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Identifying and Overcoming Obstacles at Mediation

By: Andrew Bucher *

Successful mediators must possess a variety of skills. They must be knowledgeable, impartial, and skilled negotiators. In addition, they must be amateur psychologists to deal with diverse litigants, constantly changing attorneys, and variable venues. This latter skill allows an alert mediator to evaluate the participants and circumstances in order to identify potential obstacles to a successful resolution. Impediments to resolution could be a direct party/litigant or an interested third party. In addition, an ancillary issue may present a hurdle that must be identified and surmounted before a settlement can be reached. This article will address these various obstacles to a successful mediation and will suggest methods to overcome them.

The "Direct Party" Obstacle

Whether a mediation involves sophisticated litigants or novices, it is vital to confer with the parties at the outset to enhance rapport and inspire a comfort level conducive to the open communication that is vital to the mediation process. The mediator should artfully empower the litigants by explaining his role in any successfully mediated outcome. Once the mediation begins, it quickly becomes apparent if one of the parties will be an obstacle to achieving settlement. Common obstacles might arise because one of the litigants has unrealistic expectations of what a reasonable settlement would be or because a litigant is personalizing the litigation. In addition, the obstacle may not be the litigant himself, but rather the plaintiff's or defendant's attorney.

When either party has unrealistic expectations for settlement, it becomes necessary to diffuse misconceptions quickly. The mediator must confront the litigant with carefully crafted reality testing without attempting to be biased. This can be especially challenging when the attorney rather than the litigant harbors unrealistic expectations. If the attorney has not properly prepared the client, a grossly inflated demand can confuse the client. For example, if a case has a realistic settlement value of $15,000, an opening offer of $250,000 by the plaintiff's attorney may fuel false hopes and impede the mediation process. At that point, it may be incumbent upon the mediator to determine the basis for such an offer.

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The attorney for the plaintiff should be able to provide a basis for the offer and an explanation for why the other side should agree to it. An answer such as "That is what my client wants" or "This is what my client thinks his case is worth" is an easy clue that the plaintiff may be the hurdle. Of course, if the attorney has difficulty justifying his settlement numbers, this is an indication that the attorney may be the one with unrealistic expectations for the actual value of the case. One example I have encountered when questioning an attorney as to the justification of his demand was the following response: "I have not really reviewed my file or I have not discussed the case with my client, but felt that this was a negotiable starting point." In such a situation, the mediator should ask the attorney to review the file and go over it with the client while the mediator is discussing the case with the other parties.

When the plaintiff is being unreasonable, it may be a good idea for the mediator to try to speak directly to the plaintiff to try to understand the basis for his expectations. Of course, the mediator should obtain permission from the attorney to speak with the client prior to beginning this discussion. Sometimes the plaintiff needs to hear from the mediator why his case has less value than he thinks. Understanding the plaintiff's thought process can provide insight to the mediator as to how to handle the plaintiff. If the plaintiff's attorney has unreasonable expectations for the value of the case, it may be necessary for the mediator to explain to the attorney that those expectations will not yield a settlement.

In cases where the other party's expectation is in fact reasonable, reviewing how that attorney has determined the value of the case will allow the mediator to provide the plaintiff's side with this reasoning. It will also allow the other side to provide the mediator with counter arguments and help pave the way to a settlement. If possible, the mediator may want to speak to the attorney outside of the presence of her client, as this may allow the attorney to speak more candidly. It could be that this particular case is one the attorney does not want to settle because she is looking to make case law. Alternatively, it could also be that the attorney does not focus her practice in the area that is being litigated and is unsure how to value the case. If that is the situation, a private conversation may allow the mediator to use his experience to help overcome the obstacle.

When the defendant is the obstacle to a settlement, it is important to speak to him or her in order to understand the basis for the unrealistic expectations. The defendant may answer something along the following lines: "We cannot believe he is suing us" or "We treated her so well and this litigation shocked us." In this situation, the mediator should counsel the defendant to view the case as a business transaction. Using a cost/benefit analysis regarding settlement (expense of litigation, risk of loss at trial) may provide the defendant with the necessary detachment to overcome this hurdle. Such strategy typically helps the defendant understand that the litigation is not about the defendant personally—it is all business.

The defense attorney may also be an obstacle for settlement, in which case it is necessary to understand the basis for the issue. One possibility is that the attorney has a new client and wants to take a very aggressive approach regarding settlement. In this scenario, it may be a good idea to speak privately to the attorney and see if, outside of the presence of his client, the attorney provides the mediator with a better understanding as to his thoughts regarding settlement. In this candid situation, the defense attorney may better explain his relationship with the client. A mediator may be told that the attorney wants to bill more hours on the case and that he or she will not encourage resolution unless the settlement is very beneficial to the client. Identifying such a clear obstacle will provide the mediator with ammunition to move toward a negotiated settlement. Of course, before speaking to the attorney in this situation, the mediator should obtain permission from the client.

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The "Third-Party" Obstacle

Sometimes a settlement can be derailed by the untoward or uniformed influence of a third party. This third party might be a family member, close friend, co-worker, professional translator, or any other person who may claim to have an interest in the welfare of the litigant. While the mediator must appreciate that the expressions of certain third parties, particularly spouses, must be respectfully acknowledged, if this input is based on an inadequate assessment of the law, the facts or the governing jurisprudence, it may stall progress toward settlement. Mediators need to explain to any third party that they are held to the same rules of confidentiality as the parties to the litigation if they are participating in the mediation. When the third party is present at the mediation, it may be imperative to share a complete understanding of the issues in order to assist in a joint decision. Telling a third party that his opinions are important, and treating him with the same respect as the actual parties, certainly helps. However, these people need to understand that while their opinions are important, it is not their case.

If the interested party is a spouse, child or parent of the litigant, the mediator must be cautious to allow that person the opportunity to demonstrate a natural state of love or protectiveness. While you may need to contradict aspects of the third party's misinformation, do not exhibit disrespect or demean the third party's efforts to display concern. At the beginning of the mediation, introducing yourself to everyone allows you as the mediator to get an idea as to who is with the plaintiff. Small talk should also help in determining the relationship with the third party. Question the attorney. You may learn that the third party has been directing the litigation from the beginning and, while not a litigant, is the main decision maker for the case. In that situation, the mediator may need to address the family member directly, perhaps by letting him or her know that it is a family decision. Asking them for their thoughts also allows them to express their opinions and makes them feel important.

When the spouse or family member of the litigant is taking notes or explains that his or her research shows the expected value of the case, this may reflect an intent to hijack the mediation process. When this occurs, it is helpful to remind the family member that although his opinion is helpful, he is not the one that needs to live with the pain or injury. Providing real world examples such as "Tomorrow her back will still hurt" or "She still cannot sit at a movie comfortably" sometimes reminds the family member that it is not his case. Explaining to this person that should the case not settle, he is not the one who has to sit in a deposition or be cross-examined at trial may remind this person that while his opinion is important, he still needs to listen to the plaintiff.

When litigants permit friends, co-workers, advisors, or any other third parties to attend mediation either live or remotely, the mediator must determine how much information should be shared. When encountering such a situation, a mediator has a few options to address this obstacle. First, a mediator has the right to have these non-parties leave the room at the beginning of the mediation. In this era of technology, it would not be difficult for the third party to get in touch with a litigant during the mediation. Taking away phones or technology devices may do more to alienate the parties than resolve the issues. A better option might be to discuss the role of the third party with the litigant's attorney. The attorney should help remove the third-party obstacle by defining the third party's role and affirming that he or she will consider those interests during the mediation. Addressing incorrect information directly and pointing out that the third party's thoughts, while important, are in fact incorrect, may change this person's opinion or at least remind the plaintiff that this person is not an expert.

If the third party is a confidant of, or advisor to, the litigant, a mediator may need to view this person as similar to a family member. However, if the third party is not a close confidant of the litigant, the attorney may need to help the mediator in limiting the third party's involvement in the mediation process.

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While it may be necessary to have the third party removed from the mediation, this should be done only as a last resort and with the approval of the litigant and his attorney, since such removal may upset the litigant and cause more tension in the room.

The "Ancillary Issue" Obstacle

As a mediator, encountering an "ancillary issue" may pose the most difficult obstacle to overcome. If the issue was not discussed in the opening, the element of surprise may necessitate a creative solution. The sooner that the mediator is able to draw out the dimensions of ancillary issues, the easier they will be to resolve.

For example, two ancillary issues are relatively common in workers' compensation cases. The first occurs when an insurance carrier is providing ongoing coverage to a defendant employer and demands that the claimant resign his job in connection with any settlement. This is done to reduce the risk of liability for a recurrent injury or if the claimant is perceived as litigious. At the outset of the mediation, it must be determined if resignation is required and whether the claimant is prepared to leave employment in order to settle the case. Also, in a workers' compensation case some insurance carriers may require release and extinguishment of the employee's rights to sue the employer for other causes of action with a settlement. Clearly, if there is another cause of action against the employer, it will be important to address this issue.

The second common ancillary issue occurs when the plaintiff in a personal injury or workers' compensation case is a Medicare recipient or anticipates receiving Medicare within twelve months. In this situation, the parties must articulate a detailed Medicare Set Aside (MSA) allocation subject to the approval of the Center for Medicare Services (CMS). Failing to include MSA language in the settlement may subject the parties to a subsequent lawsuit to either secure a portion of the settlement or to demand payment from the insurance carrier. Should the parties not take CMS into account, Medicare can go after the parties if their interests are not protected. By covering the requirements of an MSA with the parties, the prudent mediator ensures that it does not become an obstacle to settlement. Sometimes, using a flow chart helps explain this confusing issue by explaining which cases require CMS approval and which cases do not require a formal approval. However, in all cases CMS interests must be taken into account.

One of the most difficult situations for any mediator is when the ancillary issue is not known by one or all of the parties prior to mediation. For example, the plaintiff may have financial problems that are unrelated to the value of the case and, as a result, may need a specific amount of money for the settlement to be worthwhile. Or, the litigant may be unduly influenced by another settlement, television advertising, or a published jury award. The litigant may insist on a comparable result or want to know why his or her case is worth substantially less. Explaining the subtle differences between the cases may help the litigant understand why his case is worth less.

In a workers' compensation case, if the injured worker owes child support, up to half of the claimant's net settlement amount may be taken to pay the child support arrearage. This can be difficult for a claimant to accept.

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It can help for the mediator to explain that this hold-back is something required by law and is not simply being requested by the insurance company. Also, explaining that if he does not satisfy the child support order, he cannot ever settle his case may allow the litigant to understand this is not optional.

With any of these ancillary issues, it becomes necessary for the mediator, using a full arsenal of negotiating skills and with the help of the litigant's attorney, to explain the reality of the situation to the litigant and remind him or her that while these issues are important, they do not change the value of the case. Without a total understanding of the reality of the situation by the litigant, a settlement could be outside the reach of the mediation.

Conclusion

Mediations involve many issues and settling cases is a difficult task. However, a mediator's ability to quickly identify and resolve obstacles during mediation can be the difference between a settlement and the necessity for further litigation. The mediator must work in concert with the attorneys for all parties to overcome potential obstacles to obtain a settlement, which makes for a happy mediation room.

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Andrew Bucher is a Florida Supreme Court certified Civil Circuit Mediator with The Mediation Group. He is experienced as a mediator in cases involving employment issues, breach of contract issues, condominium issues, personal injury issues, foreclosure issues and workers' compensation issues. Mr. Bucher is also an Arbitrator with FINRA (Financial Industry Regulatory Authority). Prior to joining The Mediation Group, he was a senior trial attorney for The Zenith Insurance Company, and before that, for The Hartford Insurance Company. While at The Zenith and The Hartford, Mr. Bucher handled complex worker's compensation litigation and complex civil litigation where he gained insight into the manner in which insurance companies evaluate cases. As a defense attorney, he settled more cases than any other attorney in Florida for the Zenith and The Hartford, and enjoyed a reputation for zealous representation while reaching fair and reasonable agreements with opposing counsel. Prior to his employment in Florida, Mr. Bucher worked for The Commonwealth of Pennsylvania's Office of General Counsel, Bureau of Worker's Compensation, where he assisted in writing judicial opinions. Mr. Bucher began his career in private practice, where he represented plaintiffs who were involved in automobile accidents, slip and fall injuries, product liability disputes, bad faith claims, premises liability, negligent security and commercial litigation disputes. Mr. Bucher received his B.A. from Penn State University and his J.D. from Widener University School of Law.

Some Thoughts

"So much of life is a negotiation - so even if you're not in business, you have opportunities to practice all around you."

Kevin O'Leary

"The best move you can make in negotiation is to think of an incentive the other person hasn't even thought of - and then meet it."

Eli Broad

"Negotiation is not a policy. It's a technique. It's something you use when it's to your advantage, and something that you don't use when it's not to your advantage."

John Bolton

"Everything is negotiable. Whether or not the negotiation is easy is another thing."

Carrie Fisher

"If you come to a negotiation table saying you have the final truth, that you know nothing but the truth and that is final, you will get nothing."

Harri Holkeri

"Relationships are a constant negotiation and balance."

Claire Danes

"During a negotiation, it would be wise not to take anything personally. If you leave personalities out of it, you will be able to see opportunities more objectively."

Brian Koslow

"You cannot negotiate with people who say what's mine is mine and what's yours is negotiable."

John F. Kennedy

"You can only end a negotiation for peace if you begin it."

Benjamin Netanyahu

Mediations Are Supposed to Be Confidential... But Are They Really?

By: Phyllis Pollack

Either as a participant in a mediation or as the mediator, we have all learned the cardinal rule that mediations are confidential both in terms of the statements and other communications made during the mediation and the information the mediator keeps to herself, not sharing it with the other parties. Many times a mediator has analogized mediation confidentiality to the television ad, "What happens in Vegas, stays in Vegas" to explain the sacrosanct nature of mediation confidentiality.

But, are mediations really confidential? While in legal theory, they are supposed to be, in court proceedings, they are not always so.

A review of both federal and state law on the topic seems to indicate that mediation confidentiality is to be strictly construed and applied. For example, with respect to the federal courts, Congress enacted the Alternative Dispute Resolution Act initially in 1988 to authorize arbitrations and then amended it in 1998 to include alternative dispute resolution processes in general. 28 USC §§ 651-658. (Public Law 105-315, 112 Stat 2993 (October 30, 1998).) Section 652(d) specifically states that, "... each district court shall, by local rule, provide for confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."

To accomplish this goal, the federal courts adopted local rules mandating mediation confidentiality. For example, the United States District Court for the Central District of California enacted Local Rule 16-15.8 stating that mediations conducted by a panel mediator are confidential. The court iterates this in paragraph 9 of its General Order 11-10 (August 15, 2011). Similarly, the Ninth Circuit Court of Appeals mandates mediation confidentiality in its Circuit Rule 33-1.

While some may dispute its existence, some federal courts have relied on a federal common law mediation privilege to uphold mediation confidentiality. Most recently, the Ninth Circuit Court of Appeals in Wilcox et al v. Arpaio et al, 753 F. 3d 872 (9th Cir. 2014) (Case no. 12-16418- June 2, 2014) recognized that a federal common law mediation confidentiality privilege exists but side-stepped the issue of applying it by arguing that the parties waived it as both sides argued only the application of Arizona's mediation privilege laws and did not reference this common law privilege.

Further, the Federal Rules of Evidence may also be applicable. In some instances, Rule 408 (regarding settlement discussions) will be the relevant rule while in other instances, Rule 501 (providing that in cases under the diversity jurisdiction of the court, as to claims and defenses, the state law supplies the rule on privilege) will be important.

With respect to state law, every state in the union has one or more statutes mandating mediation confidentiality; some more expansive than others. (See, California Law Review Commission Study, K-402, Memorandum 2014-35 (August 28, 2014) for an extensive discussion and exhibit listing most states' statute(s) and Memorandum 2014-24 (June 6, 2014) discussing the Uniform Mediation Act adopted in 11 states and the District of Columbia. Other Memoranda discuss the mediation confidentiality statutes of the remaining states.) In California, Evidence Code sections 1119- 1128 set out very stringent confidentiality rules that have been vigorously enforced by the California Supreme Court. See, *Cassel v. Superior Court* (2011) 51 Cal. 4th 113.

In addition, the parties usually sign a mediation confidentiality agreement agreeing that all communications occurring within the mediation remain confidential.

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So, with all of this statutory and contractual protection, mediations should be confidential. However, a yearly analysis of cases in court regarding mediations conducted by James R. Coben, Professor and Senior Fellow, Dispute Resolution Center at Hamline University School of Law shows quite the contrary. Both in a law review article and in a recent webinar sponsored by the Section of Dispute Resolution of the American Bar Association, Professor Coben demonstrates that quite frequently, mediations have been the subject of hearings in court, and confidentiality has been ignored.

Professor Coben found that with each passing year, more and more cases have dealt with mediations. For example, in 2002, there were only 301 cases; by 2006 this number had more than doubled - there were 677 cases. In 2013, there were 802 cases.

At the same time, the trend has been a decrease in state court cases but an increase in federal court cases. In 2003, of the 335 cases, 87 of them or 26% of the cases were in federal court while 248 or 73% were in state court. Ten years later, in 2013-- of the 802 cases, 444 of them or 55% of the cases were in federal court and 358 or 45% were filed in state courts.

What were the issues raised in these cases? Out of the 735 cases filed in 2012-- 272 of them or 37% involved the enforcement of the settlement agreement, 103 cases or 14% involved mediator fees, 66 cases or 9% involved confidentiality, 37 cases or 5% involved sanctions, and 22 cases or 3% involved ethics. Again, in 2013-- 9% or 73 cases involved confidentiality.

With respect to confidentiality alone, between 1999 and 2005-- there were 601 cases filed in which oral mediation communications were offered into evidence. Notably, the idea of mediation confidentiality or privilege was not even raised in 462 of them or in 76%!

In addition, during this same time period, in 125 cases, the mediator testified and again, in 85 of them or 68% of them, the notion of privilege was not even raised.

The area in which mediation confidentiality seems to be ignored quite a lot has been class action settlements. Mediators have quite frequently submitted declarations attesting to the quality of the bargaining process and fairness of the settlement.

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Quite frequently, the federal and state courts have relied on the reputation of the mediator as evidence that the mediation process was fair, and did not involve fraud or collusion, ignoring any objections of any class members who were not at the mediation. For example, in 2013-- there were 83 cases involving class action settlements in which the involvement of a private mediator, if not her affidavit submitted to the court, played a role in the court determining that the bargaining was at arm's-length and not collusive.

Professor Coben cites three examples of cases heard in the California U.S. District Courts in 2013:

(1) *In Re MRV Communications Inc. Derivative Litig.*, No. cv-08-03800 GAF (MANX), (a derivative action) arising in the Central District of California on June 6, 2013- the mediator's declaration was quoted in the process of approving the settlement; on page 11 of the Memorandum and Order approving attorney fees, the district court states:

> "...And the mediator in the case concurs, urging that "the separately negotiated attorneys' fees and expenses agreement was negotiated in good faith and is fair and reasonable and within the range of fees paid in similar shareholder-derivative cases."

(2) *Johansson-Dohrmann v. CBR Systems, Inc.*, 12 cv -1115- MMA (SD Cal. July 24, 2013) again quoting a mediator declaration in several different places in the process of approving the settlement;

> "the settlement is . . . fair and reasonable to all parties and provides significant benefits to the Settlement Class." (Page 8 of Order) and
>
> "It was clear from the briefs and the discussions during the mediation that the parties and their counsel had a thorough understanding of the facts and law as well as the risks and uncertainties pertaining to the litigation." (Page 10 of Order)
>
> That the parties "vigorously negotiated their respective positions," and that the settlement was the "product of arm's-length and good faith negotiations." (Page 10 of Order)

(3) *Moore v. Verizon Communications, Inc.*, No. c-09-1823 SBA (ND Cal. August 28, 2013,) noting that the mediator "unreservedly" recommended the settlement. (Page 15 of Order) Here, the mediator submitted a 10 page declaration in support of the settlement.

While these cases do involve showing the fairness of class action settlements, there appears to be nothing in the mediation confidentiality statutes authorizing such as an exception. And while the parties may have waived confidentiality, many of the statutes require an express waiver in writing; rather than an implied waiver or simply ignoring the issue altogether as seems to have occurred here. See, for example California Evidence Code sections 1118 and 1122.

So... are mediations confidential? Not always- it depends on what's at stake! . . . Just something to think about!

Phyllis Pollack with PGP Mediation uses a facilitative, interest-based approach. Her preferred mediation style is facilitative in the belief that the best and most durable resolutions are those achieved by the parties themselves. The parties generally know the business issues and priorities, personalities and obstacles to a successful resolution as well as their own needs better than any mediator or arbitrator. She does not impose her views or make decisions for the parties. Rather, Phyllis assists the parties in creating options that meet the needs and desires of both sides. When appropriate, visual aids are used in preparing discussions and illustrating possible solutions. On the other hand, she is not averse to being proactive and offering a generous dose of reality, particularly when the process may have stalled due to unrealistic expectations of attorney or client, a failure to focus on needs rather than demands, or when one or more parties need to be reminded of the potential consequences of their failure to reach an agreement.

Some Thoughts

"If I had an hour to solve a problem I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions."

Albert Einstein

"I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."

Abraham Maslow

Well, if it can be thought, it can be done, a problem can be overcome."

E.A. Bucchianeri

Professional Mediation Institute
Educational Program
August 26, 2015
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Listen, Do You Want to Know a Secret?
Tips and Tools
for Everyone who Attends Mediation

Listen, Do You Want to Know a Secret? *Tips and Tools for Everyone who Attends Mediation* is the title of the August 26, 2015 PMI seminar at the Orlando Marriott World Centre. **Here's why you should attend:**

1. Hear practical discussions on topics such as: ***How to prepare for mediation, and How to win at mediation.***
2. Earn a ***full day of CME, CLE, and CEU credits.***
3. Gain insight into ***the perspectives of parties, counsel, adjusters, and mediators*** for a greater understanding of the others' points of view.
4. Enjoy a networking opportunity *unavailable at any other mediation seminar* for the people who ***hire mediators and the people who mediate*** to create potential business relationships.

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Jon Warner

Dealing with Difficult People

By: Jon Warner and John Radclyffe*

John Radclyffe

We have to face dealing with difficult people at any time in our lives (and at both work and in our home lives). But in general, it's not so much that the people themselves are difficult (although there are exceptions to this of course), but it is more likely that we find their current behavior difficult with which to deal at a particular point of time. They may be preventing us from reaching a specific goal, sabotaging an agreement we thought we had, ignoring our feelings or needs, demanding too much attention, being disruptive, not listening, being overly dominant, deliberately misunderstanding what we are saying ... the list goes on and on.

Difficult people can be bosses, peers, subordinates, customers, suppliers, government figures in authority, neighbors, friends, family members or anyone else with whom we are in contact. What they all tend to have in common is that we find it difficult to deal with them and can often react emotionally to their words and deeds and even their presence. In this brief article we want to provide a few ways in which each and every one of us may deal with difficult people more successfully in the future.

In summary terms we can deal more successfully with difficult people by using the following 4 steps:

1: Separate the Behavior from the Person

Understand that the person is far more than the behavior with which we do not want to be dealing. Often the very thing with which we find it difficult to deal assumes such gigantic proportions that we confuse the way they behave with who they really are. Think of the other person as well meaning, in general, but who is behaving in a way we don't like at this time. In some cases this may well be quite a stretch but it will help us handle their behavior to think in these terms. We will want to concentrate on changing the behavior or our response to it, not attack the person.

2: Understand That Behavior is Driven by Needs

The behavior we find difficult to handle will almost certainly be driven by a need or needs of the difficult person that has yet to be fulfilled. For example, a drive to control could be the result of a need to feel safe, or disruptive behavior the need for attention. We may not ever know what the underlying need is but if we spend time discussing what these underlying needs might be, the behavior may diminish or even disappear.

3: Take Responsibility for Inability to Handle the Behavior

Difficult people are only difficult to us because we have yet to find a way to deal with them (at least for the most part) and the way that they are behaving is likely to be affecting our own emotions in an adverse way. If we try harder to recognize and then "own" our own emotional reactions, it may be far easier to make progress. Taking responsibility for our own reactions gives us the power to deal with the other person. If we label them "difficult" we are giving them power over us.

4: Be Prepared to Learn and Build Flexibility

As there is always more than one way of looking at things, it follows that the more different ways we can find to deal with difficult people, and the better our chances of being successful. It also helps us to come from a position of looking for something new to learn in each difficult situation.

Each of the above is essentially about changing our own perspective and trying to see the bigger picture. However, there are other options available and here are some other approaches you therefore might try:

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Approach 1: Build Better Rapport

We understand the needs of others if we take time to listen and try to be as empathetic as possible or put ourselves mentally in their shoes as much as we can. Our rapport building efforts will be helped also by techniques such as active listening, matching and mirroring and trying to establish trust.

Approach 2: Match the Words They Use & Information Processing Preferences

Most people have a distinct preference for processing information in one of three ways. They prefer to see it, hear it or experience it for themselves. The key to their preference is often in the words they use. Do they "see what you mean", "hear you" or "get a feel for things"? We can build better understanding with them and reduce the barriers to progress by matching their word preferences and providing instructions, information and the like in a way that suits them best.

Approach 3: Use Advocacy and Inquiry

We can often irritate the person we are finding difficult by seeming to them to be too passive, to be interrogating them or appearing to be stuck in a position of our own to which they are responding in a negative way. By using a more appropriate balance of Advocacy and Inquiry in our communication with the other person, we can bring them into a meaningful dialogue.

Approach 4: If Emotions are running too high – Go to The Lake!

Most people become more difficult when negative emotions get in the way. The more that the emotions escalate, the more difficult the situation becomes. One way of disengaging from the emotion is to mentally "go to the lake." We all have our own special place that is mentally peaceful and pleasant where the worries of the world just evaporate. This is simply a quiet place where you can think, re-group and de-sensitize a situation and perhaps find new avenues for discussion.

Approach 5: Value The Other Person's Model of The World

Often, the person with whom we have difficulty sees the world in a very different way from us. If we dismiss their way of seeing things as wrong or inappropriate then they are likely to act negatively towards us and become more resistant or even difficult. We do not have to agree with their point of view but it helps to acknowledge that this is the way he or she see things and even affirm that we have some sympathy with this perspective if we can.

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Interesting Mediation Blogs

Negotiation Law Blog
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Approach 6: Call The Other Person's Behavior

Sometimes confronting the difficult behavior by "calling" it can have very positive effects. Use words such as "What I observe right now is that you are communicating in a very aggressive manner or interrupting me before I have made myself clear and what I would like is an equal say or a fair hearing", etc.

Approach 7: Create a Little more Physical Distance

It is easier to get perspective on difficult behavior and lower any emotional charge there may be if we maintain a healthier physical distance from the person we find difficult. We can physically stand a little further away or even talk on equal terms across a table or a desk.

Approach 8: Be Appropriately Assertive

We can always review our own level of assertiveness when dealing with the person we find difficult. Are we being too strong or too weak in our communication (and how can this best be adjusted in the circumstances)?

Approach 9: Avoid Power-plays

If the person we find difficult is playing one of the three power triangle roles: persecutor (or intimidator); rescuer (of another person) or victim, we can disengage from the natural tendency to respond with one of the other roles and maintain a calm and reasonable approach (simply refusing to play the power game).

Approach 10: Try Something Completely Different

If all else fails and we have not yet found a way to deal with the difficult person (and it still matters to find a solution) it is now time to try something completely different to any of the above approaches. We can change the dynamics of our interaction in a number of ways by radically changing what we are doing. Here are some ideas that we might try:

Some people move away from things they don't want. Try making the consequences of the current behavior worse than continuing with it.

- Agree with them.
- Act "dumb" and ask the person to explain the point that he or she is advocating in more detail so we can really understand them.
- Ask their advice.
- Apologize.
- Provide some relevant wider facts or education on a related topic.
- Change the emotional level. For example, appear to get annoyed if you have been calm.

In the final analysis "it takes two to tango" as they say and some people will remain as difficult as they were. However, the above efforts are likely to make a big difference in most situations.

Jon Warner is a Los Angeles based executive coach and management consultant with extensive expertise in organizational development, change management and business optimization. He is also a developer and user of many business and people assessment models, including the use of Psychology Type in business to help optimize individual performance and to better align teams. As part of his extensive experience as a CEO on 3 occasions over the past 15 years, Jon Warner has led organizations in a variety of industries through significant transitions to achieve significantly improved bottom-line results. He is an expert in developing and implementing strategies in leadership development, operations, marketing, sales, and corporate turnarounds.

John Radclyffe, Founder and Managing Director of WorldGAMES in Australia, is a rare breed of facilitator, trainer and consultant who has in-depth and hands-on experience in a broad range of skills; among them training and marketing. He also has expertise in new business development, business management, and financial issues.

The foregoing article, *Dealing with Difficult People?* by Jon Warner and John Radclyffe, was originally published on Mediate.com and is reprinted here with the authors' permission.

Five Things Your Client Should Know and You Should Do Before a Mediation

"Take the time before a mediation to prepare your client about the strengths and weaknesses, the costs of experts, the costs of electronic discovery, the likely twists and turns before a trial verdict and/or appellate decision, and the expectations of a mediated result."

"Explain to your client that the key ingredients of a successful mediation are patience, flexibility, and creativity. Game-play the mediation with the client, so the client understands the dynamic."

"Be prepared in the first call with the mediator to tell him exactly what the case involves, including any unique factors or history or tailored discovery that is needed to help resolve an issue in the underlying case."

"The true purpose of a mediation brief is to introduce and orient the mediator to the key issues, strengths and weaknesses, and possible outcomes of the mediation. Therefore, they should be written from the point of view of the result desired: a mediated outcome, not a victory at trial."

"The purpose of a mediation opening statement is to reflect on the nature of the dispute, the likely costs and risks ahead for both sides, and the possible avenues, creative and otherwise, to resolution of the dispute. Opening doors, and, thus, dialogue, should be the goal of an effective mediation opening statement."

Quoted in part from a paper by David Brodsky, Brodsky ADR. View the complete paper at"
http://www.brodskyadr.com/wp-content/uploads/2014/08/FiveThingsAboutMediation.pdf

Top Social Media Sites

facebook
900,000,000 Monthly Visitors

310,000,000 Monthly Visitors

LinkedIn
255,000,000 Monthly Visitors

Pinterest
250,000,000 Monthly Visitors

Google+
120,000,000 Monthly Visitors

tumblr.
110,000,000 Monthly Visitors

Mediator Ethics and Professionalism: A Recipe for Success

By: Josefina Rendon*

Several years ago in Houston, I attended an interesting presentation on agreement writing and other mediation issues for advocates. The difference between the two presenters struck me enough to still remember after all these years. One presenter talked in terms of moves, strategies, bluffs and get-away-with's. The other talked in terms of good practice and ethical standards. Though the first mediator never advocated unethical conduct, the second struck me as a professional whose values and ethical standards were at the forefront of his practice. Ethics for him seemed to be a way of life and the way to practice.

At the time, I was editor of *The Texas Mediator* (Quarterly publication of the Texas Association of Mediators) and, after the presentation, I approached the "ethical mediator" and asked him to write for our publication. Any article would have sufficed, not only because he seemed both knowledgeable and articulate, but because I had the intuition that, whatever he wrote, he would color with the brush of ethics and standards of conduct and that this would be valuable to our readers. Sure enough, he submitted an article about ethics. As a result of reading that ethics article, a former president of the Texas Association of Mediators (TAM), Laury Adams, called me to get the author's contact information to invite him to speak at a meeting of the Association for Conflict Resolution – Houston (ACRH). He has since been invited to speak on other matters at other conflict resolution conferences and has written several such articles in other publications. For years, he has been a well-regarded and much sought after mediator. He is now the Director of the Institute for Sustainable Peace in Houston, Texas. The presenter's name is Randy Butler.

I also remember an ethics presentation by another mediator at another TAM conference who stated that it is good practice to offer to return the money to one party if the mediator thinks the other side has no intention of paying the mediator's fees. This surprised me because I thought at the time that this act was too self-sacrificing and beyond the call of ethics. I felt that we mediators, more often than not, get too few mediations and too many cancellations to be offering the return of fees already earned. But I still remember his message and his name, Greg Bourgeois. Very much like Butler, he is a successful and highly-regarded mediator in Austin, Texas.

A couple of years later, Bourgeois called me for an unrelated matter. He introduced himself, assuming we had never met. To his surprise, I told him how vividly I remembered that "first encounter." Pleased, he then proceeded to tell me how he first experienced the same message as a litigator when a mediator under similar circumstances offered to return <u>him</u> the money.

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Bourgeois also vividly remembered the lesson and the mediator who taught it. He also remembered to seek that mediator again.

I share these memories to highlight the impact that, I believe, ethics, professionalism and good standards of conduct can have on both our profession and ourselves. Years later, I still remember the ethical lessons taught. But almost as important, I remember the people who taught them. These are the people I would want to represent me and my profession to the public. These are the people who will make me look good simply because we practice the same profession. These are the people I would hire as lawyers, as mediators or in whatever profession they may choose to practice.

Model Standards of Conduct for Mediators

Related to the above facts, this article discusses the Model Standards of Conduct for Mediators as revised and approved in 2005 by the American Bar Association's Section of Dispute Resolution, the Association for Conflict Resolution and the American Arbitration Association. They involve nine standards: 1) self-determination, 2) impartiality, 3) conflicts of interest, 4) mediator competence, 5) confidentiality, 6) quality of the process, 7) advertising and solicitation, 8) fees and other charges and, 9) advancement of mediation practice. It is important to note that the sequence in which the standards are mentioned are not meant to signify that one standard has priority over another.

Below is a summary of the standards of conduct.

1) SELF-DETERMINATION - A mediator shall conduct a mediation based on the principle of party self-determination. The Standards define self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."
2) IMPARTIALITY - A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. The Standards define impartiality as freedom from favoritism, bias or prejudice.

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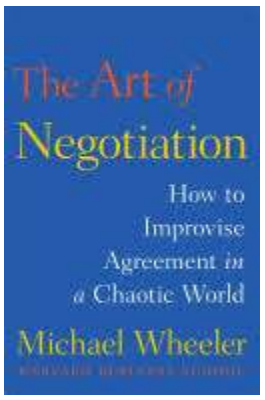
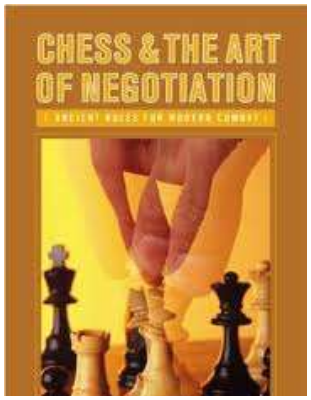
Some Books:



Award-winning Harvard Business School Professor Michael Wheeler provides a dynamic alternative to one-size-fits-all strategies that don't match real world realities. The Art of Negotiation shows how master negotiators thrive in the face of chaos and uncertainty.



Negotiations and other business maneuvers are like chess: every move generates a plethora of potential next moves. In Chess and the Art of Negotiation, a world-renowned chess master and a CEO of a global company join forces and apply the principles of chess to illuminate the dynamics of competition and negotiation

From two leaders in executive education at Harvard Business School, here are the mental habits and proven strategies you need to achieve outstanding results in any negotiation. Whether you've "seen it all" or are just starting out, *Negotiation Genius* will dramatically improve your negotiating skills and confidence.

3) CONFLICTS OF INTEREST - A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. The language under this standard also reminds mediators to make reasonable inquiries to determine whether there is a conflict of interest and to disclose any such actual or potential conflict to the parties, to withdraw from mediation if appropriate and to avoid subsequent relationships with the mediation participants that would raise questions.
4) COMPETENCE - A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties. This would include training, experience in mediation, skills, cultural understandings and other qualities. A mediator should attend educational programs and activities to maintain and enhance his/her knowledge and skill. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation. The standards also suggest that a mediator should also be willing to withdraw from a mediation upon determination of lack of competence to address the situation.
5) CONFIDENTIALITY - A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
6) QUALITY OF THE PROCESS- A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants. This standard lists several situations in which the mediator should protect the quality of the process, such as: committing the attention essential to an effective mediation; promoting honesty and candor between and among all participants; not misrepresenting any material fact or circumstance; not mixing his/her role of mediator with another professional role; postponing, withdrawing or terminating the mediation if it appears that it is being used by the parties to further criminal conduct or if the mediator is made aware of domestic abuse or violence among the parties; exploring potential accommodations, modifications or adjustments that would help possibly disabled parties to comprehend, participate and exercise self-determination.
7) ADVERTISING AND SOLICITATION - A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees. This would include not making any promises as to outcome of mediation.
8) FEES AND OTHER CHARGES- A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation. This standard specifies that a mediator's fee arrangement should be in writing unless the parties request otherwise and that the fees should not be contingent on case outcome but should instead depend on relevant factors such as complexity of the matter, mediator qualifications, time required and customary rates.
9) ADVANCEMENT OF MEDIATION PRACTICE- A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
    1. Fostering diversity within the field of mediation.
    2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
    3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
    4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
    5. Assisting newer mediators through training, mentoring and networking.

    According to this standard, mediators should also seek to learn from other mediators, respect differing points of view within the profession and work to improve the profession and better serve people in conflict.

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Local Legislation, Ethical Guidelines or Standards of Conduct

In their search to set the example of ethics and professionalism, mediators should certainly follow the Model Standards of Conduct for Mediators adopted by the national organizations listed above. Furthermore, mediators should also look for local laws, standards and/or guidelines that may have been promulgated by their local legislatures, government agencies or professional organizations. Some of the language regarding these laws, standards or guidelines may be more specific to the needs of the local or target clientele. Also, in some states, some mediator conduct may be required not just suggested. For example, in Texas, Chapter 154 of the Texas Practice and Remedies Code enacted in 1987 specifies statutorily required conduct of the mediator's regarding confidentiality. The Texas Supreme Court has also promulgated Ethical Guidelines for Mediators. These Guidelines were adopted with some variations by the Texas Mediators Credentialing Association.

Conclusion

In the race to succeed, to make mediation our day job and to promote ourselves to others, the subject of ethics may often take a back seat. Many of us already think that we are ethical and professional enough, so we concentrate on the practical how-to skills and the search for business and may often ignore ethics as an area of study and professional development. But ethics should be a subject that we study, discuss and practice everyday.

Going back to the ethical professionals mentioned earlier in this article, like them, we can set the example for others, whether our peers or the public, on how to act professionally and ethically. It is not just the money we spend on marketing that will bring us business, it is also how we comport ourselves in our practice. Ethics and good standards of conduct are, definitely, ways by which we can promote ourselves and our profession.

More important, ethical conduct is, or at least should be, a matter of character. It should define us both as human beings and professionals. It should be at the forefront of what we do. Each of us should work towards having a personal ethical vision and a clear idea of the best standards of professional conduct. It is not only good for business, it should be good for the soul.

A mediator since 1993, Judge **Josefina Rendon** has mediated over 1,200 disputes in a variety of areas including family, employment, personal injury and many other areas of law. For almost 4 years, she taught negotiation and mediated for the U.S. Air Force, Army, and Navy. She has been a Municipal Court Judge for 27 of the last 31 years. She is also a former Civil District Judge.

Rendon is a published author of over 100 articles and book reviews as well as a frequent speaker (locally and internationally) in the areas of dispute resolution, negotiation, cultural diversity and law. She was editor of The Texas Mediator and an editorial board member of both the Texas Bar Journal and The Houston Lawyer.

Judge Rendon is the current president of the Association for Conflict Resolution–Houston (ACRH) and past president of the Texas Association of Mediators (TAM). She currently serves on the board of the Dispute Resolution Center of Harris County. She also previously served on the board of the Texas Center for The Judiciary as well as on the councils of the Alternative Dispute Resolution sections of both the State Bar of Texas and the Houston Bar Association.

In 2011 Rendon was awarded both the Justice Frank Evans Award at the State Bar of Texas convention and the Susanne Adams Award at the Texas Association of Mediators Conference. Each award is given annually to persons who have performed exceptional and outstanding efforts in promoting or furthering the use of mediation and who set an example for the rest of the mediation community in Texas to follow. Rendon was also named among Texas Who's Who in ADR by Alternative Resolutions, publication of the State Bar ADR section in 2007.

The foregoing article, *Mediator Ethics and Professionalism: A Recipe for Success,* by Josefina Rendon, was originally published on Mediate.com and is reprinted here with the authors' permission.

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Agatha Christie Helped Me Be a More Effective Mediator

By: Elizabeth Kent

Give me a great mystery book and I can get lost for hours trying to figure out "who done it?" Of course, Agatha Christie is the Grand Dame of all the mystery writers, and of all her characters, my favorite is Miss Marple.

So how does reading Miss Marple books complement my mediation skills and techniques? The fictional Miss Jane Marple, more commonly known as "Miss Marple," was a spinster who lived in the small village of St. Mary Mead. She became involved in a surprising number of mysteries and solved them by using common sense, keen observation, and a knowledge of human behavior that she learned from watching her neighbors. She used parallel stories as metaphors to find solutions and when she shared them readers would have an "aha moment." I call those "Miss Marple moments" and use them in my work. Let me share what I do in case having a "Miss Marple moment" may help you too.

Often, when I am teaching communication skills or am in an intense and emotional session, people appear to be close to a breakthrough but can't quite reach get there. For instance, parties have a difficult time letting go of what they think another party's perceived intention was when she or he did something offensive. They may say something like "he did 'x' because he only thinks about himself and never thinks about anyone else" or "she did 'y' because she is lazy and self-centered." You get the idea.

When there is a lot of attribution of negative intention in the air and I think the time is right, I talk about the difference between "intent" and "impact" and how I find it difficult to know the reason that someone did something. Often I say that sometimes I have trouble knowing my own motivations so it is hard for me to be certain about another's intent. I ask if they have ever experienced that. Then I ask if it is okay if I tell them about something that happened to me. Here is one story that I use:

A few years ago our state went through challenging fiscal times and the office I was working in had cutbacks. All of us were on furlough about ten percent of the time, and we were struggling to continue to deliver services to the public at the same level as before the cutbacks. It was a stressful time.

One day when I was going to work the driver of the car in front of me turned sharply without a signal and cut me off, almost causing an accident. Luckily we didn't hit each other. I thought some uncharitable and unforgiving things and told myself that he was an idiot. Then it was over and I went to work.

Later that day I ran an errand for work and, because it was a busy day, I did it on my lunch break. I had a lot of things on my mind and almost missed my turn, but I just made it, even though I didn't use a turn signal. The driver in the car behind me honked and narrowly avoided rear-ending my car. Can you believe it? I almost cut him off!

So, did I think of myself as an idiot? No, I thought of myself as a hard working state employee who was struggling to deal with some tough times by working during what should have been her lunch break, and who was a little distracted by everything she needed to accomplish. Kind of funny, huh?

Then we talk about the story. Being cut off is something that almost everyone who has been on the roads can relate to. Usually people are able to separate the behavior from the person. They see the attribution issues – that I was willing to consider someone else's entire being in a negative fashion (he was an "idiot" and not someone who made a mistake) and that I would let myself off the hook. The last time I used this story, one of the participants shared a quote that went something like "we cannot know what is going on with someone's insides, only with her outsides." Once he shared that and we put it on the board, it was time to move on. Point made and received.

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The telling of a story that might help the parties think through their own situation and actions is what I call a "Miss Marple moment." When does it work to have a "Miss Marple moment" and to share my own story and experiences and what are the elements that make it work? First, the participants need to feel that they are in a safe space. In a mediation, this most likely means that we are in separate sessions. In a facilitation or training, it means that we have spent some time together and that a trust and rapport has developed between us. And they need to trust that I am neutral.

Second, the story needs to be self-reflective. The most effective stories are those in which the joke is on me – when I acknowledge my fallibility and am willing to share it with them. That helps them to admit their own mistakes.

Third, the story needs to be something that everyone can relate too, and not too personal. Stories about the office, general family issues, and public places work particularly well. It's easy to think of a time that I wished I had done something differently when I encountered a perceived sassy salesperson or someone who didn't seem to hear what I had to say. The other person cannot be the butt of the story – it has to be me and it has to involve me learning a lesson. Often, at the end of the story, and again pointing back at myself, I make a joke about being a mediator and a trainer in communication techniques who has to learn and relearn the techniques that I teach. People seem to get it.

At the end of training sessions and mediations and facilitations, I ask participants to fill out a survey. The survey asks them what was most effective and least effective about the session. Invariably there are positive comments about the personal stories I shared – my "Miss Marple moments." The participants say that the story helped them to look at their own behavior in a different way or to leave a negative feeling behind. In short, the stories resonated in the way that allowed the parties to see their circumstances in a different light.

I can't tell you exactly why the "Miss Marple moments" work, but they do. The older I get, the more accepting I become of not understanding exactly why something works, being happy that it achieved my goal, and then pondering it afterward to try to figure it out. After all, I really do love a good mystery.

Elizabeth Kent grew up and lives in Hawaii. She started work in her early teens, stringing and selling puka shell necklaces. Since then she has worked in a variety of interesting and challenging positions, including life guarding/teaching swimming, serving as the first female park ranger in the maintenance division at Haleakala National Park, clerking at two federal courts of appeals (New York and San Francisco), practicing commercial law, serving as the Deputy Director at Hawaii's Department of Human Services, and directing the Hawaii State Judiciary's Center for Alternative Dispute Resolution. Elizabeth is a facilitator and mediator, teaches a graduate class at the University of Hawaii in systems design, and provides training in dispute resolution. She also is an artist, designing wearable art from vintage kimono.

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