Professional Mediation Institute

Volume XXXIX, October 2016

PMI Educational Conference 2017
August 6-7, 2017

Bruce A. Blitman

Practical Tips for Mediating Labor and Employment Law Cases

Kimberly Gilmour

By: Bruce A. Blitman*, and Kimberly A. Gilmour**

During the past twenty-plus years, we have been privileged to mediate thousands of disputes. Although every case is unique, we have found that there are certain common denominators to cases which are resolved at mediation (or shortly thereafter). We hope that the following tips will help you and your clients effectively mediate your labor and employment law disputes and achieve durable mediated settlement agreements:

1. KNOW WHAT YOU AND YOUR CLIENTS WANT AND NEED

Your clients cannot get what they want from others if you don't know what your clients want for themselves. Establish specific goals. Consider what it will take to satisfy your clients' interests, needs and objectives. If you are an attorney representing a client on a contingent fee basis, wouldn't it be helpful to know as early as possible that your client really only wants an apology, rather than money damages?

For example, in a Fair Labor Standards Act (FLSA) dispute, is the client entitled to unpaid overtime or is it a half-time case? Was the employee paid for any overtime? Was the employee paid their hourly rate for all hours worked, but not the half-time rate? Other issues might involve the Statute of Limitations-is it two years or three years? Plaintiff's counsel will argue it is three years and claim there is intent not to comply with the FLSA and the defense attorney will argue compliance or "good faith" mistake. The parties need to know that the FLSA allows for liquidated damages-doubling the amount of unpaid overtime owed and, more importantly, this is a Prevailing Plaintiff attorney fee statute. As long as the Plaintiff is entitled to $1.00 in unpaid overtime, the Defendant is required to pay the Plaintiff's attorney fees and costs.

PRACTICE TIP: IT IS ESSENTIAL THAT THE ATTORNEYS AND THE PARTIES KNOW AND UNDERSTAND THE APPLICABLE LAW.

Continued, Page 2.

Practical Tips, from Page 1.

2. DEVELOP A GAME PLAN

Once you know what your clients want, establish a negotiating strategy to achieve their objectives. Before presenting your first offer, consider where you and your clients want to start and where you want to finish. Give yourselves some room in which to negotiate.

You and your clients need to present a unified presence (united front). Clients should be advised prior to the mediation that the lawyer will do most of the talking. When the lawyer and client meet in private sessions with the mediator, then the client can do all-or some-of the talking. This strategy may vary from case to case, but it should be discussed with the client well before the scheduled mediation. The client should also be advised that the opposing counsel may say things that would not be admissible at trial, but this is the only opportunity for them to address the party. Sometimes attorneys in their opening statements will ask the other party a question. Please make sure that your client is aware of this and prepare your client as to how you would like the client to respond-if at all.

PRACTICE TIP: LAWYERS AND THEIR CLIENTS MUST BE FULLY PREPARED FOR THE MEDIATION PROCESS.

3. KNOW WHAT THE OTHER PARTY NEEDS

It takes two to tango and to negotiate. To reach an agreement, all parties must feel that some, if not all, of their interests have been satisfied. Your negotiating partners also have motivations and concerns. Ask open-ended questions to gather information in order to understand their positions, perspectives, motivations and concerns.

Mediation is the art of compromise-know what the other parties want or need to come to an agreement. Make sure that your clients know what their "best case" (Best Alternative To A Negotiated Agreement-BATNA) and "worst case" (Worst Alternative To A Negotiated Agreement-WATNA) would look like. Prepare yourself and your client to answer the mediator's questions that are likely to arise during your private conversations. Be prepared and let the mediator know in advance that an interpreter may be needed. Do not rely on the mediator to serve as the interpreter nor should you rely on a family member who may have no understanding of the law to act as your client's to faithfully and accurately interpret what is being said during the mediation process. If a party does not have a good command of the English language, and does not have the benefit of a skilled interpreter, it may be virtually impossible for them to meaningfully participate in the mediation process and resolve the case.

Employment discrimination cases are not always about money. Sometimes the former employee may want an apology or wants to know if there is some kind of awareness training so that the problems do not continue in the future. Another option to consider is whether the former employee wants to be rehired. This can be very effective, but employers have to remember that the lawsuit may not end just because the employee has accepted a position with the company.

Continued, Page 4.

Mediation Institute 2016

In 2016, the annual PMI mediation conference shifted to Sunday and Monday, to rave reviews.

The program was presented in larger rooms and the crowds were an endorsement of the scheduling change.

Professional Mediation Institute is a great place to earn credits, reconnect with colleagues, and meet new friends.

PRACTICE TIP: KNOW WHAT THE PARTIES NEED TO SATISFY THEIR INTERESTS IN ORDER TO RESOLVE THE CASE. LET THE MEDIATOR KNOW IN ADVANCE ABOUT ANY SPECIAL CONSIDERATIONS, ISSUES AND ACCOMODATIONS FOR YOUR CLIENTS AND PARTICIPANTS. THESE SHOULD INCLUDE PHYSICAL ACCOMODATIONS UNDER THE ADA, LANGUAGE AND OTHER CULTURAL MATTERS, AS WELL AS POTENTIAL SAFETY ISSUES. THIS SHOULD TOUCH ON THE IMPORTANCE OF HAVING A PROFESSIONAL INTERPRETER RATHER THAN A FAMILY MEMBER-OR THE MEDIATOR (WHO IS PROHIBITED BY MEDIATOR STANDARDS OF CONDUCT FROM SERVING IN THIS CAPACITY), AS WELL AS THE SIGNIFICANCE OF MAKING SURE THE MEDIATION CONFERENCE WILL BE HELD IN A SAFE AND SECURE ENVIRONMENT. SAFETY OF THE PARTICIPANTS MUST ALWAYS BE THE HIGHEST PRIORITY. IF THERE ARE ANY CONCERNS ABOUT SAFETY, THESE MUST BE ADDRESSED WITH THE MEDIATOR IMMEDIATELY IN ORDER TO DETERMINE WHETHER THE CASE IS APPROPRIATE TO BE MEDIATED, AND IF IT IS, WHERE IT CAN BE CONDUCTED SO THAT ALL OF THE PARTICIPANTS WILL BE SAFE.

4. BE AN EMPATHETIC LISTENER

Attentive listening enables us to better understand the motivations of others. Make eye contact when anyone else in the mediation is speaking. Pay attention to the words and language they use, as well as to their body language. At one recent mediation training course, a student in the class said that her child would admonish her by saying, “Mommy, listen to me with your face!” when she was distracted and not paying attention. This is outstanding advice for all of us to follow.

The attorneys’ opening statements are the only opportunity for them to address the opposing parties. Some attorneys use this time to scare and intimidate the opposing parties, and may sometimes even go as far as to threaten them. This strategy does not usually work and can even cause a mediation conference end abruptly. On the other hand, attorneys who are well prepared can advise the opposing party how they see the case unfolding and identify the problems with the case. An effective mediator will be able to ask open-ended questions based on what has been said by the attorneys in order to facilitate the discussions and move the mediation forward. Attorneys who are prepared and are able to deliver a well-structured and developed opening statement will usually have a more successful and productive mediation experience. Just because the parties may not like one another does not mean that their attorneys should treat each other in a hostile, antagonistic manner. The attorneys and the mediator should treat everyone with dignity and respect, and model good behavior for the other participants in the mediation process. Attorneys who yell, scream and threaten each other do not help their clients or themselves achieve a mutually acceptable agreement.

PRACTICE TIP: BE PREPARED TO DELIVER A COMPELLING AND EFFECTIVE OPENING STATEMENT. LEAVE YOUR “BOXING GLOVES” HOME.

Continued, Page 5.

Practical Tips, from Page 4.

5. ATTACK THE PROBLEM, NOT THE PEOPLE

Focus on finding solutions to your shared problems. Screaming at the other party may let off steam, but it isn't conducive to effective joint-problem solving. Be courteous and tactful.

Employment case are like family cases in that they can be very emotional and volatile. In Title VII discrimination cases, the employee may feel he/she was wrongfully harassed or discriminated against because of their sex, race, or religion and then lost their job. They have not been able to find another position or a comparable one and blame the former employer. Their economic lives have been jeopardized, as well as the lives of their families. Similarly, those who have been accused of discriminatory behavior, may believe they have been wrongfully targeted and falsely accused to the extent their professional reputations have been tarnished. These parties may need to vent their feelings and frustrations before the mediations can progress and move forward. Sometimes, in these situations trying to find non-monetary solutions can be helpful; reference letters, rehiring, training for managers, etc.

PRACTICE TIP: EMPLOYMENT CASES CAN BE VERY EMOTIONAL. BE PATIENT. KEEP CALM AND CARRY ON THROUGHOUT THE MEDIATION PROCESS.

Continued, Page 6.

pmi Professional Mediation Institute

Interesting Mediation Blogs

Negotiation Law Blog
http://www.negotiationlawblog.com/

Indisputably
http://www.indisputably.org/

Disputing
http://www.disputingblog.com/

Mediation's Place
http://www.disputingblog.com/

Schau's Mediation Insights
http://schausmediationinsights.blogspot.com/

Conflict Zen
http://lenski.com/

The Strategic Mediator
http://uwwm.blogspot.com/

Eye on Conflict
http://eyeonconflict.com/

Kluwer Mediation Blog
http://kluwermediationblog.com/

Mediator Blah.....Blah
http://mediatorblahblah.blogspot.com/

SHOEMAKER

Practical Tips, from Page 5.

6.TREAT THE OTHER SIDE AS YOUR ALLY, NOT YOUR ENEMY

Your negotiating partners at mediation may have to persuade others in their organization to agree to your offer. As your friends, they can sell your proposal; as your enemies, they can sink it.

Mediation is a "win/win" process, instead of the case continuing and going to trial and there being a winner and loser. However, when an attorney's opening statement attacks the other side, it does not foster a "win-win" scenario. Similarly, if there have been settlement negotiations between the parties prior to mediation, there is nothing that requires the parties to start where they left off. We have both experienced cases in which the plaintiffs demanded six figures, which was significantly more than the last figure discussed between the parties. It can be frustrating and will probably take longer, so be prepared and make sure your client knows what to expect.

PRACTICE TIP: ATTACK THE PROBLEMS, NOT THE PEOPLE. PERSUADE.

7.EDUCATE, DON'T INTIMIDATE

Be prepared to explain, document and justify to your negotiating partners why they would be well-advised to accept your client's proposal. Help them understand your client's position.

Attorneys need to be prepared to explain their demand-the plaintiff worked five extra hours each week. They did not take lunch or they worked off the clock. When the argument is an average of five extra hours a week it is hard for the other side to accept. The more details the better. When the employer's office is only open 8 hours a day, five days a week, it is hard to understand how the plaintiff could work so many extra hours.

PRACTICE TIP: DON'T DEMAND. EXPLAIN AND JUSTIFY YOUR CLIENT'S PROPOSAL AND GIVE REASONS, NOT ULTIMATUMS.

8.BE PATIENT AND PERSISTENT

Don't be angry and insulted if the first offer you receive is not what you and your client hoped it would be. Treat this proposal as the first of several in the negotiating process. Slow but steady movement can lead you down the road to resolution. Explore as many options as possible to help the parties and their counsel achieve a mutually acceptable agreement.

Patience is a virtue. Many times the parties are quick to end the mediation without giving the process a chance.

PRACTICE TIP: VETERAN MEDIATOR AND COLLEAGUE MARTIN I. LIPNACK USED TO TALK ABOUT THE "RULE OF TOO'S": TOO MANY PARTIES-AND MEDIATORS-ARE TOO QUICK TO DECLARE IMPASSE TOO SOON." DON'T LET THIS HAPPEN TO YOU.

9.CONSIDER THE CONSEQUENCES OF NO AGREEMENT

Think about what could happen-both good and bad-if your clients are unable to agree. Can your clients afford to "walk away" from the table or are they desperate to make a deal now?

An impasse is not the best resolution. While 99% of the FLSA cases settle, the cases that go to trial do not always get decided in favor of the plaintiff. Consider this case: Plaintiffs claimed they were not allowed to take lunch breaks and worked off the clock. The Plaintiffs claimed damages of $100,000. The jury decided for the Plaintiffs BUT only awarded $1,800 in damages. The real winner in the case was the Plaintiff's attorney. The consequences of no agreement were not the best for the plaintiffs.

PRACTICE TIP: CONSIDER YOUR CLIENT'S BEST AND WORST ALTERNATIVES TO A NEGOTIATED AGREEMENT (BATNA AND WATNA) BEFORE GIVING UP. WHAT COULD GO WRONG AT TRIAL? WHAT COULD GO RIGHT?

Continued, Page 7.

10. BE FLEXIBLE AND CREATIVE

Rolling Stone Mick Jagger made famous the line "You can't always get what you want." In negotiations, this is often true. Always have a fallback position, some alternative that satisfies your clients and the other parties enough to make a deal. Be imaginative. Be creative. You just might find you get what you (and your clients) need. Flexibility is important.

PRACTICE TIP: BE AS FLEXIBLE AS A CONTORTIONIST AT A CIRCUS. NEVER GIVE UP. NEVER QUIT TRYING TO EXPLORE MUTUALLY ACCEPTABLE SETTLEMENT OPTIONS.

We hope that these suggestions will help you and your labor and employment law clients get the most out of your future mediation experiences. We wish you much good health, good luck and good mediation.

We hope to write future columns which address subjects such as: (a) Who should appear at the mediation conference (and who should not)? (b) What you should consider in selecting a mediator for your case? (c) The importance of reading court orders referring cases to mediation; and (d) The importance of preparing written mediation summaries (and to whom they should and should not be sent). We welcome your thoughts, comments, questions and suggestions about these and other mediation-related topics.

---

* Bruce A. Blitman has been a member of The Florida Bar since 1982. He is a Diplomate member of The Florida Academy of Professional Mediators, Inc. and a former President of that organization. Bruce is certified by the Florida Supreme Court of Florida as a County and Circuit Civil Mediator (since 1989) and as a Family Mediator (since 1990). He is also a Federal Mediator and a Qualified Arbitrator in Florida. A full-time mediator and ADR neutral since 1989, Bruce has mediated thousands of disputes throughout Florida. Bruce has been writing and speaking about the benefits of mediation and Alternative Dispute Resolution for almost thirty years. Many of his articles have been published in state, national and international dispute resolution journals and publications. Bruce's office is located near Fort Lauderdale. He can be reached at (954) 437-3446 and BABMediate@aol.com.

* Kimberly Gilmour brings a keen understanding of the effect of conflict on a company's bottom line as well as the benefits of mediation. She is a Florida Supreme Court certified mediator for circuit and county courts, and serves as a public arbitrator for the Financial Industry Regulatory Authority (FINRA) and the Better Business Bureau - Auto Line. Kim is a Mediator for the United States District Court – Southern District and Middle District of Florida, where she conducts numerous mediations involving wage, hour and overtime issues. In March 2001, she completed the Florida Supreme Court Arbitrator Training Program. In addition to mediation and arbitration, she is also focused on assisting clients involved in employment law challenges, from individuals to major corporations. She provides counsel for compliance on workforce issues, guidance for employment handbooks, manuals, policies, procedures, contracts and training.

This article was originally published in the August, 2016 and September, 2016 editions of the Broward County Bar Association's monthly publication, The Barrister, and is reprinted here with the permission of the editors of The Barrister and the authors

Laughing Through Conflict – Benefits of Infusing Humor into Your Relationship

By: Abigail McManus*

When I was an undergrad at Stevenson University in Stevenson, Maryland, I had a project that required me to look at my family traits and behaviors and answer several questions. I thought it would be fun to ask my parents these questions too just to see how they would respond.

One question I asked was: "*Who is the funniest person in our family*?" Both my parents almost in unison responded: "*I am the funniest*."

Both were perplexed by the other's claim to be "*the funny one*." They immediately started making their cases as to why they felt they deserve the title over the other. Back then I always looked for the middle ground between my parents, so I decided to list both of them as being the funniest in my family. However, my parents were not satisfied with sharing the title and to this day, they compete over who is "*the funny one*." The truth is, both of my parents have a good sense of humor, the situation, and mood usually dictates who is funnier at that moment.

My parents for most of their marriage have fought loudly and passionately. Neither will shy away from conflict when they feel they have been wronged – and neither ever feels they are wrong. Battles went through cycles in my house, there was yelling, then there was silence, then there was laughter. The one thing I always loved, always counted on, no matter how bad their fights were, at some point there would be laughter. My mom especially has this beautiful giggle that my dad has a particular gift for getting out of her. I always admired the way my parents could defuse the tension in our house and move forward from conflict just by making each other laugh.

Humor and laughter can be a valuable tool for defusing tensions brought on by conflict. I learned from my parents that even in the worst of times, finding a way to laugh can allow you to gain perspective.

Infusing humor and laughter into a relationship can be beneficial, but it can also cause more issues if not done well.

Laughter and humor can break down walls and make you or the other person less defensive. If we are in a conflict, and we feel backed into a corner or that someone is blaming us, we become defensive which clogs our ability to see reason and move forward. Inserting humor into the situation can break up the tension and gives each party a chance to gain some perspective.

Laughter and humor can help you bond with the person with whom you are in conflict. A joke that makes you both laugh builds an intimacy between you and these moments assist in making a relationship stronger.

However, make sure you are laughing with them, not at them. Laughter and humor are great ways to ease tension; however, all parties involved should be in on the joke. If you are making a joke about the other person, it shouldn't be mean-spirited. If they are not laughing, you have gone too far. The line between funny and hurtful can be thin so be sure to gauge the mood of the other person.

I encourage everyone to find humor in everyday moments and laugh as often as possible in their relationships. By doing this, you create stronger bonds and relationships which can make difficult times more bearable. My parents laugh all the time now; it is adorable to observe. This week they will celebrate 27 years of marriage and humor I believe is a big part of their secret.

Abigail McManus works in Negotiation and Conflict Management. This post was originally published on the Texas Conflict Coach site (http://www.texasconflictcoach.com/) by Pattie Porter, LCSW. She is the Founder and President of Conflict Connections, Inc. in San Antonio, TX. She provides workplace and business conflict resolution services including mediation, conflict management coaching, team facilitation and training throughout the U.S. She is the host of her own Blog Talk Radio show called The Texas Conflict Coach. Original post http://www.texasconflictcoach.com/2016/laughing-through-conflict-benefits-of-infusing-humor-into-your-relationship/.

Want to Influence Behavior? Stop Telling and Ask These Types of Questions Instead

By: Tammy Lenski*

Positive affirmations may be popular, but if you want to influence behavior, questions trump statements; but not just any old questions. Two types of questions in particular can create powerful psychological leverage for changing your own and others' behavior.

"Stay calm," you remind yourself in difficult moments. "Don't drink and drive," say the public service ads. "Be respectful of each other," some mediators say at the start of their mediations.

Clear and direct, you hope these messages influence behavior. But after combing through 40 years' worth of research on messaging and behavior, a team of researchers from four U.S. universities concluded that asking is better than telling when it comes to influencing your own or another's behavior.

"If you question a person about performing a future behavior, the likelihood of that behavior happening will change," says Dave Sprott, a co-author from Washington State University. It appears questions prompt a psychological response that is different than the response to statements. This means, for instance, that "Please recycle" is likely to have less impact than, "Will you recycle?"

Although the robustness of the question-behavior effect is evident, its theoretical underpinnings remain, say the researchers, "a matter of some debate." So we know it occurs but we don't yet have a clear understanding about why. Is it because "Will you recycle?" makes us look inward? Is asking for commitment? Causes a deeper analysis? Prompts discomfort from guilt if we don't recycle? We don't really know yet.

Here are a few other takeaways from the meta-analysis:

* Researchers found the effect to be strongest when questions are used to encourage behavior that fits the receiver's personal and socially accepted norms. Translation: "Will you agree not to interrupt?" is likely to yield excellent results if asked of my husband, yet be less effective if asked of me (click on the links to see why that might be).

Continued, Page 10.

Influence Behavior, from Page 9

* The effect is weaker where vices and bad habits already exist. This isn't surprising, as we already know how difficult big behavior change can feel. The researchers suggest it is better to aim at small behavioral changes that collectively over time can lead to substantive outcomes.
* The effect was more pronounced with questions that can be answered with a yes or no and seems to be influential for at least six months.

The power of "Will..?" and "How can..?"

It's notable that the researchers repeatedly used "will" to construct examples of questions that have an impact.

"Will" is, of course, the future tense of the verb "to be," implying ownership and action. It is stronger than "can" and "could," which imply the question is about ability rather than action. And it is stronger than "would," which is conditional and implies possibility more than probability.

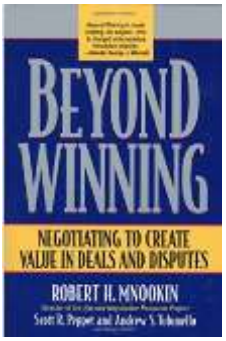
Another type of question that has the power to move us to action is, "How can...?" Harvard psychologist Ellen Langer tells us that "can" and "how can" are vastly different from one another.

Says Langer, "When you ask yourself, 'How do you do something,' you're bypassing your ego in some sense. You're just out there examining, fiddling with things trying to find the solution. If you ask yourself, 'Can you do it?' then all you can appeal to is the past."

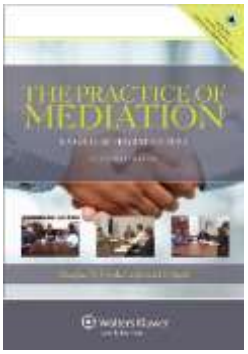
---

* For two decades Dr. Tammy Lenski has been bringing destructive and chronic conflict to its knees by helping people approach it differently. Since founding her conflict resolution firm in 1997, she has worked with thousands worldwide as a mediator, coach, speaker, and educator. In 2012 the Association for Conflict Resolution (ACR) awarded her the Mary Parker Follett Award for innovative and pioneering work in the conflict resolution field and in 2015 she received the Pioneer Award from the New England Association for Conflict Resolution for significant contributions to the conflict resolution field. Lenski began her career in higher education, serving as a dean and vice president, then later as co-founder of the world's first master's degree in mediation, now housed at Champlain College. She has written two Amazon alternative dispute resolution bestsellers: *The Conflict Pivot* and *Making Mediation Your Day Job*.

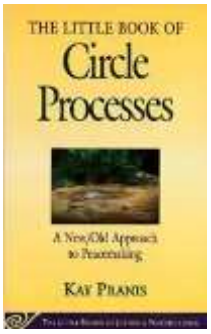
Some Books



Conflict is inevitable, in both deals and disputes. Clients call in the lawyers to haggle over who gets how much of the pie. Too often, deals blow up, cases don't settle, relationships fall apart, justice is delayed.



The Practice of Mediation combines in-depth textual analysis of the mediation process with videos illustrating the stages of the mediation process and the many constituent skills of effective mediators.



Our ancestors gathered around a fire in a circle, families gather around their kitchen tables in circles, and now we are gathering in circles as communities to solve problems. The practice draws on the ancient Native American tradition of a talking piece.

Mediated Family Estate-Planning

By: Nöel L. Miner*

Two very emotional and stressful events in any person's life are divorce and death. For years mediators have helped siblings with estate disputes after their parents are deceased. An enormous amount of misery and conflict could be avoided if parents would talk to their adult children about their estate-planning goals. A professional mediator can help parents through the emotions and complexity of mediated estate planning.

Parents are experienced in making decisions for their children. However, when the kids are mature adults, some estate-planning decisions may be counterproductive. For instance, you and your spouse own a retail store with a number of long-term employees. You have decided to leave the family store to your mature adult children and hope that they will continue the family business as if you were still alive. Of your three children, two have been living with their respective families and one lives in the same town as the family store, however, each is well established in a profession. Your estate plans have now turned your children into business partners. Your children were certain that you knew they did not want to own and run the family store. They did not choose to become partners in the family business nor were they able to choose the terms of the partnership.

Mediation is an excellent process for assisting families through the difficult and usually avoided discussions of estate-planning. An experienced mediator can facilitate communication and guide the family through those conversations. Family members no longer have to guess about what will happen and how decisions may affect others.

Mediation may be used for a multitude of disputed matters, such as divorce, business & business partnership conflicts, insurance claim disputes and HOA disputes. Contact a mediator before a conflict rises to the level of filing legal action or before the parties are unwilling to communicate.

_____

Ms. Miner is President of Linke Mediation, Inc., and is certified by the Florida Supreme Court as a Circuit, County & Family Court Mediator and Qualified Arbitrator. Her Practice is primarily concentrated in the areas of divorce, employment, workplace, EEO, ADA, insurance, mortgage foreclosure and business disputes. She earned her Master of Science degree in Dispute Resolution from Nova Southeastern University, Fort Lauderdale, Florida. Ms. Miner has enjoyed a twenty-year career as a legal professional has been involved with conflict management since 1991.

Nurturing the Peacebuilders and Conflict Resolvers of Tomorrow

By: David Smith*

As practitioners, we focus on providing services and support for those dealing with conflict and differences. For many of us, it's our livelihood. As such, it's at times difficult to find space to promote our field in other ways such as by volunteering our skills (possibly at a community mediation center) or consulting pro bono (for a local group in need of strategies for dealing with conflict).

One area where it is important that we offer our time and experience is in inspiring and mentoring youth. Besides the occasional bringing dad or mom to career day at our child's middle school, many of us have limited opportunity to engage in a direct way with youth. This is unfortunate, in that as professionals engaged in efforts that have direct impact on future generations, we have a duty to making sure that young people, particularly those in high school and college, recognize the important role of peacebuilders and conflict resolvers. It is critical that there are those who will follow in our footsteps and be able to apply our craft to serve the greater good in meeting the important difficulties and challenges our society will face when we are gone.

Over my career of 30 years, I have been fortunate to spend most of my professional time with would be peacebuilders: high schoolers, college and university undergraduates, and graduate students. During that time, I have often been faced with a question that many of us have been asked: "How do I get a job working for peace?" This question has variations, of course, where students might more specifically be interested in your work as a mediator, ombuds, social activist, or peace educator. Though I have had experience as a lawyer, a family and community mediator, a program officer at the U.S. Institute of Peace, and overseas as a U.S. Fulbright Scholar teaching ADR and peace studies, I've often struggled with my answers. This is particularly the case with younger students who have gotten the peacemaking "bug" and now are in need of career direction on what to study, what experiences to seek, and more importantly, what expectations they should have for their professional careers.

In a way, this is the same struggle many of us had during our own career journeys. For those who, like me, entered the field in the 1980s, we often were seeking better ways of dealing with differences than our professions of origin, such as law or social work, were advancing. Starting in the 1990s, with the advent of graduate programs in the field, more of us were clearer about the nature of the work, but not always any clearer as to where it might be done. For the aspiring conflict intervener, be they a high school senior, a graduate student pursuing a conflict-related degree, or a mid career lawyer seeking a change, the pathways are still today murky at best.

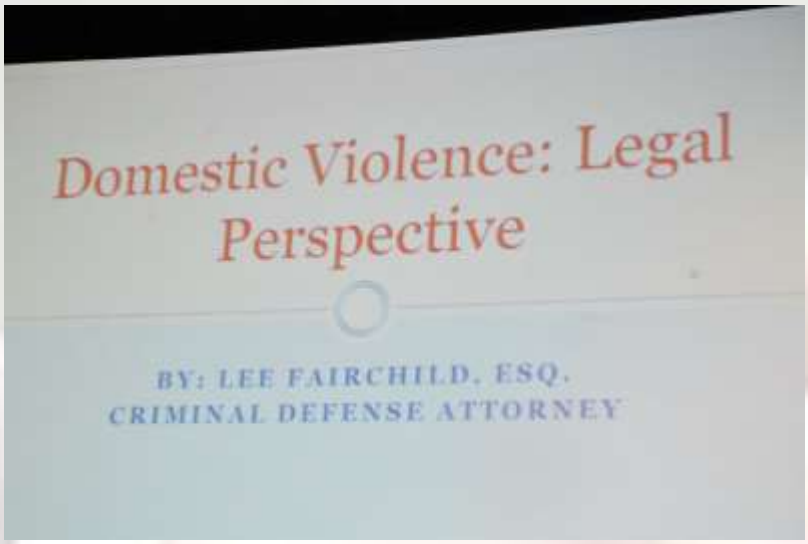
Though I teach graduate students, I have been mostly focused on providing direction for students in college and high school. It is during this time that young people first start to formulate their career goals. Much time is spent today in high school getting young people to think about what is the best educational pathway to becoming a nurse, or engineer, or technology professional, or lawyer. And in college, the notion of career education has never been more emphasized, especially when one considers the massive debt that many undergraduates face.

Through the course of my thinking and working with students, I have come to my own approaches to considering careers. In my book *Peace Jobs: A Student's Guide to Starting a Career Working for Peace*, I offer them to youth who are starting to think about how they can work to help move conflict to constructive outcomes, heal those dealing with the aftermath of violence, and work to sustain peaceful relations between individuals, communities, and nations.

Too often our instinctive response to a student inquiring about the work of peacebuilding and conflict resolution is to respond by directing them to careers that engage in direct action to respond to conflict.

Continued, Page 14.

Mediation Institute 2016



Domestic Violence and Ethics and Diversity are sometimes hard subjects to find. But attendance at Professional Mediation Institute provides all the hours you need.

An all star panel led off the Professional Mediation Institute discussion!

PMI board member Stuart Suskin moderated a discussion of CMS with two national experts, Rafael Gonzalez and Mark Popolizio.

Nurturing, from Page 13

We often talk about our own field first, often not recognizing the long and at times arduous road we have travelled. Of course, if we are a mediator, we should talk about the work of mediation and how it is valuable in a world fraught with conflict, and how we find it rewarding. But the road to a successful mediation career is a difficult one, and for an 18 year old to learn that the journey ahead is one that is uncertain and requires extensive training and education might be discouraging and unrealistic. The same goes in looking at other direct action fields such as humanitarian work, diplomacy, or human rights advocacy. Direct action work is where many of us are making are living, but to only focus on fields that work directly to resolve conflict, limits our ability to consider the ways in which our approaches and knowledge can be applied to the widest range of fields, and ones where a student might already have an interest.

It is in **indirect action** fields where the vast array of occupations that contribute to a functioning and vibrant society can be found: healthcare, business, the arts, science and technology, government, education, military service, and not for profit work. Indirect action careers are those where the prime objective is not necessarily resolving differences or building peace, but might though come about as an important by-product, and as a result improve conditions for those in need. The emergency room nurse who needs to comfort loved ones after trauma or must help foster better understanding between family members, or the athletic educator who comes to realize that there is a need to provide students with cooperative based activities rather than competitive ones, are both engaging in indirect action. The range of careers where indirect action can be advanced is limitless. Consider the police officer who engages in restorative justice strategies, or the IT professional who supports the technology needs of a community mediation or justice center.

By helping young people recognize that peacebuilding and conflict resolution work can take place in every profession, we provide students with realistic and achievable goals. In addition, we ensure that the values of conflict resolution are inculcated across the career spectrum. We want every young person entering the labor market to believe that their skills in dealing with conflict will be appreciated where they start their careers. Today we recognize that we should not have a monopoly on resolving differences. In fact, the aim of our work is not so much to help our clients come to agreement in our presence (though that is what often happens), but to empower them with the skills and abilities to continue to seek peaceful resolution of differences. We know that our good work doesn't end when the clients walk out the door, but continues as parents, co-workers, community leaders, and public officials continue to draw from our involvement in reaching consensus and agreement.

For those of us seriously engaged in the work of peace, we need to make a priority spending time with youth of all ages to show them the possibilities of making a professional life in advancing the resolution and transformation of conflict. In this way, we are ensuring that there will be a cadre of dedicated professionals following us committed to the values of peacebuilding. This is an important legacy for us all.

David J. Smith is the author of *Peace Jobs: A Student's Guide to Starting a Career Working for Peace* (Information Age Publishing 2016). He teaches part-time at the School for Conflict Analysis and Resolution at George Mason University and is the president of the Forage Center for Peacebuilding and Humanitarian Education. He is a recipient of the William Kreidler Award for Distinguished Service to the field of Conflict Resolution given by the Association for Conflict Resolution.

"If I could just get the relevant parties into the room..."

By: Nancy Shuger*

Then Secretary of State John Kerry said famously that if he could just get the relevant parties into the room, he could make a deal in almost any conflict. See "Negotiating the Whirlwind," The New Yorker, December 21 & 28, 2015, pp. 66-77, at p. 66. Whether or not one agrees with his philosophy or approach to negotiation, or even his politics, he gives voice to a concern faced by nearly every mediator at one time or another: how can a mediator bring disputing parties to the table? This is an issue that can surface even if attorneys represent both sides. It is particularly problematic when parties are unrepresented and one contacts a mediator in an effort to resolve a situation before or instead of filing litigation.

How should the mediator respond?

A possible answer to this question is illustrated by a situation I recently encountered. A property owner contacted me and described a problem common in cities like Baltimore with thousands of 100+ year old rowhouses. He determined, after investigating and hiring a contractor, that water was seeping down the inside wall of the next door neighbor's rowhouse and into his adjoining living room wall. Despite the repairs he had paid to have done, the situation could not be corrected without access to the roof and wall on the neighbor's side. He and his neighbor had had a cordial relationship when he first bought the property several years ago, as the neighbor lived in his property then, and they would see each other occasionally. Now, however, each house was rented, and the neighbor refused to respond to texts requesting his involvement in fixing the problem. The owner who contacted me was concerned that he would lose his tenants, and that his property would lose value if the problem remained unaddressed. While he already had spent considerable money and effort without success, he did not want to incur further costs, stress, and time that he suspected litigation would entail. Plus, he understood the complex technical issues well, as he was an engineer, and knew that it might be difficult to explain the situation to a judge not versed in construction and plumbing.

How to bring the neighbor to the table?

The engineer, taking a practical approach consistent with his training, asked me to write a letter to the neighbor requesting him to participate in mediation, and offering me as the mediator. To the engineer, this seemed like a logical, straightforward way to proceed. I told him that I could not write such a letter, principally because doing so could compromise my neutrality in the eyes of the neighbor. He might perceive me, I explained, as already having sided with the engineer, and so would reject mediation, and me as the mediator. I already had discussed the concept of neutrality with the engineer when I outlined the process of mediation for him. And, I knew, although we did not discuss it, that such a letter might pose additional ethical issues for me.

I told him, however, that I had another idea: what if he were to write the letter? After all, he knew how to describe the plumbing and construction issues in a way that his neighbor, who was a plumber by trade, would understand. Both property owners had tenants they desired to keep. Neither owner wanted to see the value of his property decline due to damage that could be ameliorated at this early stage. Both probably wanted to avoid litigation. Perhaps a discussion could be opened which would clarify why the plumber seemed to be avoiding the engineer. Perhaps he was short on cash at the moment; perhaps he had family problems. In sum, it was in their mutual interest to mediate the matter: this was a perfect case for mediation. The engineer was persuaded. He decided to write the letter.

Continued, Page 16.

Relevant Partis, from Page 15.

By proposing this course, I sought to shift responsibility for convening the parties from the mediator to the parties. I was seeking to empower them to initiate the process through which they could craft a mutually acceptable solution to their dispute. I was encouraging them, not me, "to bring the relevant parties into the room." I hoped they would conclude that what they needed was not a John Kerry to bring them together, but simply a conversation between two good citizens.

Let's see if this proposal works. How would you have handled the situation?

Nancy B. Shuger is based in Maryland. After retiring as a trial judge in 2011, she launched her mediation business. Her practice is multicultural, focusing primarily on family, small business, and congregational matters. She is experienced in, and enjoys, working with self-represented parties.

Some Thoughts

"I'm not interested in closure. Some people just have heart attacks and die, right? There's no closure."

Larry David

"I don't believe you ever get closure on anything. Things leave a permanent mark on you."

Allison Anders

"I sort of don't believe in closure. In the sense that it doesn't make me feel better to think that something is over."

Elizabeth McCracken

"Have gratitude for the things you're discarding. By giving gratitude, you're giving closure to the relationship with that object, and by doing so, it becomes a lot easier to let go."

Marie Kondo

"You'll never convince me there is a hopeless situation or there is any finality in any success or any failure. "

Carlos Ghosn

"Finality is death. Perfection is finality. Nothing is perfect. There are lumps in it."

James Stephens

Perceptions about Adjudication, ADR and Adjudicators

By: David Langham*

The National Center for State Courts (NCSC) recently published *Survey Finds Longstanding Public Concerns About Court Fairness and Inefficiency*.

The results demonstrate some lack of public trust, at least perceived, in the operation of American adjudication systems. The survey was conducted last year by telephone, and is part of an annual effort of the NCSC in conjunction with a "strategic consulting team." The interpretation is that public concerns about inefficiency and unfairness in the courts are longstanding and real.

The report references "persistent concerns" and a conclusion that "the courts are seen as a last resort rather than a preferred means of resolving disputes." Despite that conclusion, the report notes that among the three branches of government, trust runs highest in the judicial. With the "approval ratings" we hear on the news regarding the President and Congress perhaps that trust conclusion is less than comforting. The NCSC reports that nonetheless there is a perception that politics has invaded the judicial branch and that it influences the manner in which cases and controversies are decided.

The NCSC says that three years of research has led it to conclude that the public harbors "persistent concerns about customer service, inefficiency, and bias" which "are undermining the public's confidence in the courts and leading them to look for alternative means of resolving disputes." That is a fairly critical indictment.

According to the survey, less than half of respondents believed that "judges in courts make decisions based on an objective review of the facts and law." An almost identical percentage instead believes that judges "make decisions based more on their own beliefs and political pressure. That statistic alone may be the most troubling of the study.

The study is a somewhat enthusiastic endorsement of alternative dispute resolution (ADR) such as mediation; 55% of respondents agreed mediation and other ADR "are faster, cheaper and more responsive to the needs of the people." Enthusiasm for ADR is not a negative necessarily. ADR generally is a benefit to people, because it can be creative, personal and flexible. People with differences can be more creative in crafting an agreement than a judge or even jury may perhaps be in resolving the same dispute.

The preference for mediation may be in part based on these ADR strengths, which could be the "more responsive to the needs of the people." But some might view it as unfortunate that part of the affinity for ADR comes from it being "faster" and "cheaper." Running an adjudication system, there is conflicting feedback. As many complain that adjudication is too fast as complain that it is too slow. I am not convinced that speed is a critical issue in Florida workers' compensation, where the vast majority of trials are conducted within 180 days of filing.

At least in workers' compensation, the "cheaper" attributed to ADR may be a product of calculated decisions to minimize costs by foregoing functions like cross-examination. Few proceed to trial without deposing the experts involved (often doctors), and subjecting those conclusions of causation, compensability, and disability to cross-examination. But anecdotally, we see a reasonable number proceeding to mediation without that deposition.

For the mediation, without the need of persuading a final decision-maker, medical records or reports are often seen as sufficient. These may be less final or definitive. I have many times in mediation heard "I know that record/report says _____, but wait until I get that doctor under cross-examination. There is no way that opinion will stand up." The deposition and cross-examination is seen as a cost that can be foregone until ADR fails, and then undertaken as a "must" if the case proceeds to trial.

Continued, Page 18.

Diminished Capacity, from Page 17.

The mediation/trial comparison is somewhat like cards. At trial, all the cards in someone's hand have to be put on the table. The cards will be compared to the cards held by other players. The facts and figures become revealed and all are eventually known. At mediation, some cards may be shown, and others perhaps only alluded to. There is some level of conjecture about how things will come out in the end and so there is room for doubt, discussion and negotiation. It is these mutual feelings, interpretations, and frankly doubts that drive people to little compromises. And, if the parties make enough little individual compromises, viola resolution!

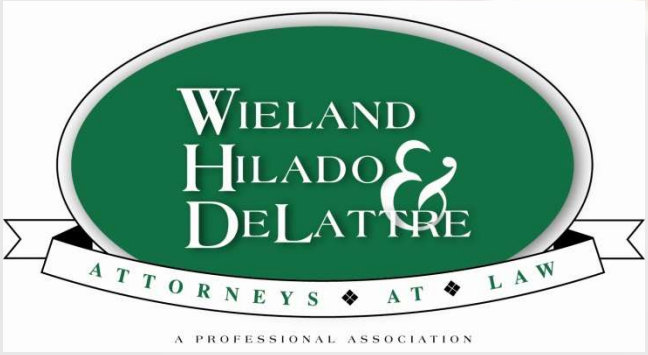
Back to the NCSC study; the respondents opined that two-thirds believe that the poor receive unequal justice, while significant (percentages in parenthesis) number believe unequal justice is afforded by courts for African Americans (51%), divorced fathers (46%) and Hispanics (44%). These perceptions have to be considered in light of the expressions by people recently involved with court systems. Among these recently involved, 70% were "satisfied with the fairness of the process in . . .dealings with the court system." So, there are broad perceptions of inequality, but a great majority of those with recent involvement find the process fair.

This incongruity may be because those who did not have "recent involvement" may be forming opinions that are based on pop-culture, television, short anecdotal news reports, or second-hand stories of friends, or friends of friends, or worse. This second-hand perception concept was illustrated in the 1986 classic *Ferris Beuler's Day Off*. As a teacher is attempting to ascertain why Ferris is absent, classmate Simone explains "my best friend's sister's boyfriend's brother's girlfriend heard from this guy who knows this kid who's going out with the girl who saw Ferris pass out at 31 Flavors last night. I guess it's pretty serious." Perceptions may be based upon hearsay upon hearsay upon hearsay.

We all know the power of rumors. A poignant lyric from REO Speedwagon in their 1981 hit *Take it on the Run* also illustrates this. There the person "heard it from a friend who heard it from a friend who heard it from another you been messing around." But, they point out that "talk is cheap when the story is good" and the "tales grow taller on down the line." Perhaps the general public is picking up their perceptions of the legal system from a small sample of outcomes that are less than stellar? Perhaps those become "horror stories" that spread. Everyone loves a good horror story. Perhaps the success stories of the system lack the energy to spread "from a friend" to a friend. Perhaps those success stories just remain with the first-hand parties, those in the 70%?

Overall though, the NCSC suggests that state court systems need to recognize the perceptions, regardless of cause, and consider changes in process and procedure. A resounding 60% of respondents believe that courts should "do a better job of adopting new technologies to break down barriers between the public and the courts."

A Final Thanks to our 2015 PMI Mediation Conference Sponsors:



Thanks to our 2016 PMI Mediation Conference Speakers:

Efrat Almog
Miami, FL

Ted Banstra
Miami, FL

Andy Bucher
Boca Raton, FL

Tucker Byrd
Orlando, FL

Robert Dietz
Sebastian, FL

Kristyn DiVerniero
Ormond Beach, FL

Sal Gardino
Naples, FL

Tom Glick
North Miami, FL

Rafael Gonzalez
Bradenton, FL

Jeff Grubman
Boca Raton, FL

Christine Harter
Ocala, FL

Bob Hoyle
Bradenton, FL

Geoffrey Hudson
Tampa, FL

Jay Hunston
Stuart, FL

Melanie Jacobson
Boca Raton, FL

Michelle Jernigan
Maitland, FL

AnneMarie Kim
Orlando, FL

Lawrence Kolin
Maitland, FL

Larry Langer
West Palm Beach, FL

Ramon Malca
Miami, FL

Howard Marsee
Maitland, FL

Celia Mendez
Orlando, FL

Mark Popolizio
Sunny Isles Beach, FL

Robin Caral Shaw
Boca Raton, FL

Christopher Shulman
Tampa, FL

Stuart Suskin
Gainesville, FL

Richard Thompson
Sarasota, FL

Luis Torres
Orlando, FL