEMENT

Even if the parties have not yet been able to come to a total resolution, consider how to add value to the process and keep the negotiation alive. For example, consider whether they can agree to exchange information or undertake discovery outside the formal process, such as agreeing on a deposition schedule. Such an agreement saves the parties time and money, and may provide enough new information to encourage reassessment of positions and the basis for another face-to-face meeting.

[3.18] XIX. RULE 19: MEDIATION CAN CONTINUE WITHOUT ANOTHER MEETING

A corollary to Rule 16, "Keep in Touch," is that mediation, once begun in person, can continue by telephone, email, or any other means of communication. Many a successful mediation is concluded after the last face-to-face meeting.

[3.19] XX. RULE 20: KEEP THE DOOR OPEN

Let the parties know that the mediator will remain available to them, and that counsel for any party is welcome to call the mediator any time. Remind the parties and their counsel of the progress they have made in their understanding of their own and the other party's circumstances, and that they are likely to come to a meeting of the minds in the future—either on their own or with the mediator's assistance.

DEVELOPING SKILLS TO ADDRESS CULTURAL ISSUES IN ARBITRATION AND MEDIATION

Theodore K. Cheng[*]

The increasing globalization of commerce and the growth of multi-national companies have, among other things, resulted in an increased use of arbitration and mediation to resolve commercial disputes, both domestically and internationally. Accompanying this growth is a greater need for arbitrators, mediators, and advocates to develop critical cross-cultural competency skills. More and more parties to disputes hail from different legal systems, social traditions, faith-based customs, and family backgrounds. These disparate perspectives permit disputants to look at the same set of facts and circumstances and interpret them differently because of their respective cultural paradigms. They then bring those paradigms with them as they engage in the arbitration and mediation processes, affording endless opportunities for cross-cultural misunderstandings, even among citizens of the same country. Thus, developing cultural sensitivity and cultivating awareness of subtle cultural nuances in an arbitration or mediation proceeding can lead to prompt recognition and identification of cultural issues so that they can be addressed in a manner most useful to the proceeding. This is neither a simple nor straightforward process, but well worth the effort.

Culture can arise at almost every juncture. Cultural issues may:

- impact how the parties or their counsel select the arbitrator or mediator;
- shade what and how issues are raised and discussed during a preliminary hearing or a pre-mediation conference call;

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- influence how the process itself is structured;
- affect how a party's conduct during the process is perceived by the arbitrator, the mediator, the opposing party, and the opposing party's counsel;
- color how the evidence adduced at the hearing is viewed and/or received by the arbitrator, or how the factual background and perspectives articulated during the mediation session are viewed and/or received by the mediator; and
- have an impact on how credibility determinations are made.

At the core of these cultural issues are communication style differences that lead to how information is presented, received, and processed.

I. DIFFERING FORMS OF COMMUNICATION STYLES

Perhaps most indicative of the importance of cultural issues relates to how information is presented and received, which manifests itself in differing forms of communication that can have a profound effect on how the information will be processed. For example, as explicated in Edward T. Hall's 1976 book "Beyond Culture,"[1] most East Asian cultures are described as being "high-context," meaning that much is left unsaid, letting the background culture itself explain and fill in the gaps. In such a culture, words and word choice become highly important because just a few words can communicate not only a large amount of information, but also a complex level of information, to those sharing that same cultural background, while also communicating less effectively to those who do not. By contrast, the United States is described as a "low-context" culture, meaning that the speaker typically needs to be more explicit, and the value of any single word is less important. Just imagine how these culture differences can manifest themselves in both the quantity and quality of the answers that a witness from an East Asian culture might give in response to traditional American-style trial examinations. That witness may appear less forthcoming, curt, and perhaps even evasive. All of this has a marked impact on how others may assess an individual's credibility and how the information being presented by that individual is received and processed. Sometimes, in multi-cultural disputes, where no common language is available, the use of an interpreter is unavoidable. However,

[1] Edward T. Hall, "Beyond Culture" (Anchor Books 1976).

if at all possible, the use of an interpreter should be discouraged. No matter how competent, an interpreter can compound whatever communication problems may exist between the various individuals in an arbitration or mediation simply because of the very act of having to translate from one language to another.

For example, if the circumstances warrant, allowing a witness from a high-context background additional time to tell her/his story or permitting the examining attorney more leeway to ask leading questions may accomplish the purpose of fleshing out a more robust record for the arbitrator or tribunal. Perhaps viewing a party's compliance with contracts using a different lens can assist in providing more background or perspective for the conduct at issue. In some cultures, like in the United States, strict adherence to the language of the contract is upheld as paramount. However, in other cultures, like in China, the obligations embraced in the contract are meant to describe the overall relationship between the counterparties, and, thus, technical compliance with its terms and conditions is not valued as highly as how the parties treat each other. The contract simply functions as a document that embodies and reflects the parties' commercial relationship and, thus, is often viewed in those cultures as simply the beginning point for further negotiations when rifts in those relationships arise. Understanding that this view may be at the core of the dispute between the parties can have tremendous implications for assessing a party's good faith in complying with the terms and conditions of the contract, thereby having a direct impact on an arbitrator's evaluation of any claim of bad faith or assisting the mediator in beginning to build the necessary trust between disputants in order to arrive at a business resolution.

II. IDENTIFYING CULTURAL ISSUES IN ARBITRATION

In an arbitration, at minimum, identifying cultural issues begins at the preliminary hearing, where the arbitrator, the parties' counsel, and perhaps even the parties themselves will begin to get a sense of how information is being transmitted and received. This might lead to a recognition that cultural differences are influencing the observed conduct. Then, the parties and their counsel, guided and facilitated by the arbitrator, may choose to probe whether modifications in the "typical" or "standard" process need to be made to accommodate any cultural issues.

The arbitrator, the parties, and their counsel should also stay attuned to this heightened sensitivity to cultural differences during subsequent status conferences and information exchange disputes, as the positions taken, and the kinds of arguments made, by the participants can afford invaluable insights into how differing cultural frameworks are affecting the process. The evidentiary hearing is also another opportunity to remain vigilant to the cultural differences that may be in play. For example, the presentation of the evidence to the arbitrator or tribunal is an exercise that is markedly different between civil law countries – where the tendency is to let witnesses recount their stories without much direct assistance from the counsel – and common law countries – where the tendency is to have counsel rehearse and prepare witnesses in advance before taking the stand. Much can also be gleaned from norms developed in the international arena, where cultural differences have been particularly germane in areas such as arbitrator disclosures, witness preparation, and witness examination.[2]

III. IDENTIFYING CULTURAL ISSUES IN MEDIATION

In a mediation, it is paramount for the mediator not only to facilitate communication between the parties so as to ensure that there is no miscommunication, but also to uphold and honor the business expectations of the parties, which may differ markedly depending upon their respective underlying cultural backgrounds. The mediator can raise perceived cultural issues, or invite the parties to do so, through appropriate and sensitive questioning during the pre-mediation calls, either jointly or ex parte, which can be even more productive (if not at least revealing) if the parties themselves participate. Mediation (or conciliation in some international spheres) is viewed very differently in different cultures, so it is critically important to understand the parties' expectations from the very beginning. For example, one of the parties may be influenced by a consensus-driven culture where no one wants to appear being blamed. Another party may view individual caucuses with suspicion, like they are in some countries where the parties only engage each other in joint sessions.

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[2] For other views on the issue of culture in arbitration, *see, e.g.*, William K. Slate II, "Paying Attention to 'Culture' in International Commercial Arbitration," *Dispute Resolution Journal*, Vol. 59, No. 3 (August 2004), available at https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/paying-attention-to-culture-in-international-commercial-arbitration.pdf.

The mediator can also set an appropriate tone during joint sessions by emphasizing collaboration and cooperation so that offers and demands are received in the most positive manner. Because a mediation does not usually take place within a rigid legal framework, and, in fact, is much less formal than in an adjudicated proceeding like an arbitration or a court litigation, the mediator, as well as the advocates, need to be able to read the level of emotional intelligence in the room in order for the mediation to make progress, which includes developing cultural flexibility and adaptability, as well as a greater overall awareness and sensitivity towards cross-cultural issues. Thus, for example, some parties may desire additional representatives at the mediation session than what we are accustomed to here in the U.S., which will likely require advance planning and coordination of multiple schedules. Another party may need additional time to fully consider a settlement proposal, which may counsel for taking more frequent breaks during the session or even scheduling multiple days of sessions.[3]

I once conducted a mediation involving an infringement claim against a large U.S. multi-national corporation over a U.S. patent issued to a Chinese-owned company. For the benefit of that patent owner, I took my time describing in more detail, but in general terms, both the mediation and litigation processes so as contrast them to what the principals of that party might be more accustomed in their home country. In particular, the U.S patent laws were a framework with which these individuals were not very familiar, including the measure of damages and how to establish an entitlement to them. I also began my individual caucus with them by saying a few words in my limited Mandarin (mostly about my parents and where they came from), which started to build some trust and rapport between us. These steps helped lay a foundation upon which a resolution was ultimately possible.[4]

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[3] For other views on the issue of culture in mediation, *see, e.g.*, David J.A. Cairns, "Mediating International Commercial Disputes," *Dispute Resolution Journal*, Vol. 60, No. 3 (August 2005). For some insights into the "ethical conundrums" that can arise when there is a "clash of cultures," *see, e.g.*, Carrie Menkel-Meadow and Harold Abramson, "Mediating Multiculturally: Culture and the Ethical Mediator," in "Mediation Ethics: Cases & Commentaries" (Ellen Waldman ed. San Francisco: Jossey-Bass 2011), at 305, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1968&context=facpub (Digital Commons @ Georgetown University Law Center © 2011).

[4] For more on how a mediator can help negotiators bridge cultural differences, *see, e.g.*, Harold Abramson, "Selecting Mediators and Representing Clients in Cross-Cultural Disputes," 7 *Cardozo J. Conflict Resolution* 253 (2007). For more on the differences

IV. SOME FINAL THOUGHTS AND RESOURCES

Despite their adherence to being fair and impartial, arbitrators and mediators hold implicit biases, too, and it takes time to both recognize them and to try and account for them. The key is to make course corrections at a human level by being more self-aware and observant of whether there are cross-cultural issues in the proceedings. Being sensitive to the parties' needs and letting them fully present their case consistent with their own preferences and cultural background can ameliorate many of the communication style differences and lead to better information processing. Both arbitration and mediation are well suited to address cross-cultural concerns precisely because they are flexible and customizable, which are distinct advantages over traditional court litigation.

Lest all of this sound too complicated, there are numerous resources to help arbitrators, mediators, and advocates educate themselves about different cultures and their impact on communication and the dispute resolution process. Legal sources are an obvious first place to consult, including various books and treatises; national, local, and specialty bar associations; and law school faculty. There are also a host of non-legal (psychological, sociological, and anthropological) books, journals, and studies that may be of assistance.[5] In particular, one resource worth noting is "When Cultures Collide: Leading Across Cultures" by Richard D. Lewis.[6] A noted British linguist, Lewis charted national communication patterns, leadership styles, and cultural identities in his book, which revealed some helpful notions about the way in which people from different cultural backgrounds generally negotiate. For example:

- Americans lay their cards on the table and resolve disagreements quickly with one or both sides making concessions;

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between international and domestic commercial mediation, *see, e.g.*, Paul E. Mason, "What's Brewing in the International Commercial Mediation Process," *Dispute Resolution Journal*, Vol. 66, No. 1 (February/April 2011).

[5] *See, e.g.*, Jeanne M. Brett, "Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries" (Jossey-Bass 3d ed. 2014); Andy Molinsky, "Global Dexterity: How to Adapt Your Behavior Across Cultures Without Losing Yourself in the Process" (Harvard Business Review Press 2013).

[6] Richard D. Lewis, "When Cultures Collide: Leading Across Cultures" (Nicholas Brealey Publishing 3d ed. 2005).

- People in the United Kingdom tend to avoid confrontation in an understated, mannered, and humorous style that can be either powerful or inefficient;
- Germans rely on logic but "tend to amass more evidence and labor their points more than either the British or the French";
- The Swiss tend to be straightforward, nonaggressive negotiators. They obtain concessions by expressing confidence in the quality and value of their goods and services;
- The Dutch are focused on facts and figures but are "also great talkers and rarely make final decisions without a long 'Dutch' debate, sometimes approaching the danger zone of over-analysis";
- The Chinese tend to be more direct than the Japanese and some other East Asians. However, meetings are principally for information gathering, with the real decisions made elsewhere;
- Koreans tend to be energetic conversationalists who seek to close deals quickly, occasionally stretching the truth; and
- Indonesians tend to be very deferential conversationalists, sometimes to the point of ambiguity.[7]

Of course, in the face of broad, sweeping pronouncements like the foregoing, one should be cautious not to over-generalize and unnecessarily stereotype an individual from any particular cultural background. Among other things, doing so would exacerbate any implicit biases and their potential adverse impacts on others in the dispute resolution process. But knowing and/or being sensitive to these general norms may prove beneficial or advantageous in any given situation.

Other resources include conferences and seminars, cultural community leaders/members, community organizations/centers, cultural societies, social services organizations, consultants with expertise in the culture in question, professional colleagues from the culture in question, and various culture-related listservs.[8] The internet itself can also yield

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[7] *See* Gus Lubin and Jenna Goudreau, "23 Fascinating Diagrams Reveal How to Negotiate with People Around the World," *Business Insider* (August 14, 2015), available at http://www.businessinsider.com/how-to-negotiate-around-the-world-2015-8 (quoting from Lewis' book).

[8] For example, Transnational Dispute Management sponsors a listserv to promote discussion and sharing of insights and intelligence relating to international dispute management.

extremely helpful resources. It is imperative on all of us to conduct our own due diligence and research, to the extent that we believe necessary, in order to fulfill our respective roles as arbitrators, mediators, or advocates.

Clearly, there is much to be learned. Delivering a dispute resolution process that serves the needs of a multi-cultural, global business community and improves the quality of that process for the participants means developing cross-cultural competency skills that incorporate cultural sensitivity and cultivate awareness of the cultural differences that will undoubtedly emerge. This is a skill set worth having in everyone's toolkit.

Called OGEMID (which loosely stands for Oil, Gas, Energy, Mining, Infrastructure, and Investment Disputes), the listserv can be found at https://www.transnational-dispute-management.com/ogemid/.

Resolution Alley
Making an Appearance: Being Present and Engaged at the Mediation Session

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

The mediation process involves a neutral, disinterested third party who facilitates discussion amongst the parties to assist them in arriving at a mutually consensual resolution. One key objective is to see if, with the mediator's assistance, communications between the parties can be improved and possible alternatives for a resolution can be explored. Yet that can only work if each party is committed to participating in the process in good faith, and, in particular, attending the mediation session in person.[1]

For example, in *Binoin v. O'Neal*,[2] the plaintiff allegedly suffered from a rare condition called ectodermal dysplasia, a group of inherited disorders that involve defects in the hair, nails, sweat glands, and teeth. He commenced an action against professional basketball player Shaquille O'Neal for apparently mocking and ridiculing him by publishing photos of the plaintiff on Instagram and Twitter, along with photos of himself (O'Neal) attempting to make a face similar to the plaintiff. Two months into the lawsuit, the court ordered the parties to mediate, directing that "Pursuant to Local Rule 16.2E, the appearance of counsel and each party or a representative of each party with full authority to enter into a full and complete compromise and settlement is mandatory."[3] However, apparently upon the advice of his attorneys, O'Neal chose not to personally and physically appear at the mediation session. Instead, he merely spoke with the mediator on two occasions via Skype and sent a representative to participate at the mediation session on this behalf.[4] Not surprisingly, the case did not settle, and the court later imposed monetary sanctions against O'Neal's attorneys for contravening both the mediation referral order and the local rule, further ordering the parties to mediate the case again.[5] Five days later, this time with O'Neal's personal participation, the case settled. [6] Although O'Neal avoided being personally sanctioned, the court treated him the same as any other party-litigant, irrespective of his fame and status in the professional sports arena.

Critical to the success of any mediation process is whether the necessary decision makers are in attendance at the mediation. First and foremost, the integrity of the process requires that there be proper authority represented at the mediation in order for the parties to enter into authentic representations of their bargaining positions and interests, as well as ultimately enter into a binding resolution. Aside from the issue of actual party authority, the entire dynamics of the mediation session can easily become skewed when either the wrong party (or party representative) attends or when no party (or party representative) attends. For example, sometimes companies will send a lower level in-house attorney to attend the session. This individual may have an arbitrarily low level of settlement authority, a limited understanding of the background facts, or a lack of appreciation of the company's true flexibilities when entering into acceptable resolutions. Such a situation is likely to result in the discussions and negotiations prematurely reaching an impasse at some point, and both the other party and the mediator recognizing that the company sent the wrong individual to the mediation session.[7]

A different kind of dynamic problem arises when principals of the same or similar perceived level do not attend. This can often be the case when the parties are of different sizes or resources, such as when the plaintiff is an individual or small business and the defendant is a large, multi-national corporation. That imbalance (real or perceived) can lead to offending one side or the other. Similarly, the failure to even appear at all, as in O'Neal's case, can communicate the entirely wrong (and, presumably, inadvertent) message to the other side about how seriously the absent party is taking the mediation. So much of a mediation session entails listening, hearing, and recognizing the verbal and non-verbal cues (the tone of voice, the words spoken, and the body language) between and amongst the parties, as well as with the mediator. Hence, someone who is not physically present is not able to build the kind of trust, credibility, and rapport—let alone assess the temperature in the room and engage in dialogue—that is essential to maintaining productive negotiations and generating creative solutions. The absent party who does not participate actively in the mediation process simply does not have the frame of reference or context for understanding the various offers and demands made at the session, thereby potentially undermining the hard work and progress made by those actually in the room.

For all of these reasons and more, all New York courts require the parties to personally participate in court-annexed mediations.[8] For example, the Southern District of New York's mediation program procedures succinctly state that "[e]ach party must attend mediation." Similarly,

the rules and procedures of the New York County Commercial Division's ADR program sets forth that "[a]ttendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one." In explaining this personal attendance requirement, the Eastern District of New York offers this rationale: "This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions."[9]

At the same time, mediation participants should be mindful that there may be legitimate exceptions to personal and physical attendance at the mediation. Such exceptions could include situations where the higher level executives simply do not have the time or are so remotely connected to the events comprising the dispute that they cannot add any value at the mediation. Another instance might be when scheduling, travel, or financial constraints make in-person mediation impracticable, or where the true decision maker is a third-party (like an insurance carrier) whose physical attendance at the mediation is not absolutely critical, although being available at least by telephone would be an absolute requirement. Sometimes, the legal merits of the dispute are so one-sided that participation by one party (or even both parties) through teleconferencing or videoconferencing may be adequate. Today's advances in technology may also yield other acceptable substitutes.

All that said, more often than not, the actual personal and physical attendance by the parties (or their appropriate representatives) at the mediation session will be a critical factor in whether a resolution can be achieved. The focus of the pre-mediation preparation, then, should be on ascertaining whether the right individual (or individuals) will be present at the mediation, or at least assist in the pre-mediation work. These are the people who possess the requisite interest, knowledge, background, skills, temperament, and authority to enable the party-litigant to meaningfully participate in the mediation process. For example, in entertainment-related disputes, individuals who understand the business and industry customs and practices are often vital to exploring possibilities for a resolution, including licensing and other artist arrangements, that may be "outside the box." Additionally, and oftentimes, individuals specifically adept in the finance side of the business can provide the foundation necessary to arrive at a solution that will meet the economic needs and constraints of all the parties. On the legal front, both outside trial counsel and in-house intellectual property (or entertainment law) counsel can be particularly helpful. The former can reinforce the legal positions taken by the party, while also tacitly convey a willingness and ability to try the case if a resolution is not achieved; the latter can reiterate the concerns of the internal business unit, as well as help execute the company's overall approach to settling disputes. Moreover, the pre-mediation conference calls that most mediators hold are the perfect time to raise any of the foregoing issues and concerns—jointly or in individual caucus with the mediator— thereby enlisting the mediator's assistance in ensuring that the appropriate individuals are both assisting in the pre-mediation preparation and attending the mediation session itself, and that everyone understands and appreciates the reasons.

In the end, it is always a better course of action to have the parties personally and physically attend and participate in the mediation process. As O'Neal and his attorneys learned the hard way, there really is no substitute for being present and engaged at the session if the prospect of a resolution is something that is a real objective. Anything less than that ideal may mean that the process is being unnecessarily put at risk of failure.

Endnotes

1. *See generally* David C. Singer and Cecile Howard, "Outside Counsel: The Duty of Good Faith in Mediation Proceedings," N.Y.L.J. (Aug. 25, 2010) ("Good faith is integral to the process of mediation – it would be difficult if not impossible for mediation to succeed without it.").
2. Binion v. O'Neal, No. 15-cv-60869-JIC (S.D. Fla.).
3. *Id.*, 2016 U.S. Dist. LEXIS 18387, at *2 (S.D. Fla. Feb. 16, 2016) (quoting June 30, 2015 order referring case to mediation) (emphasis omitted).
4. *Id.*, Report of Mediator (S.D. Fla., Feb. 3, 2015).
5. *Id.*, 2016 U.S. Dist. LEXIS 18387, at *6.
6. *Id.*, Report of Mediator (S.D. Fla. Feb. 23, 2016). Other courts have also levied sanctions against parties for failing to appear in person at mediation sessions. *See, e.g.*, Negron v. Woodhull Hosp., 173 Fed. Appx. 77, 79 (2d Cir. 2006) (upholding sanctions where the party representative failed to attend a mediation as ordered because such conduct "impaired the usefulness of the mediation conference"); Seidel v. Bradberry, No. 3:94-CV-0147-G, 1998 U.S. Dist. LEXIS 10310, at *9 (N.D. Tex. July 8, 1998) (sanctioning the defendant for, among other things, failing to attend the mediation because his conduct was "evidence that [he was] intentionally thwarting the authority of the court and hampering the judicial process"); *cf.* Kerestan v. Merck & Co. Long Term Disability Plan, 05 Civ. 3469 (BSJ) (AJP), 2008 U.S. Dist. LEXIS 50166 (S.D.N.Y. July 2, 2008) (sanctioning the plaintiff for failing to appear in person at the settlement conference as ordered).
7. *See, e.g.*, Nick v. Morgan's Foods, Inc., 270 F.3d 590, 596 & n.4 (8th Cir. 2001) (affirming the district court's order denying a motion for reconsideration and imposing additional sanctions where the appellant's corporate representative at the ADR conference had settlement authority limited to $500 and any settlement offer over $500 could only be considered by another individual who was not present and only available by telephone, thereby hampering "the corporate representative's ability to meaningfully participate in

the ADR conference and to reconsider the company's position on settlement at that conference").

8. *See, e.g.*, E.D.N.Y. L.R. 83.8(c)(2) (rev. Sept. 28, 2015) ("[T]he Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party."); N.D.N.Y. L.R. 83.11-5(b) (eff. Jan. 1, 2016) ("The attorneys who are expected to try the case for the parties shall appear and shall be accompanied by an individual with authority to settle the lawsuit. Those latter individuals shall be the parties (if the parties are natural persons) or representatives of parties that are not natural persons. These latter individuals may not be counsel (except in-house counsel)."); S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) (Dec. 9, 2013) ("Each party must attend mediation."); W.D.N.Y. ADR Plan §§ 5.8(A), (E) (rev. June 24, 2011) ("All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 5.8(E) below," which requires a showing "that personal attendance would impose an extraordinary or otherwise unjustifiable hardship."); N.Y. Supr. Ct., N.Y. Co., Comm. Div. Rules and Procedures of the Alternative Dispute Resolution Program Rule 10(b) (eff. Feb. 10, 2016) ("Attendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter.").

9. E.D.N.Y. L.R. 83.8(c)(2). *Accord* S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) ("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.").

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Mediation vs. Adjudication

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I. Mediation

A. Mediation is a confidential dispute resolution process in which parties engage a neutral, disinterested third-party.

B. The mediator facilitates discussion amongst the parties to assist them in arriving at a mutually consensual resolution.

1. The mediator can convene the parties jointly to facilitate communication between them.

2. Unlike an arbitrator, the mediator can also meet privately with the parties on an *ex parte* basis, thereby potentially uncovering other possibilities for a resolution.

3. As a result, mediation is oftentimes referred to as "facilitated negotiation."

C. Mediation is a non-adjudicative process, *i.e.*, there is no judge or other decision maker who will determine the merits of the dispute or compel a resolution.

1. The role of the mediator is to try and improve communications between the parties, explore possible alternatives, consider options, and address the underlying interests and needs of the parties.

2. The goal may be to help move the parties towards a negotiated settlement or other resolution of their own making.

3. Other goals include:

a. Resolving discrete issues or portions of disputes, instead of the entire dispute.

b. Having the opportunity for the parties to face each other and conduct communications, if not negotiations.

c. Arriving at a better sense of the relative credibility of the parties and their principals.

d. Obtaining better clarity on the issues and contentions being advanced by each party.

D. There is also enormous flexibility afforded to parties in designing a customized mediation process.

1. The manner in which communications between and amongst the parties and/or with the mediator can be tailored to fit the specific circumstances of the dispute.

2. The extent to which information is informally exchanged in advance of or during the mediation session itself can also be tailored to fit the specific circumstances of the dispute.

3. The timing of the mediation session and whether multiple sessions may be appropriate are also considerations that can be tailored to fit the specific circumstances of the dispute.

4. Like in arbitration, another aspect of this customization is the ability to choose a mediator who is an acknowledged expert in the subject matter of the dispute (such as accountant's liability) or the relevant industry in which the dispute arose (*e.g.*, theater, software, construction, etc.).

5. Selecting the appropriate mediator – one who is well versed in mediation process skills, with perhaps some knowledge of, or prior experience with, either the subject matter of the dispute and/or the particular industry in

E. Mediation can be very helpful in those situations where the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse in their dialogue.

1. A mediator may be asked to recommend possible solutions, but a mediator is not authorized to impose a resolution.

2. Instead, the mediator provides an impartial perspective on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain.

F. Mediation is prospective, not retrospective, in nature.

1. A litigation looks to past events to find fault and impose appropriate relief.

2. By contrast, a mediation focuses on the future to determine how the parties can best resolve the pending dispute or conflict and move on.

3. Thus, a mediation tends to be more cooperative, rather than adversarial, in nature.

G. The outcome of a mediation is typically some kind of a binding agreement between the parties.

1. General background contract law governs the enforceability of that agreement.

2. Preferably, the agreement should be in writing. Oral agreements may be enforceable depending upon the jurisdiction.

3. However, because the parties' self-determination and informed consent to enter into an agreement are cornerstones of the mediation process, they are free to enter into and disengage from the process at any time. No party can be forced to resolve the dispute.

4. The mediator also has no authority to compel the parties to resolve the dispute and should not be engaging in coercive tactics to have the parties arrive at a resolution.

II. Arbitration

A. Arbitration is another confidential dispute resolution process in which the parties engage a neutral, disinterested third-party.

B. Like a judge, the arbitrator is tasked with determining the merits of the dispute, usually in a final and binding manner, according to rules and procedures that are agreed-upon by the parties. It is a very formal process not unlike litigation.

C. Arbitration is a "creature of contract."

1. Parties privately agree in writing to utilize arbitration as a dispute resolution process.

2. An arbitration agreement or clause is triggered by a dispute arising out of the contract between the parties.

3. There is enormous flexibility afforded to parties in designing a customized process.

D. Arbitration is seen as having a number of significant advantages over litigation. One of these advantages is that the parties have the ability to choose their own decision maker.

1. The ability to choose one's own decision maker is an aspect of the customization of the arbitration process.

2. That decision maker can be someone who is an acknowledged expert in the subject matter of the dispute or the relevant industry in which the dispute arose.

    a. Such an arbitration should (at least in theory) be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and, most likely, generalist judge.

    b. Generalists are presumed not to have any special expertise, knowledge or insight into the dispute, the relevant industry, or the business context.

3. Thus, the selection of the appropriate arbitrator could be critical to achieving a just result because the parties typically want a decision maker who can appreciate both the legal issues and the technical industry concepts involved.

4. The characteristics of the individual being selected as the arbitrator could make a difference in how (and sometimes whether) the dispute is resolved, how quickly a resolution is achieved, and how cost-effective the process will likely be.

E. Another advantage of arbitration over litigation is the ability to maintain the privacy of the proceedings.

1. Confidentiality in arbitration proceedings, however, is not automatic. Administering institutions/providers maintain confidentiality rules, but those rules only apply to them and arbitrators, and not to the parties or their counsel.

2. The parties can agree on the nature and scope of confidentiality in their arbitration agreement or clause. Absent an explicit agreement, the parties will have to either negotiate and agree upon maintaining confidentiality after the dispute has arisen or seek such protection from the arbitrator.

3. Generally, no confidentiality applies to third-parties who are brought into the proceeding, either during the information exchange process or as witnesses during the evidentiary hearing.

F. The ability to secure a preliminary injunction or other interim relief in an arbitration setting is another valuable attribute for selecting arbitration to resolve disputes.

1. Injunctions, attachments, and other preliminary remedies can be used to stop offending conduct or maintain the status quo. These remedies are frequently employed as part of the litigation strategy in copyright law disputes.

2. Courts have routinely held that arbitrators possess the power under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. to issue such non-monetary remedies and, in particular, to issue them before an evidentiary hearing on the merits.

3. The power to grant interim relief has also been expressly granted by statute in 20 states and the District of Columbia, all of which have adopted the 2000 Revised Uniform Arbitration Act (RUAA). *See also* N.Y. CPLR 7502.

4. All of the major arbitration providers – *e.g.*, the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention and Resolution (CPR Institute), JAMS, the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) – have included emergency arbitrator provisions in their default rules (although they each expressly allow for the parties to opt-out of these provisions through their arbitration agreements).

G. But there is an increasing trend here in the United States to permit more discovery-like exchange of documents and information in the arbitration process.

1. If managed poorly, arbitration becomes as expensive and time-consuming as litigation, oftentimes referred to as "litigation-lite."

a. Care must be taken to manage the process where the volume or universe of relevant and material documents is large.

b. Particularly problematic in today's environment where much of the document depositories are electronic in nature.

c. Use of interrogatories and depositions is also unfortunately increasing.

2. If properly managed by the arbitrator, the parties, and their counsel, arbitration can result in a process that is fair, expeditious, and cost-effective.

H. There are very limited and narrow grounds on which an arbitration award can be vacated (or overturned).

1. There is no traditional appellate review of an arbitration award.

2. Depending on the statutory framework (FAA or state law), the grounds for vacatur include:

a. Where the award was procured by corruption, fraud, or undue means.

b. Where the arbitrator demonstrated evident partiality or corruption.

c. Where the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

d. Where the arbitrator exceeded his/her powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

e. Where the award was in manifest disregard of the law.

f. Where the award was irrational.

g. Where the award was against public policy.

I. To alleviate this issue, the parties could agree to implement optional appellate arbitration procedures after the issuance of the arbitration award.

1. Doing so would afford the parties a merits-based review of an arbitrator's award by a panel of arbitrators.

2. Adopting such a mechanism would also increase the time and expense of the arbitration process.

MEDIATION	ADJUDICATION
Party decision making, self-determination	Third-party tribunal decision making
Interest and needs based	Law and fact based
Mediator helps parties communicate, consider options, negotiate terms	Third-party tribunal takes evidence, issues decision
Informal, relaxed procedures	Formal rules, procedures
Less discovery needed	Extensive discovery
Party communications more direct	Party communications indirect
Mediation conferences are private, confidential (with some exceptions)	Litigation is public
Resolution is negotiated	Resolution is imposed
Costs comparatively lower than adjudication	Costs comparatively higher than mediation
Mediator meets jointly, privately with parties in informal setting	Judge/arbitrator holds hearings with all parties in formal setting
Hours, days to resolve	Months, years to resolve
Reinforces negotiation (> 80% success rate generally)	Reinforces ADR process of negotiation (> 95% pretrial disposition)

Resolution Alley
Providing for Neutrals with Industry, Legal, and Business Expertise

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

Imagine that you are the Human Resources manager at a record label and you have just received a copy of a federal court complaint filed by a recently terminated employee who is now claiming that her firing was discriminatory. The court has also automatically referred the case to mediation. Although there are any number of potential mediators with expertise in the employment field, you wonder whether someone with knowledge of the music industry might better understand the context of the employment situation.

"A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing—not a reality testing of the legal contentions, but the practicalities of implementing certain proposals."

Or maybe you negotiate agreements for the purchase of artwork for your museum's own collection. Allegations have surfaced that your most recent acquisition from a private gallery may be a counterfeit. Your agreements with galleries always contain a standard, generic arbitration clause, but you now wonder whether having an arbitrator with knowledge, training, or expertise in art history might better understand both the background of the dispute, as well as appreciate the technical information that might be adduced at the evidentiary hearing.

Or perhaps your company licenses the logo of a professional basketball team and makes and sells various articles of clothing and other merchandising on which that logo appears. Recently, the team's in-house director of intellectual property and licensing contacted you and is upset about the quality of the apparel being made by your overseas manufacturer, which she contends is damaging the brand. She is threatening to terminate the licensing agreement, pointing to some arguable language in the agreement as a basis for doing so. You wonder whether you might suggest that the parties try mediating the dispute using someone with knowledge of sports merchandising and licensing in the apparel industry.

In each of the above scenarios, the characteristics of the person being selected as the arbitrator or mediator could make a difference in how (and sometimes whether) the dispute is resolved, how quickly a resolution is achieved, and how cost-effective the process will likely be. As alternative dispute resolution mechanisms like arbitration and mediation are voluntary and consensual in nature, they are processes detailed in dispute resolution clauses that are (outside of the mandatory, adhesion context) customizable by the parties, in that the parties have broad flexibility to design a dispute resolution mechanism that best fits the dispute in question. One of the aspects of this customization is the ability of the parties to select neutrals who are "experts" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arises, or the legal framework governing the dispute itself. Exercising this flexibility is something often overlooked by many parties.

Theodore K. Cheng

Arbitration is seen as having a number of significant advantages over litigation. One of these advantages is that the parties have the ability to choose their own decision maker. That decision maker can be someone who is an acknowledged expert in the subject matter of the dispute, such that an arbitration should (at least in theory) be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and, most likely, generalist judge, who has no special expertise, knowledge or insight into the dispute, the relevant industry, or the business context.

A mediator who is an acknowledged expert in the industry or the business norms underlying the dispute could assist in helping the parties to furnish or uncover creative and innovative solutions. A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing—not a reality testing of the legal contentions, but the practicalities of implementing certain proposals.

Delineating the qualifications and/or credentials of the arbitrator or mediator can also lead to increased savings in both time and cost. The parties do not need to expend additional time and energy educating the neutral as much about the underlying industry, business norms, or legal framework applicable to the dispute, as so often is important in entertainment, arts, and sports disputes.

"Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise."

The parties can begin thinking about this option when they first draft and enter into a dispute resolution provision. Here is an example of an arbitration clause that requires a certain level of subject matter experience:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules before a single arbitrator. The arbitrator shall have at least 10 years of experience in intellectual property licensing matters. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Or, for employment matters in a particular industry, the clause might read something like this:

> If a dispute arises out of or relates to this employment contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. The mediator shall be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Any arbitration shall be administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures before a single arbitrator, who shall also similarly be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Depending upon the circumstances, some degree of expertise can matter. Why not provide for it upfront in the dispute resolution clause?

For the situation where a court has automatically referred or mandated the dispute to be resolved, in the first instance, through one or more alternative dispute resolution mechanisms, many courts maintain rosters of individuals with varying degrees of industry, business, and legal backgrounds. Parties can choose someone from those rosters with the appropriate background for that dispute. And if the practice is for the court to assign a neutral, the rules usually permit parties to opt out of that selection and choose a replacement—someone who would be a better fit.

One cautionary note is to exercise some restraint in drafting such specificity into the clause. Being too specific can inadvertently limit the pool of arbitrators or mediators from which the parties can make their selection. For example, a clause that mandates that "the mediator shall possess a Ph.D. degree in the field of experimental plasma physics and/or quantum particle acceleration" would obviously result in few available candidates because, even if the pool of such Ph.D. degree recipients is large, the likelihood that they also possess the requisite mediation skills (or can even conduct anything approaching a mediation process) is undoubtedly low. Thus, over-specifying the qualifications and/or credentials of the arbitrator or mediator may inadvertently lead to situations where very few suitable neutrals can be identified (or, in some cases, none), thereby thwarting the original intent of the parties in trying to design a more cost-effective and efficient process.

If the parties had not exercised this flexibility to insert the qualifications and/or credentials of the neutral into the dispute resolution clause before the dispute arises, all is not lost. Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise. In matters administered by a provider such as the AAA, the CPR Institute, or Resolute Systems, the parties may be afforded an opportunity, after the case is filed, to articulate any preferences they may have for the neutral, particularly in situations where the dispute resolution clause is generic or silent as to the neutral's qualifications and/or credentials. Such an opportunity is another time when the flexibility and customization of alternative dispute resolution mechanisms can be leveraged to ensure that the neutral might have a better understanding of the industry, business norms, and/or legal framework in which the dispute has arisen

and appreciate any technical information that might be adduced at the evidentiary hearing.

The ability to provide for, and ultimately select, the neutral with the right background and experience for the dispute in question is one of the hallmarks of a voluntary, consensual alternative dispute resolution process. It distinguishes arbitration and mediation, for example, from the traditional litigation model for resolving disputes and is well worth considering, not only at the moment when dispute resolution clauses are being drafted and entered into, but also when disputes actually arise.

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THE BRAINS BEHIND MEDIATION: REFLECTIONS ON NEUROSCIENCE, CONFLICT RESOLUTION AND DECISION-MAKING

*Daniel Weitz**

INTRODUCTION

On September 13, 1848, an explosives charge sent a three-foot tamping iron about an inch in diameter through the head of Phineas Gage.[1] Although Gage survived, the tamping iron, which entered just under the left eye and exited through the frontal portion of his head, destroyed his prefrontal cortex.[2] Prior to the accident, Gage was a popular foreman of a railroad construction crew.[3] After the accident, he was a tactless, profane, and impulsive man with a dramatically altered personality.[4]

It is through extreme examples of severe deficits in the brain that scientists were able to develop our earliest descriptions of how the brain affects behavior. Today, advances in neuroscience have given us unprecedented insights into the workings of the human brain.[5] A great deal has been discovered in disciplines ranging from cognitive-behavioral psychology and neuropsychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly-pursued topic. While a quick survey of recent studies of the brain produces a flood of connections to the practice of mediation, even

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1 *See The Phineas Gage Information Page Maintained By Malcolm Macmillan*, http://www.deakin.edu.au/hbs/GAGEPAGE (last visited Feb. 14, 2010).

2 *Id.*

3 *Id.*

4 *Id.*

5 For a great explanation of functional magnetic resonance imaging (fMRI), see MARCO IACOBONI, MIRRORING PEOPLE, THE SCIENCE OF EMPATHY AND HOW WE CONNECT WITH OTHERS 59 (2009). For a description of transcranial magnetic stimulation (TMS). *Id.* at 90. Other brain imaging techniques include electroencephalography (EEG) and magnetoencephalography (MEG). *Id.* at 162, 163.

neuroscientists caution against the certainty of their findings.[6] There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we should resist the temptation to champion a long sought-after scientific basis for all that we do as mediators. However, there is no denying the fascination with what we are learning about the human brain, how it guides our behaviors, and how it impacts the way we make decisions. At a minimum, it is cause for great reflection.

I. OUR NEGATIVE VIEW OF CONFLICT

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something that is always negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask whether anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding, and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict often depends on how it is handled.

Recent discoveries in the field of neuroscience shed even greater light on our predominantly negative view of conflict. In *Nurture Shock*, Po Bronson and Ashley Merryman discuss the work of Dr. E. Mark Cummings at the University of Notre Dame.[7] Cummings studied the impact that everyday parental conflict may have on children. Cummings found that the typical married couple had about eight disputes each day and that spouses were roughly three times more likely to express anger to each other as they were

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[6] *See* Edward Gandolf, *Cautions About Applying Neuroscience to Batter Intervention* 3 (citing NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004)), *available at* http://www.nationalcenterdvtraumamh.org/lib/File/Neuroscience%20and%20batterer%20programs-FINAL.pdf (last visited Mar. 6, 2011); *see also* Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (Apr. 2006), *available at* http://www.nature.com/nrn/journal/v7/n4/full/nrn1887.html.

[7] PO BRONSON & ASHLEY MERRYMAN, NURTURE SHOCK 184 (2009).

to show affection.[8] Children are witnesses to these conflicts forty-five percent of the time.[9] Cummings staged experiments to see what impact this type of conflict had on children. Ultimately, what he found was that witnessing the conflict itself did not result in any negative change in the child's behavior, provided the child was allowed to see the resolution of the argument.[10] It was only when the argument was stopped in the middle before resolution that it had a negative effect on the child's behavior.[11] Cummings has even shown that being exposed to marital conflict can be good for children provided it is constructive and resolved with affection.[12]

Think for a moment about our own childhood experiences with conflict. Did our parents fight? If so, was it constructive conflict? And as to a more subtle point, as Bronson and Merryman highlight, did our parents ironically make matters worse by taking the fight upstairs or into the other room, thus sparing us the exposure? If so, did they remember to tell us that they worked it all out?

Bronson and Merryman also point to a body of research on the nature of conflict among siblings.[13] Dr. Hildy Ross of the University of Waterloo found only about one in every eight conflicts between siblings ends in compromise or reconciliation.[14] In the other seven conflicts, the siblings withdraw usually after the older child bullied or intimidated the younger child.[15] Scottish researcher Dr. Samantha Punch concluded, "Sibship is a relationship in which the boundaries of social interaction can be pushed to the limit. Rage and irritation need not be suppressed, whilst politeness and toleration can be neglected."[16] Children made seven times as many more negative and controlling statements to their siblings as they did to their friends, according to Dr. Ganie DeHart of SUNY Geneseo in New York.[17]

Bronson and Merryman wonder what siblings learn from the thousands and thousands of interactions that they have with each other when, no matter how the conflict is handled, they will still be

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8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 BRONSON & MERRYMAN, *supra* note 7, at 120.
14 *Id.*
15 *Id.*
16 *Id.* at 121.
17 *Id.* at 120–21.

together the next day. They suggest perhaps that children learn poor social skills from those interactions, just as often as they learn good ones. They learn of conflict, but not necessarily constructive conflict.[18]

Bronson and Merryman also provide support for those who claim that we get our negative view of conflict, and perhaps our poor conflict resolution skills, from children's television. Citing studies involving comparisons of educational television with more violent children's shows, we now know that while children may be less violently aggressive after watching educational television, they are far more relationally aggressive.[19] Bronson and Merryman explain that while physical aggression can include pushing or hitting, and verbal aggression often involves name calling, relational aggression involves ignoring or telling lies about another child. The more children watched educational television, the more controlling, manipulative and bossier they became. Bronson and Merryman point out that one possible explanation for this phenomenon may be that educational television spends most of its time establishing conflict between characters and very little time resolving it. Preschoolers, for example, are said to be less able to connect the information from the end of the show to what happened earlier. They tend to learn from the individual behaviors shown rather than the overall lesson.[20]

Bronson and Merryman not only provide us with insights into our views on conflict, but they also provide us with food for thought on why we behave the way we do in conflict.[21] For example, significant research has been done on the importance of sleep, which supports the position that we consolidate learning and store memory during sleep.[22] Bronson and Merryman report that according to these studies, negative memories are stored in the amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the hippocampus (an area of the brain associated with storage of memory and conversion of short term to long term memory).[23] Furthermore, lack of sleep is harder on the hippocampus than it is on the amygdala, so we may remember negative feelings and events more

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[18] *Id.* at 119.

[19] BRONSON & MERRYMAN, *supra* note 7, at 180.

[20] *Id.*

[21] *Id.* at 35.

[22] *Id.* at 33–35.

[23] *Id.* at 35.

so than neutral or positive ones. Could this explain why we so often seem to judge people in conflict by their most negative potential? Other studies have shown that stress can cause a similar effect on the hippocampus.[24] During situations of stress, hormones called glucocorticoids are released in the brain.[25] Glucocorticoids are known to cause damage to the hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the hippocampus.[26] This suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict and how we interact with them.

What can we learn from the field of neuroscience and these studies of the brain, conflict and even educational television? The above research suggests that our predominantly negative view of conflict is shaped by our experience dating back to early childhood. This further suggests that our negative view of conflict is perhaps a conditioned response. Did any of us have positive role models for dealing constructively with conflict when we were children? And even if we did, were those lessons as frequent or as powerful as the negative ones?[27] Did our parents let us watch educational television thinking we were learning something good about conflict resolution? The jury may still be out on exactly what it was we were learning, but it appears evident in the way in which so many of us behave in conflict situations that we developed more destructive than constructive skills. Furthermore, our negative view of conflict undoubtedly impacts how we approach it and increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal. The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them. However, if our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. If our destructive behavior in conflict is further influenced by the unconscious effects of stress or lack of sleep, perhaps we can mitigate these effects by simply becoming aware that they exist. Therefore, the integration of mediation and neuroscience not only provides help with resolving the conflict at hand, it provides an opportunity to develop con-

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24 JOHN MEDINA, BRAIN RULES 178 (2009).

25 *Id.* at 179.

26 *Id. See also* NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248 (2007).

27 For an interesting discussion of the psychological phenomenon of "negativity bias," which means that the human mind is wired to magnify the negative, see JONAH LEHRER, HOW WE DECIDE 81 (2009).

structive conflict resolution approaches and skills that can be used well into the future.

II. NEUROPLASTICITY AND REASON FOR HOPE

During much of the twentieth century, the prevailing theory was that our brains, at least for the most part, were almost completely formed and unchanging after childhood.[28] However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[29] For example, studies have shown that exercise can improve cognitive function and even brain physiology.[30] Exercise also appears to stimulate a protein known as Brain Derived Neurotrophic Factor ("BDNF"), which aids in the development of healthy tissue.[31] In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain.[32] According to Medina, BDNF not only keeps neurons young and healthy, rendering them much more willing to connect with one another, but it also encourages the formation of new cells in the brain.[33]

Another revolutionary scientific discovery is the neural insulator known as myelin. In *The Talent Code*, Daniel Coyle describes how myelin wraps itself around the nerve fibers in our brain that serve as the basis of skill, making them stronger and faster.[34] The thicker it gets, the better it insulates and the faster and more accurate our movements and thoughts become. Coyle tells us that we continue to grow myelin well into our fifties and beyond, after which we still make myelin even though we start to lose more than we make.[35]

These are amazing discoveries. No matter how prior experience may have shaped our perception of conflict, if we can always acquire new skills and improve our brain function, it is not a far stretch to believe we can improve the way in which we perceive

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28 DOIDGE, *supra* note 26, at i.

29 *Id.* at xix.

30 *See* MEDINA, *supra* note 24, at 7–27. *See also* DOIDGE, *supra* note 26.

31 *See* MEDINA, *supra* note 24, at 22.

32 *Id.*

33 *Id.*

34 *See generally* DANIEL COYLE, THE TALENT CODE (2009).

35 *Id.* at 6.

and deal with conflict. As Coyle puts it, maybe you *can* teach an old dog new tricks; it just takes "deep practice."[36]

III. MEDIATOR SKILLS AND DECISION-MAKING

In my journey through numerous books and studies dealing with neuroscience, a number of associations with conflict resolution and mediation emerged. Studies of the brain have produced major insights into how we make decisions. When viewing these insights from the perspective of a conflict resolution professional, it does not take much to connect aspects of mediation and mediator skills to neuroscience and what we have been learning about the brain.

Fundamental mediator skills include the delivery of an opening statement, framing negotiable issues, and generating movement between parties who are stuck in their positions.[37] The utility of these skills can be connected to a number of findings including the psychological phenomenon of "priming," "the framing effect," the role of mirror neurons, and the functions of the left and right hemispheres of the brain as they impact cooperation, empathy, and problem solving.[38] Additional studies in behavioral economics and cognitive-behavioral psychology provide explanations for how our adult views of conflict are shaped, discussed *supra*, and reasons why mediator skills and reflective practice are so helpful to people in conflict.

Malcolm Gladwell wrote in *Outliers* that, "[p]lane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions."[39] The same is true for any discussion of the impact of specific mediator skills. Focus on the use of any one skill or nuance of process will not by itself typically change the nature of the dialogue between the parties in me-

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[36] *Id.* at 47–53. "Deep practice" as used by Coyle is comparable to the term "deliberate practice" used by psychologist Anders Ericsson, who described deliberate practice as "working on technique, seeking constant critical feedback, and focusing ruthlessly on shoring up weaknesses." *Id.* at 51. Ericsson is known in part for his groundbreaking work, which included the central tenet that "every expert in every field is the result of around ten thousand hours of committed practice." *Id. See also* MALCOLM GLADWELL, OUTLIERS 40 (2008).

[37] *See Mediation Training Curriculum Guidelines*, New York State Unified Court System, http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf (last visited Mar. 6, 2011) [hereinafter Mediation Training Guidelines].

[38] *See infra* Part IV.

[39] GLADWELL, OUTLIERS, *supra* note 36, at 183.

diation. The true difference between whether or not the parties' conflict lands safely or crashes to the ground is the accumulation of skills and nuances of process that may seem trivial when viewed in isolation.

IV. THE PSYCHOLOGICAL PHENOMENON OF PRIMING AND MEDIATOR OPENING STATEMENTS

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce, community, or workplace mediation.[40] The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility.[41] Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. However, the research of John Bargh on the "priming effect" may provide new insights.

John Bargh, a psychology professor at Yale University, has published many books and papers on the "priming effect," in which prior presentation of a word or concept can influence behavior.[42] One of the most well known priming studies involves two groups of undergraduate students at New York University who were asked to read a long list of words.[43] Everyone was given a list of five-word sets and asked to make a grammatically correct four-word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five-word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed into the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the

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40 *See* Mediation Training Guidelines, *supra* note 37.

41 This is based on my own experience working with mediators.

42 *See* MALCOLM GLADWELL, BLINK 53 (2007).

43 *See id.* at 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).

degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences, the students were instructed to take the completed lists down the hall to the professor's office where they were to be collected and scored. When the students arrived at the professor's office, there was another student standing in the doorway asking the professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[44] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in an almost limitless variety of ways.[45] Research has even shown that priming can make us slow or fast, or even good or bad at math. But before we explore math, I will conclude the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as "listen," "understand," "comfortable," "confidential," "freely," and "informal." Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation because we want to establish an atmosphere of cooperation and open dialogue and in doing so, distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the "priming effect," "the way we think and act . . . are a lot more susceptible to outside influences than we realize."[46]

When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive

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[44] *Id.*

[45] *See* IAIN MCGILCHRIST, THE MASTER AND HIS EMISSARY 167 (2009).

[46] GLADWELL, BLINK, *supra* note 42, at 58.

and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere, but perhaps also plays a role in neutralizing the way in which parties are negatively primed as they enter the process.[47]

V. THE FRAMING EFFECT AND THE UTILITY OF FRAMING NEGOTIABLE ISSUES

The research showing that we can be made to perform better or worse on mathematical problems ties the "priming effect" with another psychological phenomenon known as the "framing effect."[48] In a study conducted by Sian L. Beilock from the University of Chicago, a group of female undergraduates were given a series of relatively simple math problems known as "modular arithmetic."[49] Students were given horizontal math problems, represented by a left to right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example that women do not do as well as men on math.[50] This form of priming is called the "stereotype threat" condition in which simply reminding people of a stereotype can create anxiety, which in turn decreases performance.[51] This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of neuroscience, described the results of Beilock's study in his blog, *The Frontal Cortex*.[52] As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems.[53]

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47 For a related discussion on the power of "anchoring," a commonly used negotiation technique, see LEHRER, *supra* note 27, at 156–58.

48 *See id.* at 106.

49 *See* Sian Beilock, *Math Performance in Stressful Situations*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3395 (2008).

50 *Id.* at 339.

51 *Id.*

52 Jonah Lehrer, *The Frontal Cortex* (Apr. 13, 2010), http://scienceblogs.com/cortex/2010/04/dont_choke.php.

53 *Id.*

The reason for these results has to do with the local processing differences of the brain.[54] The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety, which would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected.[55] The vertical math problems are perceived primarily as visual spatial problems, which are associated with a different area of the brain (the right prefrontal cortex), which is not distracted by our anxieties or threatened by stereotypes.[56] In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[57]

Beilock's study should also remind mediators of a classic skill we call "framing negotiable issues."[58] Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of either party and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know that neutral framing also changes the way in which the brain actually processes the information and may even mitigate the anxiety produced by conflict.

VI. PRISONERS OF OUR PRECONCEPTIONS[59]

"Tell me what you know . . . Then tell me what you don't know, and only then can you tell me what you think. Always keep those three separated."

Colin Powell[60]

Robert Burton's fascinating work, *On Being Certain, Believing You Are Right Even When You're Not*, discusses an impressive line

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *See* Lela P. Love, *Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30 (2000).

59 This phrase is borrowed from University of California at Berkley psychologist Philip Tetlock referring to political pundits who, according to Tetlock, are particularly prone to dismissing dissonant or contradictory possibilities. Or as Jonah Lehrer puts it, they "[p]erform elaborate mental gymnastics to avoid admitting error." *See* LEHRER, *supra* note 27, at 209.

60 *Id.* at 248.

of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.[61] Burton also makes a compelling case for how this same argument applies to thoughts: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."[62]

In *How We Decide*, Jonah Lehrer points to studies that show people with strong affiliations, for example, partisan voters, when confronted with inconsistent information, recruit the prefrontal cortex to filter the information to fit what it already believes and to ignore inconsistencies.[63] Once this is done, they get a positive emotional response (through the release of dopamine) and are rewarded—to Lehrer, this is the definition of rationalizing.[64]

Marco Iacoboni and colleagues conducted research that revealed how political sophisticates, in answering political questions, rely on memory and a "default state network" or the region that is most active when we are resting.[65] In order to better understand the default state network, Iacoboni refers to the state you are in when you are daydreaming.[66] You were certainly conscious but not necessarily engaged in any form of conscious deliberation. Sophisticates think about politics all the time so they do not need to employ conscious deliberation to the political statements—they just rely on memory. Political novices show activity in the regions of the prefrontal cortex associated with cognitive attention and in doing so shut down the default state network.[67]

Think about parties in conflict who have invested a lot of time, energy and thought to their positions. How much of their behavior in conflict is driven by their default state network and retrieval of memory? The research on political sophisticates suggests that perhaps a great deal of conflict is driven by processes other than conscious deliberation.[68] Colin Powell's approach to thinking, for

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61 *See generally* ROBERT A. BURTON, ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008).

62 *Id.* at 97–98.

63 LEHRER, *supra* note 27, at 205. For another example of cognitive dissonance, see BURTON, *supra* note 61, at 13.

64 LEHRER, *supra* note 27, at 205.

65 *See* IACOBONI, *supra* note 5, at 252–53.

66 *Id.* at 253.

67 *Id.* at 252.

68 For a related discussion on the phenomenon of "confabulation," in which the mind "makes up" information to resolve ambiguities, see MCGILCHRIST, *supra* note 45, at 81.

instance, is a possible way to avoid becoming prisoners of our preconceptions.

VII. Mirror Neurons

Conflict escalation is a universal experience. We have all been involved in conflicts and we have all experienced firsthand how conflict has a tendency to escalate. One person speaks and the receiver raises an eyebrow. The speaker continues and suddenly an insult is hurled. Mediators allow venting as a means to let off steam. Mediators also frequently and repeatedly summarize the concerns raised by the parties as a way to de-escalate conflict and encourage discussion of interests instead of positions.[69] But what really is at the core of the escalation? Is it just poor word choice or tone? What did that raised eyebrow really mean and were there other expressions communicated that we perhaps failed to consciously appreciate?

According to Marco Iacoboni, Italian scientists were among the first to discover mirror neurons while researching the macaque monkey in a laboratory in Parma, Italy.[70] Macaque monkeys were given grasping tasks, for example, picking up a raisin or a peanut.[71] Meanwhile, the researchers tracked the firing of neurons in the motor areas of the monkey's brain through implanted electrodes.[72] One day, researcher Leo Fogassi casually picked up a peanut and discovered that the monkey's brain reacted as if the monkey had grasped the peanut himself.[73] The area of the brain that reacted was the same area that reacts when the monkey performs the grasping action.[74] Only this time it happened based solely on observing Fogassi as he performed the task.[75] Soon enough, researchers discovered these same mirror neurons in human beings.[76]

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69 Love, *supra* note 58, at 28.

70 *See* Iacoboni, *supra* note 5, at 10 (According to Iacoboni, there are several recorded observations of mirror neurons claiming to be the first but none are confirmed as such. However, through many subsequent controlled experiments over a period of twenty years, the existence of mirror neurons was indeed confirmed).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 Iacoboni, *supra* note 5, at 10.

Anyone who has ever spent time with a baby knows how easily they can imitate and how this simple action can easily bring a smile to your face. But what researchers are beginning to conclude is that babies do not only learn to imitate, they imitate to learn.[77] In one study, a baby imitated facial expressions as early as forty-one minutes after birth.[78]

According to Iacoboni, this ability to imitate is the result of special neurons known as mirror neurons. These mirror neurons are not just about copying, but are also a means of understanding another's intentions.[79] In fact, the mirroring of other people's speech is necessary for us to perceive it.[80] Mirror neurons send signals to the limbic system, which allows us to feel the emotions associated with the observed facial expressions. Only after we feel these emotions internally are we able to explicitly recognize them.[81] Mirror neurons also learn to predict the actions of other people and to code them for intention, which suggests that mirror neurons are shaped by our experience.[82] Mirror neurons help us reenact in our brains the intentions of other people, giving us a profound understanding of their mental states.[83]

The discovery of mirror neurons has had widespread implications for many disciplines. For example, Iacoboni and others have begun to connect deficits in mirror neuron function to conditions such as autism.[84] Is there a connection between our unconscious imitation or mirroring of others and the way in which conflicts escalate? How much of our anger or frustration, or dismissive tone is derived from the other as opposed to our own free will or autonomy?

Iacoboni also discusses the interdependence of self and other when he says, "the more we learn about mirror neurons, the more we realize that we are not rational, free acting agents. . . . Mirror neurons in our brains produce automatic imitative influences of which we are often unaware and that limit our autonomy by means of powerful social influences."[85] He even points out that "imita-

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77 *Id.* at 48.

78 *Id.*

79 *Id.* at 58.

80 *Id.* at 105.

81 *Id.* at 112.

82 IACOBONI, *supra* note 5, at 162.

83 *Id.*

84 *Id.* at 172.

85 *Id.* at 209.

tion and 'liking' tend to go together as well."[86] Is that why we hate it when people make faces at us or roll their eyes when we speak? Are we unconsciously looking for mirroring and instead receiving explicit rejection? How much of our response to conflict begins as an unconscious mirroring of the other? And if mirroring plays a role in the escalation of conflict, can it play a similar role in the de-escalation of conflict? According to Iacoboni, "mirroring is a pervasive form of communication and social interaction among humans."[87]

We now know that parties in conflict have to deal with brains that may be wired to amplify the negative in conflict and are subject to the unyielding power of our preconceptions and the escalating potential of mirror neurons. At the same time, mediators can use opening statements and summarizing skills to encourage the parties toward a more collaborative conflict approach, de-escalate conflict, and perhaps discuss their interests instead of just their positions. The reflections on the neuroscience surrounding conflict and decision-making are endless. But for now, I have only one more observation.

VIII. MEDIATING ON THE RIGHT SIDE OF THE BRAIN

In 1979, Betty Edwards published the bestselling book *Drawing on the Right Side of the Brain*, in which she illustrated how suppressing the left side of the brain and enabling the right side of the brain can bring out the true artist in anyone.[88] She believed that the left hemisphere is too narrowly focused on details to see the big picture. However, by using techniques to suppress the left hemisphere, she allows the right hemisphere to see the whole picture and put the pieces together.[89]

A common theme in the neuroscience literature surveyed for this article involves the differences between the left and right hemispheres of the brain. While the left hemisphere of the brain is critical to decision-making, particularly for its ability to engage in sequential logic, it is the right hemisphere upon which we rely for

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[86] *Id.* at 114.

[87] *Id.* at 245.

[88] *See generally* BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979).

[89] *Id.* For an interesting interpretation of the applicability of Edwards' book, see DANIEL H. PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE 15 (2006).

matters of cooperation, empathy, and the types of problem solving associated with a shift toward collaboration.[90]

If we are to accept some of the differences between the left and right hemispheres as accurate, then mediators should find ways to activate the right hemispheres of the parties in mediation. By doing so, we maximize the parties' ability to engage in collaborative dialogue. According to the research reported by Iain McGilchrist and others, there are quite a few commonly accepted differences between the left and right hemispheres of the brain. For example: "the left hemisphere delivers what we know, rather than what we actually experience"[91]; or the right hemisphere is concerned with the whole context while the left hemisphere is concerned with the parts and naming.[92] According to McGilchrist, "we must learn to use a different kind of seeing, to be vigilant not to allow the right hemisphere's options to be too quickly foreclosed by the narrower focusing of the left hemisphere."[93]

Most mediators likely recall the Prisoner's Dilemma model in game theory, which has served as a basis for training mediators in the benefits of collaboration over competition.[94] According to McGilchrist, scientists have studied the brains of humans as they played this Prisoner's Dilemma game.[95] In Prisoner's Dilemma, subjects that achieve mutual cooperation with another human being show activity in the pleasure centers of the brain, including the

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90 *See generally* MCGILCHRIST, *supra* note 45. Additional differences between the left and right hemispheres cited by McGilchrist include: "When we put ourselves in others' shoes, we are using the right inferior parietal lobe and the right lateral prefrontal cortex, which is involved in inhibiting the automatic tendency to espouse one's own point of view." *Id.* at 57; "In circumstances of right hemisphere activation, subjects are more favourably disposed towards others and more readily convinced by arguments in favour of positions that they have not previously supported." *Id.*; "The right hemisphere plays an important role in 'theory of the mind,' a capacity to put oneself in another's position and see what is going on in that person's mind." *Id.*; "Ultimately, there is clear evidence that when it comes to recognising emotion. . .whether it is expressed in language or through facial expression, it is the right hemisphere on which we principally rely." *Id.* at 59; "The one exception to the right hemisphere's superiority for the expression of emotion is anger." *Id.* at 61; the right hemisphere is partial to emotions that deal with bonding and empathy while the left hemisphere is partial to competition, rivalry and self belief. *See id.* at 62–63; an extensive body of research now indicates that insight, whether mathematical or verbal, is associated with activation in the right hemisphere." *See id.* at 65; "Denial is a left hemisphere specialty." *See id.* at 85; "Our sense of justice is underwritten by the right hemisphere, particularly by the right dorsolateral prefrontal cortex." *Id.* at 86.

91 *Id.* at 164.

92 *See id.* at 70.

93 *Id.* at 164.

94 For a detailed description of Prisoner's Dilemma, see MCGILCHRIST, *supra* note 45, at 147.

95 *Id.*

dopamine system, striatum, and orbitofrontal cortex.[96] They do not, however, show activity when cooperation is with a computer.[97] When playing with a human being, the majority of regions showing cooperation are right-sided whereas when playing with the computer the regions are mainly left-sided.[98] McGilchrist goes on to say that "[i]t is mutuality, not reciprocity, fellow-feeling, not calculation, which is both the motive and reward for successful cooperation."[99]

The research on the Prisoner's Dilemma scenario provides support for the theory that relationship building and direct communication between the parties is a critical component of establishing a cooperative negotiation environment. This research also has implications for the use of caucus in mediation. Mediators are frequently taught to caucus less if the parties have an ongoing relationship; the parties need to learn to work things out themselves.[100] The research on Prisoner's Dilemma supports the theory that the parties, particularly those with the potential for an ongoing relationship, may do better together in joint session than apart in caucus. At a minimum, caucus should be used sparingly in order to give the parties the greatest opportunity to develop the mutuality and fellow feeling necessary for cooperation.

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96 *Id.*

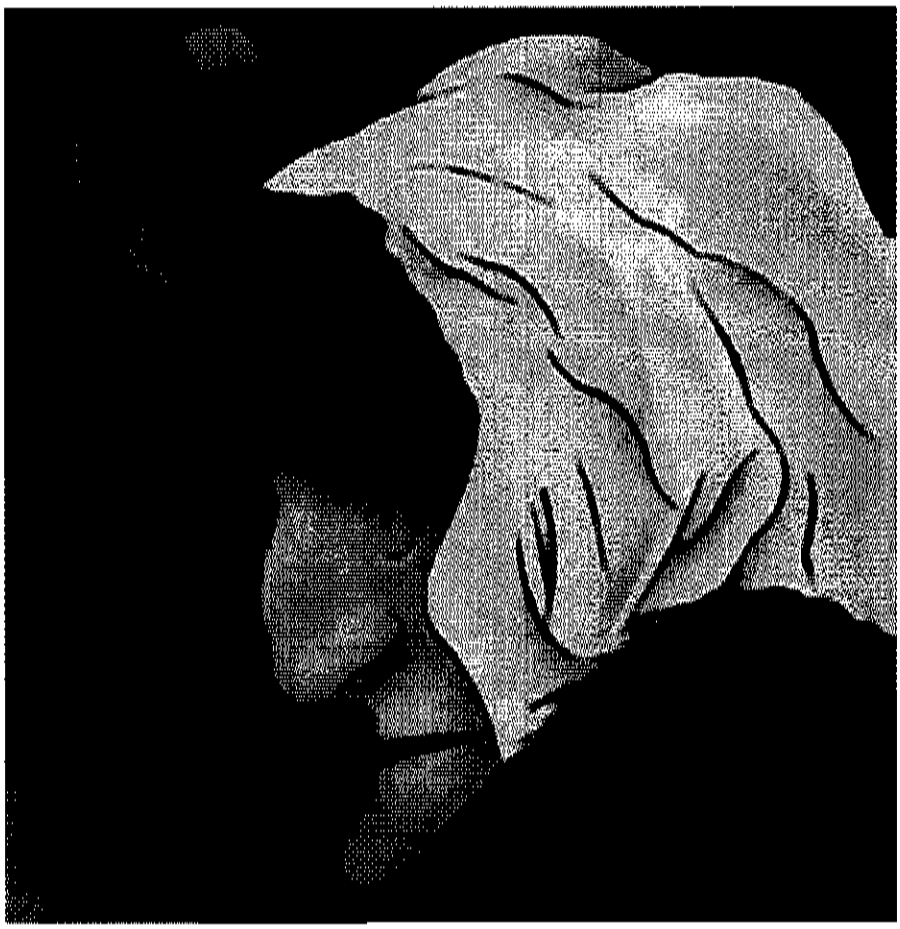
97 *Id.*

98 *Id.*

99 *Id.*

100 CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 355 (2d ed. 2005).

IX. OLD LADY YOUNG LADY[101]



The above image has been used extensively by mediation trainers. Through elicitive dialogue trainers might ask the trainees to look at the image and describe what they see. Some trainees would say they see an old lady. Others would say they see a young lady. And some would say they see both. The trainer might then ask those who see the young lady to help those who do not and vice versa. Trainees draw attention to the mouth of the old lady and encourage the viewer to see the mouth as a choker on the neck of the young lady. They point out that the young lady is looking off to her right revealing a profile of her left jawbone. The jawbone is

[101] This picture known as "My Wife and My Mother-in-Law" was originally published in 1915 by the cartoonist W.E. Hill.

also the nose of the old lady. Eventually, everybody will see both images. The lessons learned may include the fact that two people can look at the same thing and see it in dramatically different ways. One might say the image reflects the importance of being open to looking at a situation from another point of view. However, if anyone doubted that the other was telling the truth about what they see, they might only be willing to look at the image from their own point of view. What neuroscience now tells us about this exercise takes these lessons one step further.

McGilchrist argues that the right hemisphere will not prematurely resolve ambiguities such as the "old lady young lady image" because studies of the brain involving images like this one reveal that such ambiguities can be seen in one way or another, but not simultaneously.[102] This means you cannot hold onto your own point of view and simultaneously see the other. You have to suspend your point of view or toggle points of view for a brief moment in order to see the other perspective. This is easier said than done. With images such as the old lady young lady, "[w]e remind ourselves that this is pure biology on display, and move on to other thoughts. But with unstable mental images that are personally meaningful, this is far more difficult."[103] The key to this challenge may reside in the abilities of the right hemisphere. "So the left hemisphere needs certainty and needs to be right. The right hemisphere makes it possible to hold several ambiguous possibilities in suspension together without premature closure on one outcome."[104]

CONCLUSION

"It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought."[105]

Phineas Gage and his horrible accident provided us with some of our earliest insights into the connection between our brain and the way in which we behave. Advances in technology now enable

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102 *See* MCGILCHRIST, *supra* note 45, at 82.

103 BURTON, *supra* note 61, at 199.

104 MCGILCHRIST, *supra* note 45, at 82.

105 GEORGE LACKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 13 (1999).

us to observe the brain in unprecedented ways. This has led to a wide array of discoveries in neuroscience with potentially broad application to the dispute resolution profession. Researchers who have studied the role of conflict in the lives of children have taught us that we learn as many if not more ineffective conflict management skills growing up as effective skills. From glucocorticoids to cognitive dissonance and the discovery of mirror neurons, we have reason to believe our perceptions of conflict and those with whom we have conflict may be influenced as much, if not more, by our unconscious thoughts than our own free will. We have explored how the "priming effect" and the "framing effect" can be correlated with the utility of certain mediator skills, including the delivery of opening statements and the framing of negotiable issues. We have learned there are many differences between the tendencies of the left and right hemispheres of the brain. These differences may provide new clues in how to best use mediation to foster collaborative dialogue. Yet we have only seen the tip of the iceberg when it comes to the application of neuroscience to the world of dispute resolution and mediation. More discoveries are surely on the horizon.

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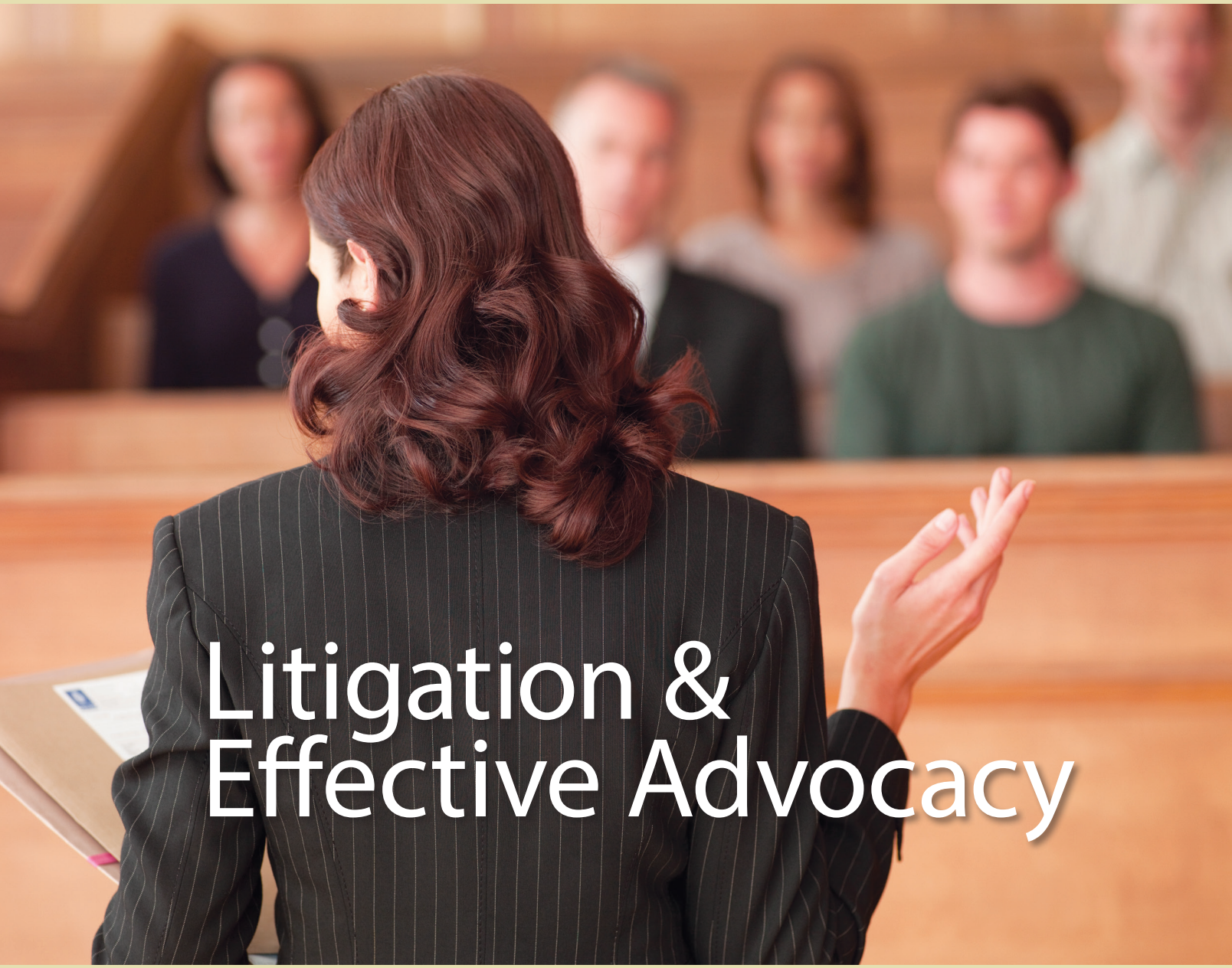

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Preparation is the Key

to a Rewarding and Successful Mediation

BY THEODORE K. CHENG, ESQUIRE

Mediation is a confidential process in which the parties to a dispute engage a neutral, disinterested third party who facilitates discussion to assist them in arriving at an informed and mutually consensual resolution. A mediation can be rewarding and successful if attorneys and clients prepare for the various stages of the process and if the client's expectations are managed in advance. The more all parties know about what will likely happen during a mediation process, the higher the likelihood that a resolution can be achieved. Those newer to the field probably have not had much experience with mediation, so here are some things to consider as you prepare for the process.

First, the client needs to understand the nature of a mediation process and especially how it differs from litigation. Naturally, the parties most directly affected by a dispute are, given the right circumstances, the ones best able to resolve it. Therefore, mediation is 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 both the process and the outcome. To assist in that endeavor, the nature and design of a mediation process is completely flexible and can be tailored to meet the specific needs of the parties and their dispute. In some cases, having the parties together in a joint session at the beginning of a mediation can be a fruitful way to start a dialogue

and, perhaps, the healing process. In other cases, keeping the parties apart from each other is more conducive to making progress toward a productive and meaningful resolution. These and other design issues should be carefully considered by both attorney and client, as well as discussed with the other party and attorney, along with the mediator.

By contrast, the litigation forum presents several limitations, including the lack of real flexibility in designing a mechanism for resolution tailored to the dispute in question; the additional expense (in time and legal fees) of appearing before a decision-maker with possibly little to no expertise in the subject matter of the dispute; the inability to maintain true confidentiality because of the public nature of the proceedings; and, perhaps most poignantly, the frustration of having no control over the timing of the process and when relief can be afforded. Unlike litigation, mediation is a non-adjudicative process. There is no judge or other decision-maker who will determine the merits of the dispute. Rather, a mediator selected jointly by the parties conducts the proceedings with an eye toward trying to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them toward a negotiated settlement or other resolution of their own making.

To that end, selecting the appropriate mediator is an important aspect of the process that is oftentimes critical to maximizing the likelihood that a resolution can be achieved. The parties could opt to select a mediator who is well-versed in mediation process skills and/or someone who is an "expert" familiar with the subject matter of the dispute, the industry, or background business norms in which the dispute arose or in the legal framework governing the dispute itself. Additionally, while litigation generally looks to past events to find fault and impose appropriate relief, mediation focuses on the future to determine how the parties can best resolve the pending dispute and move on. Moreover, usually by statute, rule, or case law, mediation is a confidential process, which generally means that any communications made during the mediation cannot be used or disclosed outside of the mediation. It also means that ex parte communications with the mediator are kept confidential from the other participants unless consent has been given. Confidentiality is another bedrock principle of mediation because it helps foster open, honest, and candid communications with the mediator, if not also with the other participants.

Second, the attorney and the client both need to be prepared for a change in mindset from an adversarial posture to one that is more cooperative and collaborative. In litigation, a party advocates for positions while simultaneously trying to undermine the other party's positions. By contrast, mediation is prospective in nature and tries to help put parties on a path to a resolution for mutual benefit. Moreover, parties to a dispute oftentimes are unable to engage in negotiations toward a resolution because the dispute has triggered the emotional, sometimes irrational, part of the brain (the amygdala) and is interfering with the thinking, rational decision-making part of the brain (the neocortex). For a resolution to be achieved, human brains need to shift and change from the former to the latter. Unless and until the conflict between those different parts of the brain is resolved, a complete resolution of the dispute is not likely.

Mediation can be a process that helps parties undergo that shift and change, and one of the skills of a mediator is to help parties do that. In the context of a mediation, an expression of concern for the injury or pain suffered by the other party need not be accompanied by any admission of fault or agreement with the other party's positions. There is nothing inconsistent with a party holding a strong conviction about its positions, while also recognizing that continued litigation typically means spending more money, more time, and more emotional capital to achieve an outcome over which the party has increasingly less and less control.

Third, attorneys and their clients need to spend the time and effort to provide the other participants and the mediator with sufficient information not only about the dispute, but also about the factors that may affect how a resolution could be achieved. Oftentimes, the parties will agree to undergo a mediation process without enough information in hand about each other's respective positions and interests. A mediator can assist the attorneys in structuring a limited, informal exchange of documents and information that will help each party better understand the parameters of the dispute and what positions each party is taking and why. This can also help each party undertake a more serious, balanced, and informed evaluation of both the merits of the dispute and an appropriate valuation for resolution purposes.

Most mediators will also ask the parties to submit additional information in advance of the mediation session, either on an ex parte basis or exchanged with each other. This is a tremendous advocacy

Continued on the next page.

opportunity to address the client's perspectives about liability and damages; the client's interests and concerns regarding the dispute; the client's reasonable proposals for a resolution, including any non-monetary proposals; the status of any prior settlement discussions; and any other information that might be relevant for the mediator and/or the other party to know. The submission can also address some fundamental questions, such as what is at the core of the dispute; what is preventing the dispute from resolving, identifying any potential roadblocks, barriers, or impasses to a resolution; and what would need to happen to resolve the dispute, such as any specific conditions, or must-haves, that need to be a part of any resolution. The submission is also an opportunity to alert the mediator and/or the other party about any cultural issues that could impair the mediator's ability to develop a rapport with the parties, impede the receipt/flow of communications and information during the mediation, or otherwise interfere with the mediator's attempt to create an environment conducive to cooperation and collaboration. To the extent that the submission is shared with the other party (even if only in a redacted form), it will begin the process of educating the other party about the client's positions, interests, and needs and, in the process, help move the dialogue forward. The more the other party understands and appreciates the strengths of the case (as perceived by the attorney and the client), as well as the interests and needs of the client, the more likely that progress can be made at the mediation session. Taking full and serious advantage of the pre-mediation submission is an opportunity not to be missed.

Fourth, the client needs to be prepared to participate in the mediation process. Unlike with meet-and-confer conferences with opposing counsel or an argument or trial in a courtroom, a client should not sit idly by at a mediation while the attorney handles the proceedings. Mediation requires a client to be actively engaged in the process and participate by helping the mediator (if not also the other participants) better understand what interests, concerns, needs, feelings, and motivations are underlying the adversarial positions being taken in the dispute. Clients and their representatives should be familiar with the background facts of the dispute, be able to answer questions from the mediator (who will typically be gathering and assimilating the basic facts during the early portions of the mediation session), and be involved in re-evaluating positions as new information comes to light during the mediation. Active participation by the client is critical to the success of a mediation.

Fifth, all mediation participants should take advantage of the flexibility that mediation affords to exercise the opportunity to be creative and truly think outside the box. Much too often, attorneys and their clients come to mediations focused on a resolution based solely upon monetary terms. They fail to recognize that mediations—which are, at their core, a type of facilitated negotiation—can be at their most efficacious when the concepts of integrative negotiation (or principled bargaining) are employed. As explained in the seminal work "Getting to Yes" by Roger Fisher and William Ury, integrative negotiation techniques allow the parties to uncover and identify the real underlying interests and needs behind the positions the parties are espousing; determine how to articulate such interests and needs to each other; and creatively search for and develop options for mutual gain that integrate those various interests and needs. By focusing on the problem at hand, rather than the people who brought the dispute forward, mediation affords the participants the opportunity to explore any number of potential solutions. And because these solutions will eventually be embodied by a voluntary, consensual, and informed agreement between the parties, they can accomplish objectives that an adjudication cannot because a court or arbitrator is usually constrained by the legal framework to provide only certain kinds of relief. Creative and innovative thinking are highly encouraged in a mediation.

Finally, and perhaps most importantly, attorneys and clients should be prepared to spend enough time to allow the mediation process to unfold and, thereby, reap its benefits. Mediation is a marathon, not a sprint, and progress toward a resolution can only be made if the participants are willing to engage with the mediator, if not with each other, and undergo the steps necessary in an integrative bargaining process. A mediator needs to set the appropriate tone and establish a rapport with the participants, giving them the opportunity to be heard. In turn, doing so will allow the participants to truly hear any observations the mediator offers about the dispute, the parties' respective positions, and the proposed resolutions.

Moreover, although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the

parties satisfy their best interests while uncovering areas of mutual gain. In that respect, mediation can be particularly helpful in those situations in which the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse. Not only does all of this take some time to develop, but it helps shift the brain from the emotional/irrational part to the thinking/rational decision-making part. The participants in a mediation need to be realistic about their expectations of the process for it to be as rewarding and successful as possible.

Attorneys oftentimes treat mediations as just another extension of the litigation process, where their finely honed legal skills—sharpened for the inevitable adversarial battles inherent in discovery and trial—will simply be put to good use before the mediator. But a mediator is not the adjudicator of the dispute, and mediation is an entirely different process altogether. Thus, preparing for a mediation requires a different set of skills, a different mindset, and, as in all effective advocacy, proper representation and solid preparation in advance. ◆

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