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IMPASSE AVOIDANCE STRATEGIES IN MEDIATION

A Collection of Practical Tools

By: Louis L. C. Chang*

Effective mediation is both a science and an art. In facilitating the negotiation of people in conflict, mediators deal with a highly dynamic and situation-specific confluence of personalities, perceptions and procedures and their effect upon interests, needs, wants and values. Sometimes agreements and resolutions are readily reached. At other times, conflicts become intractable.

Since being initially trained as a commercial and construction mediator in 1984 by the American Arbitration Association, I continue to be intrigued with the challenge to understand why and when a particular strategy, process or approach proves effective in advancing the course of negotiations and avoiding an impasse. Colleagues, mentors and friends have been open and generous with the sharing of lessons learned from past mediations. The objective of this article is to present to you a listing and description of the various tools, approaches and strategies that have been successfully used by mediation colleagues, friends and mentors to keep negotiations continuing until resolutions are reached.[1]

Before discussing specific impasse avoidance tools, let me offer the following observations regarding impasse, which I hope will be helpful. Impasses do not inevitably occur in mediated negotiations. What may appear to be an impasse may only be a breakthrough delayed. Some disputes seem almost to require negotiation to reach the brink of impasse before parties are motivated to make compromises and hard decisions. Such cases present what can be characterized as a "false impasse." Here are some indicators of false impasses:

- Negotiations where the consequences of not reaching resolution are worse, more expensive or more undesirable than options identified during the mediation process;
- Negotiating parties with a high sense or affinity for gamesmanship, tactics or maneuvers;
- Negotiator who seems to want to get that last bite or just a little more or one who is fearful of "leaving something on the table";
- Institutional or political requirement or expectation that a party must fight a good fight until the last moment;

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- Negotiators or advocates who strictly control or limit the flow of communications and the mediator's access to principals.
- Circumstances where a proposal coming from a neutral mediator may be acceptable where proposals from a party would be regarded with suspicion.

The presence of one or more of these indicators in the negotiations should suggest to the mediator that, with patience and understanding, the apparent impasse can be overcome.

It is important for the mediator to avoid rushing to declare an impasse. Ideally, the mediator should be the last party to abandon hope that a particular dispute can be resolved. Mediators must be patient and persistent, even tenacious, in a commitment to keep an open and receptive view for new options, ideas and variations of negotiation packages. One should also avoid rushing to utilize or implement any of the tools and strategies discussed too soon in the course of mediated negotiations. Most of the strategies discussed can be viewed as end game strategies. If used prematurely, they may prove ineffectual.

Mediators attempt and employ various strategic interventions to try to prevent negotiation impasses from occurring. The following impasse avoidance tools and strategies are most effectively used <u>after</u> the mediator has:

- Established and earned credibility and established trustworthiness;
- Obtained a thorough understanding of the past, present and future potential relationships of the parties;
- Explored the facts and perceptions of facts held by the parties;
- Determined, distinguished and prioritized the real needs of the parties as distinguished from their stated positions;
- Explored unarticulated, unrealized or hidden needs of parties; and
- Created the most positive atmosphere conducive to reaching resolutions.

In this article, impasse avoidance strategies will be discussed under the following headings:

1. Strategies that expand the pie.
2. Using objective and external standards.
3. Assessment strategies.
4. Changing procedural or process patterns.
5. Strategies relating to the physical control of the process or creation of conducive environments for negotiating resolutions.
6. Last resorts.

1. <u>Strategies that expand the pie.</u>

<u>Inventing options.</u> This approach is articulated best and simplest by Fisher & Ury in their seminal book on interest based negotiations, <u>Getting to Yes: Negotiating Agreement Without Giving In</u>.[1] Parties in conflict frequently approach negotiations with expectations of entitlement and fixed ideas of what should be the "right" solution. One very important value which a mediator can provide to parties in conflict is encouragement,

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openness and a sense of creativity and flexibility in the search for and invention of numerous options for mutual benefit. It may be axiomatic, but the more options that can be identified, the greater the likelihood of reaching a successful resolution. Since resolutions in mediation are not bound by convention, restricted by legal precedents nor by limits upon the type or quantity of relief available through the litigation or arbitration process, mediated negotiations can be tailored to meet and satisfy mutual needs and interests. I call this applying *the mediation advantage*. The more the mediator knows about the needs, business, problems, opportunities, hopes and dreams of the parties involved, the better the mediator can help the parties identify solutions and options tailored to fit their specific needs and interests.

A wonderful example of this strategy comes from a case involving a pizza parlor franchisee who leased newly renovated space from a developer and real estate broker who was renovating an old commercial structure into a new commercial strip mall. The pizza franchise operator was the first new tenant to open for business. The developer encountered several problems during the renovation. Asbestos was discovered in old insulation material resulting in substantial delays in the completion of the project and tenancy of other spaces. Promised benefits of a fully occupied, newly renovated commercial mall were substantially delayed. The pizza franchisee was unable to successfully operate for many months and stopped paying lease rents alleging breach by the developer-lessor. After much give and take in mediation, the parties were separated by only a few thousand dollars. Unfortunately, the developer-lessor was unwilling to pay a penny more and the franchisee-lessee was unwilling to accept a penny less.

Because the mediator was wide ranging in his efforts to understand the nature of the businesses of both parties, the mediator learned critical information seemingly unrelated to the dispute over the lease and development delays. The mediator learned from the business plan and marketing surveys conducted by the franchisee-lessee that a great proportion of a pizza parlor's business comes from the community within a one or two mile radius of the site. The marketing study also disclosed that the dining out decisions made by

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ZIMMERMAN KISER SUTCLIFFE
ATTORNEYS

families with young children were more often than not determined by the desires of the children. The mediator also learned that a successful marketing strategy involved the use of gift certificates. With birthday parties, video game, drinks and souvenir revenues, the real value of a gift certificate sold was actually a multiple of the face value of the certificate.

As for the developer, the mediator understood that the developer was a real estate broker with numerous real estate agents working the nearby community. As it happened, real estate activity at this time was very active. Listings for family homes in the community sold very quickly. The developer-real estate broker was receptive to the idea of providing gift certificates which agents could give to families with children in the nearby community. From this diverse information, the mediator was able to invent an option that bridged the gap between the parties. The developer was happy and willing to purchase gift certificates for the pizza parlor to be used by his real estate agents as promotional gifts to clients and families in the neighborhood. The business generated by the gift certificates was worth far more to the pizza parlor operator than the face value and cost to the developer. The promotion also boosted traffic for the new commercial center as well as the broker's real estate office located there. The mediator thus expanded the pie and invented additional creative options. He was able to identify options of unequal value with a low cost to one party but a higher value to the other.

Options of unequal value. An example of identifying options of unequal value is working with the time value of money. A party may be willing to pay more money if given time to make payment. A letter of recommendation or apology involves no monetary cost but may be of tremendous value to the recipient. One may be unwilling to pay money to another party but willing to make a donation to a charity acceptable to the other party. The giver receives a tax deduction and the recipient receives the satisfaction of causing a donation to be made to a good cause.

Creative packaging. The pizza parlor case is also an example of the creative packaging strategy. Sometimes the linking of an option or trade-off item can lead to agreements. The mediator can ask: "If they were willing to . . . , would you consider . . .?" Other items of value or trade can be brought into the negotiations. If parties have more than the given dispute, perhaps one dispute can be solved in conjunction with the resolution of other issues that may exist between the parties.

Brainstorming. This classic option generating process calls for everyone to participate in the generation of ideas. It is usually done quickly, the mediator invites ideas in a spontaneous, game-like atmosphere. Everyone contributes ideas, they can be wild and crazy. The mediator records the ideas, often on a chart pad for all to see. No one is to criticize or evaluate ideas until after the brainstorming is done. Only after all ideas are expressed will people then discuss the promise and potential of the ideas identified.

2. Using objective and external standards.

Guidelines and standards. The general strategy here is to identify objective criteria or an external source or reference that all parties are willing to refer to for guidance. A classic example is the "blue book" which provides used car values. Numerous professional and industrial associations promulgate guidelines or standards of performance. Building codes, architectural standards and trade associations have industry standards which can provide objective criteria for the evaluation and resolution of disputed issues.

Respected Personages. Sometimes the external standard is provided by a respected personage, a trusted authority, a technical expert, an architect, a community or religious leader, a scientist or scholar.

The panel of experts. A panel of experts can be convened. A brief written digest and/or presentation of key facts and views of the parties is provided. The discussion, evaluation and recommendations of the panel can be videotaped for later viewing and consideration by the decision-making parties.

3.Assessment strategies.

The mirror of reality. Perhaps the most frequently utilized impasse avoidance strategy is the *mirror of reality*. This is where the mediator helps parties to assess the relative advantages and disadvantages of options facing them. In meeting with parties, I find it helpful to keep a separate place in my case binder where I record and collect observations concerning the strengths and weaknesses of each party and their circumstances and the motivations which drive a need to resolve. The common elements include:

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Some Thoughts

"I only hear what I want to, I don't listen hard, I don't pay attention."

Lisa Loeb, *Stay*

"A compromise is the art of dividing a cake in such a way that everyone believes he has the biggest piece."

Ludwig Erhard

"A lean compromise is better than a fat lawsuit."

George Herbert

"All compromise is based on give and take, but there can be no give and take on fundamentals. Any compromise on mere fundamentals is a surrender. For it is all give and no take."

Mahatma Gandhi

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- Cost of continued conflict measured by lawyers' fees, experts' charges, deposition costs, travel expenses, motions, trial time, appeal risks and the like.
- Delay and loss of productive resources (management and staff time, resources and opportunity costs).
- Opportunity to adopt a creative or tailored resolution option.
- Uncertainty inherent in the arbitration or litigation process, the whims of a jury, a skeptical judge, the wild arbitrator, appellate courts, changes in the law.
- Bad publicity or the risk of damage to reputation.

The most important recommendation to be made in a mediator's assessment to a party is that the mediator should avoid the temptation to emphasize and accentuate only the negatives which might compel or motivate a resolution. The mediator is better served by an even-handed assessment of both advantages and disadvantages, and incentives and disincentives to a negotiated resolution. This preserves the mediator's neutrality and trustworthiness. Costs can be couched in terms of costs saved. Opportunity costs can be viewed as opportunities to generate business or to pursue other positive ventures. As a mirror of reality, the mediator should help parties review their options and make their own evaluations. If properly done, it remains the decision of the parties to select from among the options identified or to pursue litigation, arbitration, or other options.

Testing the strength of held positions. Party positions can be tested or challenged by timely questions appropriately asked. Some examples include: "If you could accomplish . . ., would you walk away from this opportunity to . . .?" " How do you think the Supreme Court would rule on the issue of . . . ?" "Might the jury, judge, or appeals court take a different viewpoint on this?" "What happens if we fail to reach an agreement at this juncture?"

The visual chart. Sometimes it is helpful to compare options and packages visually . A decision making matrix can be prepared. The matrix can include the same or similar elements as considered in the mirror of reality discussion above. Whenever options are listed or charted, room should be left for more options yet to be identified. This leaves open

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the ever present possibility that a different idea or a different combination might be identified with continuing effort and openness.

The secret poll. This approach can be appropriate where there are teams of negotiators, advocates and representatives. The mediator selects a few key questions to ask of all persons involved in the negotiations. The questions may involve anticipated ranges of outcomes or jury verdict, estimates of costs to be incurred, time delay, likelihood of appeals, etc. Let every person have a sheet of paper to use as a secret ballot to express their personal and individual views. Make it a game if possible. You might consider adopting an Olympic scoring system where the extreme high and low scores are eliminated from consideration and the remaining scores or opinions are accepted and charted. The secret poll is particularly useful where you want input from all members of a negotiating team. Sometimes when a negotiating team has a particularly strong spokesperson, other members are overshadowed and dominated to the point of not contributing their insight and input. The secret poll allows for wide input. With such input, you may find that there is broader consensus on some of the key questions. That recognition may facilitate reaching resolution.

4. Changing procedure or process patterns.

The mediator has a wide range of procedural tools. Often time the mediator is recognized as an authority on appropriate process. Parties are often very willing to defer to the mediator's experience and judgment on suitable process or changes in process which may facilitate the negotiations. When a particular process is unproductive, the first responsive strategy is to change the process. A common example is to change from joint sessions to private caucuses or vice-versa. Where emotions are high or where there is great posturing when parties are meeting together in joint sessions, the mediator can change to a private caucus, shuttle diplomacy format.

The gag rule. In one case, discussions in private sessions proved unproductive because parties had fundamentally divergent interpretations of complex "facts." In joint sessions, advocates for both sides expressed the certainty that their side would prevail in court. Obviously, someone was wrong. The extremely strong and vocal positions taken by the advocates hindered communication and blocked the exploration of options and differences in perceived "facts." The mediator spoke with the groups, advocates and principals, privately. Each group was willing to have their advocate spokesperson refrain from comments in joint sessions on the condition that the other side would gag their spokesperson. Both groups were willing to do so because, after all, it was the other party's advocate who was being unrealistic or unreasonable in their stance. The negotiation could then progress in joint session to sort out different perceptions and identify options.

"Sunshining" a problem. Sometimes it is helpful to bring tensions out of the shadows and put them squarely in view. Where there exists unproductive conduct, sarcasm or disrespectful conduct, a mediator can indirectly suggest that a possible problem may exist. At times, lawyers take too strong a position in championing their client's cause. The mediator can suggest how clients sometimes expect too much from their counsel to serve as mighty warriors who take no prisoners no matter what the cost. Often, simple recognition of the conduct as a barrier to negotiations is sufficient to change the conduct. Sometimes, other members in a negotiating team upon recognizing the impact of the undesired conduct will come to the assistance of the mediator to help reign in or control their high intensity colleague.

Changing roles. There are many ways that a mediator can help a party "walk a mile in the other's moccasins." You can have the parties physically change positions with the other party, sitting in the other party's chair for example. Then ask each party to articulate what they believe the needs, interests and viewpoints of the other parties to be. After each side or group has had an opportunity to participate, you can ask "if you were the mediator, what might you suggest."

Changing relationships. In negotiations involving teams, sometimes it can be the composition of the team that may warrant change or supplementation. Key views or interests may not be represented at the negotiations. Vocal opponents who have the opportunity or capacity to "shoot down" a committee recommendation may need to be added to the negotiating committee rather than be left out to continue to criticize the product or efforts of the negotiating team.

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Change the mediator. Consider also that perhaps you may not be the right person for the circumstances. Consider whether bringing in a co-mediator or changing mediators might be helpful. Bringing in someone who can talk in language the parties understand or relate to may be desirable.

The pilot project. Settle on a small scale. Consider experimentation or the "pilot project." An option can be attempted, evaluated, adapted then expanded.

Incorporating dispute resolution processes. Where disputes are numerous, minute, detailed or not capable of complete anticipation, the adoption of a dispute resolution process in a settlement option can be helpful. Various models of arbitration procedures can be suggested such as baseball arbitration (arbitrator must pick one or the other side's position without compromise), high-low arbitration (arbitrator must rule within the high and low range agreed to by the parties), mediation with last offer arbitration. A fast track arbitration process empowering the arbitrator to investigate, evaluate and decide certain issues without hearings may be an acceptable mechanism. Other dispute resolution options such as early neutral evaluations, mini-trials and agreements to mediate future disputes might also be incorporated into a resolution package.

5. Strategies relating to the physical control of the process or creation of conducive environments for negotiating resolutions.

There are many actions mediators take to create an atmosphere or to adapt to an environment suitable for encouraging negotiated resolutions. The physical arrangement of chairs, the use of a circular table, the use of a sitting room rather than a conference room setting are simple examples. Sharing favorite treats, homemade brownies or a fruit basket can be an unexpected but welcome reminder of commonalties, shared joys and experiences.

Physical control. Mediators are sometimes afforded more freedom than others to exercise physical control of the process and participants during the course of a mediation. A mediator might be permitted to place a gentle hand on the shoulder of a party threatening to walk out of the negotiations when no one else would dare try.

Doing the unexpected. One situation was related by Bert Kobayashi, Sr. who was called in by the Governor of the State of Hawaii to help mediate a particularly bitter dock strike negotiation. In the negotiations, tough as nails, fist pounding negotiators for both management and labor met

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with the mediator for many hours. Late into the evening, the anger, distrust, frustration and clash of egos exploded at the conference table. Amidst yelling and invectives, the chief negotiators for both sides squared off for a no holds barred, bare knuckle brawl. In the flash of the moment, the short, not particularly big mediator leaped onto the conference table between the imminent combatants and said "If you want to fight, you two will have to fight me first." The surprising scene of this one man standing on the negotiation table challenging the two embittered negotiators to fight him first created an abrupt freeze frame in the action. Nervous laughter rippled among the negotiating teams. The negotiators then realized that matters had gone too far. The mediator was able to refocus the efforts of the negotiators upon reaching a workable settlement. Before long, a settlement was reached and a crippling dock strike averted. The mediator who later became a Justice of the Hawaii Supreme Court shared this story with a group of young mediators as an example of how a mediator can do the unexpected and also be allowed to physically control the negotiation process to keep parties focused on the goals to avoid impasse. We later learned that Justice Kobayashi held black belts in both judo and aikido and was quite capable of defending himself under the circumstances.

Humor. An atmosphere that includes some humor can create a healthy positive atmosphere conducive to healing wounds and reaching resolutions. If used, humor must be natural, comfortable, non-threatening and politically correct. The mediator can readily make fun of himself but never of others. Effective humor may make a point but without potentially offensive barbs of criticism.

The best use of humor arises from the situation and is consistent with the context of the setting. One example from a recent mediation arose when one bargaining team observed that one team was comprised of all males and the other team of all females. One day, a member of the male team brought with him the popular book "Men are from Mars, Women are from Venus." The male team in separate sessions joked about the female team and about how they needed to be sensitive to how their negotiation positions and proposals might be received by the team from Venus. They joked about how their proposals might be too Martian, abrupt and insensitive to the importance of relationships as might be viewed by the female team. In jest, one of the male negotiators suggested that they should consider offering to take everyone, including the mediator, out to lunch if a settlement could be reached. A proposal was communicated with an offer to buy lunch for all if the proposal was accepted by the female team. Not to be outdone, the female team continued the theme and offered to take the male team out to lunch if the male team would accept the latest proposal proffered by the female team. Before long, an agreement was struck, a memorandum of agreement was signed and the female team leader treated everyone to an unexpected and fine lunch.

Another situation involving a humorous resolution involved a dispute between a developer and a general contractor over roofing defects affecting fifteen homes in a new subdivision. The parties approached a mutual friend to mediate a resolution between the developer and contractor who had been long time friends as well as business associates. Knowing that the disputants were friends who on previous occasions golfed together, the mediator suggested that the dispute not be resolved in the friend's law office but rather on the golf course. The parties agreed to play a round of golf and the loser at each hole would be responsible to pay for the necessary repair of one house. After fifteen holes, the matter was resolved. Each ended up undertaking to pay for the repair of approximately half of the homes. The roofs got fixed and the relationship was preserved so they could golf and do business together again in the future.

Puzzles and camels. Sometimes a simple puzzle or story can help to create a desired atmosphere of creativity, flexibility and openness to other solutions. The nine dot puzzle is a popular and frequently used puzzle. Three rows of three dots must be connected by utilizing four connected straight lines drawn without lifting pen from paper. People commonly struggle to solve the puzzle unsuccessfully by constraining their solution attempts within the borders created by the nine dots. Solutions are not possible if people attempt to solve the puzzle by remaining within the constraints or limits of the borders created by the nine dots. However, if one is willing to draw their lines outside of the nine dots, multiple solutions are possible. This simple puzzle creates an ethic applicable to the negotiations that it may be helpful to think "beyond the nine dots" in order to identify a solution that may prove to be mutually agreeable.

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At an annual conference of the Society of Professionals in Dispute Resolution (SPIDR), William Ury shared with mediators the following story concerning an eighteenth camel. In this story, a father willed to his three children all of his wealth comprised of camels. The father's will specified that the oldest child would receive half of his camels, the second child one-third and the third child, one-ninth of his wealth of camels. When father passed away, he had seventeen camels. It became apparent that one-half, one-third and one-ninth did not result in readily divisible numbers when applied to the seventeen camels. The children could not resolve this conflict so they sought the assistance of the village wise person. After earning the parties' trust, obtaining a thorough understanding of the circumstances and relationships, clarifying facts and perceptions, and the needs and positions of the squabbling children, the wise person could not fashion a solution acceptable to the fighting children. The wise person apologized and before leaving gave the children an eighteenth camel. After the wise person left this generous gift, the oldest child took nine, being one-half of the eighteen camels, the second child took six or one-third of the eighteen camels, and the third child took two or one-ninth of the eighteen camels. After taking the nine, the six and the two camels, oddly, the eighteenth camel remained. The children returned the eighteenth camel to the wise person with great thanks. With that story, William Ury wished the mediators at this SPIDR Conference great success in helping future disputants find their eighteenth camel.

6. Last resorts.

Inevitably there are situations where impasses are reached in negotiations. A dispute may not be "ripe" for resolution. Necessary parties may not be at the table. Questions of insurance defense or coverage or indemnification obligations may be unresolved. Parties may need or want to conduct more discovery. More litigation blood may need to be shed before some identified option or variation thereof will become acceptable. Whatever the reason for the impasse, the mediator can maintain optimism and hope that the matter can still be resolved. Here are some suggestions for handling last resort situations.

The walkaway with an open door. The mediator can thank all parties for their hard work and commitment to participate in mediation. The mediator can then make statements like the following:

> "I really believe this case can be settled. Everyone's best interest is that we reach some kind of amicable agreement. We have identified numerous potentially advantageous options. We may be closer than you think. You may be better off resolving this matter on terms that you know and can live with rather than having the court/arbitrator cram something down your throat. This matter may take a little rethinking. Perhaps a little time would be helpful for all of us. Can I suggest that we leave this matter subject to call? Because circumstances may change, if any of us can think of something else that might help, any party or the mediator can call to discuss the idea or possibility. I'll do whatever I can to help. Let's leave the door open. Is that all right?"

The mediator should always try to leave the door open to future resolution.

The disappointed cheerleader. Sometimes people need to see a signal to the end of the negotiations. The mediator who has been a fountain of optimism during the mediation closes his notebook, puts away the pen and starts to put things away. The mediator's demeanor changes from one of optimism to downhearted disappointment. The mediator can then thank everyone for their efforts and say something like "We really tried hard on this. I know you all want to find a solution, but . . . . Does anyone have a suggestion or is there anything any of you would like to discuss in caucus for a quick moment?" The mediator can then stop and be silent. Let the parties break the silence. The tension of the silence may prompt a return signal from someone of desired continued negotiations.

Confidential mediator evaluations. Mediation meetings may be stopped for an agreed period of time. The mediator can offer to provide a confidential written recommendation separately to each group with suggestions for adjustment of options, interim information gathering or steps that can be taken, etc. In this way, the mediator can continue to be available to facilitate future negotiations between the parties.

Private caucus warning. Where the mediator believes that a party has an unrealistic view of his or her case, that evaluation can be explored in private session as follows:

> "Having arbitrated a number of these cases, I think an arbitrator/judge/jury might have some trouble with these aspects of your case . . . . Here's why. . . I know it is ultimately your decision

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and that you will live with the outcome, good or bad. But tell me would you like for me to pursue the possibility of . . . . ?"

There are, of course, dangers with this private caucus evaluation. Once the mediator provides an evaluation, the mediator risks loss of hard earned trust and neutrality. Often, mediators do not know all of the facts. Nor can the mediator anticipate all circumstances that may in the future affect a given dispute or case. Thus the parties upon receipt of the mediator's evaluation, can reject it because of the mediator's lack of total understanding and knowledge.

CONCLUSION

This is but a partial list of innumerable tools and approaches that may be of assistance to help avoid breakdowns in mediation. It is a living list in that it can continually be added to, refined and adjusted. I invite your suggestions and comments for additional effective impasse breaking strategies.[1] I hope that you will find this list of impasse avoidance strategies helpful in your challenging negotiation and mediation practice.

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[1] Fisher, Roger & Ury, William, Getting to Yes, Negotiating Agreement Without Giving In, Houghton Mifflin, 1981.

Some Thoughts

"The education of circumstances is superior to that of tuition."
William Wordsworth

"It is good to learn what to avoid by studying the misfortunes of others."
Publius Syrius

"The experience of others adds to our knowledge, but not to our wisdom; that is dearer bought."
Hosea Ballou

"He knows the water best who has waded through it."
Danish Proverb

A Connecticut Mediator in a Kangaroo Court? Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies

By: Paula Young*

I. INTRODUCTION

Mark Twain's book, *A Connecticut Yankee in King Arthur's Court*,[1] tells the story of Hank Morgan, a 19th-century resident of Hartford, Connecticut, who wakes one day to find himself in early medieval England. Hank uses his knowledge of modern technology, advertising, and democratic values to influence the superstitious, uneducated, and brutal aspects of English society. Twain exposes the romanticized ideas about medieval chivalry and life under the thumb of powerful forces, including the aristocracy and the Roman Catholic Church.[2]

A review in an 1889 issue of the Boston *Sunday Herald* noted: "the pages are eloquent with a true American love of freedom, a sympathy with the rights of the common people, and an indignant hatred of oppression of the poor, the lowly and the weak, by the rich, the powerful and the proud."[3]

This article tells the cautionary tale of a Connecticut therapist-mediator,[4] Dr. Resa Fremed,[5] faced with a disciplinary proceeding in what she believes was held in a kangaroo court.[6] She spent $6,000 out of her own pocket unsuccessfully defending a complaint accusing her of the unauthorized practice of law (UPL).

When the author interviewed her for this article, Dr. Fremed still had a poor understanding of what she had done that had drawn the attention of the family law judge who requested the disciplinary investigation. She also had a vague understanding of the basis for the consent judgment[7] she reluctantly signed with the Chief Disciplinary Counsel because she could no longer finance her defense or endure the emotional and psychological toll of a disciplinary proceeding. She cannot translate into action the limitations of the consent judgment and so, Connecticut has lost a skillful family mediator because she is simply too afraid to practice in the state.

A careful review of the facts leading to her disciplinary proceeding and a careful review of the transcript of that proceeding leads to one conclusion—no clear and convincing evidence showed that she had engaged in the practice of law. At the same time, that same review shows that her behavior fell within a reasonable interpretation of the ethics guidelines—both aspirational and mandatory—that apply to the mediation field. The disciplinary proceeding highlights one of the cross-cultural conversations that occur when lawyers talk with mediators about mediation.

More specifically, Professor John W. Cooley suggests that we need to reframe the problem presented when nonlawyer-mediators provide certain services—including option generation, option evaluation, and the drafting of mediated settlement agreements.[8] Instead of applying the dominant paradigm represented by the various analyses of the practice of law, the mediation field needs to provide a competing paradigm that asks "what is the authorized practice of mediation within the larger practice of ADR?"[9] Cooley explains:

> *The principal quandary of the pioneers and designers of this new paradigm—the ADR profession—is that members of the prevailing—law practice—paradigm want to apply their law practice definitions before the pioneers have had an opportunity to define basic terms and establish clear boundaries of their ADR profession. The pioneers, therefore, must design an interim paradigm to avoid being subsumed into the law practice paradigm. An interim paradigm, or as some would urge, a "parallel" paradigm, appears to be the optimal solution to the reframed problem.*[10]

This article does not attempt to design an "interim" or "parallel" paradigm. Instead, it applies several expressions of that paradigm to the specific facts of this disciplinary proceeding. It concludes that Dr. Fremed adhered to the values of her mediation profession. However, the application of a broad interpretation of the prevailing "law practice" paradigm to her situation had a significant impact on mediation in Connecticut.

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The Professional Mediation Institute Acknowledges and Thanks

For Their Support of the PMI and its Educational Efforts for Mediators

Some Thoughts

"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

"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

"Negotiation in the classic diplomatic sense assumes parties more anxious to agree than to disagree."

Dean Acheson

"The most difficult thing in any negotiation, almost, is making sure that you strip it of the emotion and deal with the facts."

Howard Baker

"Kangaroo Court" From Page 11.

As Cooley predicted, aggressive UPL enforcement or suggested efforts to avoid it "muzzle[s] mediators, . . . discourage[s] talented non-lawyers from entering the ADR profession, [and] reduce[s] the mediation process to a mechanical, word-precise, self-conscious, inflexible, content-void exercise."[11] If disciplinary bodies in other states use Dr. Fremed's case as precedent, it will have a much broader and inappropriate impact on the mediation field.

This article joins Cooley's "call to arms"[12] and invites the mediation field to play a much more active role in disciplinary proceedings that involve mediators. The mediation field should demand greater due process guarantees in these proceedings, demand that the disciplinary body meet a high burden of proof to support a finding of unauthorized practice of law, support mediators and their attorneys through expert testimony and amicus briefs, and generally ensure that the disciplinary bodies are well-schooled in the "authorized practice of mediation" paradigm before they make a decision in a proceeding.

This article also calls for the mediation community to accept greater responsibility for the regulatory vacuum that allows UPL disciplinary bodies to step in more easily and apply the "law practice" paradigm. The field should actively engage in changing applicable law through legislation, creating new regulatory infrastructures for mediators, and pursuing litigation to establish favorable precedent.

Unfortunately for Dr. Fremed, neither persons operating the Connecticut court-connected mediation programs nor members of its mediation community have created the regulatory "infrastructure" that supports high quality mediation in the state.[13] That infrastructure helps develop the "parallel" paradigm of what constitutes the "authorized practice of mediation." At the time of Dr. Fremed's disciplinary proceeding, Connecticut had no court-approved standards of ethics governing mediators. It had no formalized court-approved training program for mediators or other barriers of entry to the field. It did not attempt to discover if prospective mediators had good moral character. It had no licensing, registration, certification, or recertification process.

It did not require mediators to get continuing mediator education. It had no immunity statute for mediators. And, it had no ethics advisory panel that could help mediators resolve the inevitable ethical dilemmas they face.[14]

Continued, page 13

Instead, a private group of Connecticut mediators, the Connecticut Council for Divorce Mediation (CCDM), offered some of the elements of the "infrastructure" supporting mediators in the state. But none of those elements had the express blessing of the Connecticut Supreme Court or the organized bar. In other words, they carried limited weight among those persons who might decide the UPL issue in the context of mediation. More importantly, without the dialogue that accompanies design of a regulatory infrastructure, the legal community perpetuates many misconceptions about mediation.

Had Connecticut judges, lawyers, and mediators created a more comprehensive infrastructure for mediation, the "parallel" paradigm arising from that infrastructure could have changed the outcome in this case. First, it may have changed the way Judge Vilardi-Leheny analyzed the situation before she decided to make a referral to the disciplinary body. Second, it could have changed the way the members of the disciplinary body analyzed the facts of the situation. While fears of a disciplinary proceeding do not alone justify the field's efforts to create the "'parallel' paradigm," "the current lack of certification, regulation, and oversight of [mediators] is in large part fueling the efforts of the 'practice of law' proponents to bring mediation within the scope of lawyer regulation."[15] The author sees the development of the "parallel" paradigm in every state as a way to "push back" against the "law practice" paradigm.

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1 MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT (Barnes & Noble Classics 2005)(1889)

2 See generally id.

3 Mark Twain's Masterwork: A Connecticut Yankee at King Arthur's Court, SUNDAY HERALD (Boston), Dec. 15, 1889, at 17, available at http://etext.virginia.edu/railton/yankee/cybosher.html.

4 The author apologizes in advance for using the term nonlawyer-mediator in this article, which some mediators have labeled "pejorative." Lemoine D. Pierce, Letter to the Editor, It's Time to Get Rid of the Term "Non-Lawyer," DISP. RESOL. MAG., Fall 1998, at 2, 2; see also Ericka B. Gray, What's in a Name? A Lot When "Non-" Is Involved, 15 NEGOTIATION J. 103, 103 (1999); David A. Hoffman, Is There a Niche for Lawyers in the Field of Mediation?, 15 NEGOTIATION J. 107, 107–08 (1999) ("When the term 'non-attorney' is used scornfully or dismissively to describe these [mediation] colleagues, it is painful, and I stand shoulder-to-shoulder with Ericka [Gray] and other mediators who seek to end this invidious distinction.").

5 Dr. Fremed granted the author the right to disclose her name and to discuss the facts of her disciplinary proceeding. Dr. Fremed waived her right to confidentiality and she made all the records of the proceeding available to the author. The author deeply appreciates Dr. Fremed's candor and courage.

6 A "kangaroo court" is "a mock court in which the principles of law and justice are disregarded or perverted [and] characterized by irresponsible, unauthorized, or irregular status or procedures." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 657 (1985).

7 The Chief Office of Disciplinary Counsel called the consent judgment a "Stipulation." See infra note 317 and accompanying text.

8 John W. Cooley, Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR, DISP. RESOL. J., Aug.–Oct. 2000, at 72, 77.

9 Id. (quotation marks omitted).

10 Id. at 78; see also Jacqueline M. Nolan-Haley, Lawyers, Non-lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective, 7 HARV. NEGOT. L. REV. 235, 282–86 (2002) (advocating a "power-sharing and problem-solving" approach); David A. Hoffman & Natasha A. Affolder, Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?, DISP. RESOL. MAG., Winter 2000, at 20, 22–23 (asserting the need for greater clarity and uniformity in defining terms).

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11 Cooley, supra note 8, at 74. Cooley makes the argument that the mediation field's attempt to advise nonlawyer-mediators how to avoid engaging in the practice of law will lead to these negative affects on the field. Id. Obviously, application of the law practice paradigm in a specific situation involving a nonlawyer-mediator can have the same affect, only more directly.

12 Id. at 79.

13 For a discussion of a comprehensive regulatory system, see Paula M. Young, Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field, 21 OHIO ST. J. ON DISP. RESOL. 721, 731–41 (2006) [hereinafter Young, Take It or Leave It].

> A comprehensive regulatory system typically consists of several components. First, the regulatory system creates barriers of entry to the field consisting of several possible components: (a) training requirements that vary depending on the type of mediations the mediator intends to conduct, (b) ethics training, (c) moral character reviews, (d) minimum degree or professional license requirements, (e) written tests, and (f) performance-based testing or evaluation. The system may also grant official recognition that the mediator has passed these barriers to entry by certifying, registering, or rostering the mediator. The regulatory system may regulate or approve mediation training programs. The system may also require mediators who have successfully passed the barriers of entry to prove at a later date—through a recertification or re-registration process—that they are committed to the mediation field and to their skill development. The system may require continuing mediation education, including additional ethics training, or proof that the mediator has completed a specified number of mediations in a specified time period. The regulatory system may also support mediators by providing ethics information, encouraging compliance with aspirational ethics guidelines, creating a mandatory ethics code, and issuing ethics advisory opinions. The regulatory system may further provide rules or guidelines for interacting in the legal world on issues of mediation confidentiality, the unauthorized practice of law (UPL), and mediator immunity. It should offer public oversight through well-designed grievance systems. Finally, a comprehensively designed regulatory system will grant the state supreme court or its ADR administrator the power to sanction mediators for ethical violations or other misconduct. Those sanctions would at least include the ability to remove mediators from court-approved mediator rosters. Id. (footnotes omitted).

14 E-mail from Kate W. Haakonsen, Partner, Brown, Paindiris & Scott, LLP, to author (Feb. 22, 2008, 10:40:00 EST) (on file with author).

15 Cooley, supra note 8, at 78.

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Mediators & Everything Mediation

Recap on Professional Mediation Institute 2012

The 2012 Professional Mediation Institute (PMI) conference was held August 22-23, 2012 at the Marriott World Center in Orlando. Thirty-four exceptional speakers addressed a multitude of mediation topics. They were: Markel Arrizabalaga, Bruce Blitman, Pati Caldwell, Charles Castagna, Haley Cutler, Kahlil Day, Robert Dietz, Donna Doyle, David Dreszer, James A. Edwards, Thomas Glick, Rafael Gonzalez, Christine Harter, David Henry, Geoff Hudson, Clem Hyland, AnnaMarie Kim, Larry Langer, Honorable John Lazzara, John Elliott Leighton, Mike Mattix, Rod Max, Honorable Jonathan Ohlman, Michael Orfinger, Dr. Beverly Pennachini, William Pipkin, Diana Santa Maria, Jake Schickel, Robin Caral-Shaw, Ross W. Stoddard, III, Stuart Suskin, Gary Toole, John Trimble, and Donna Urbanski.

This exceptional faculty addressed diversity, domestic violence, mediator ethics, mediation practice marketing, use of Dale Carnegie tools in mediation, the operation of mediation oversight by Florida, electronic mediation, drafting effective mediation agreements, and much more. There was something for everyone, with the only complaint being that it was impossible to attend all of the breakouts on this diverse schedule.

PMI President Robert Dietz welcomed attendees and introduced the Keynote Program speakers, Charles Castagna, of Clearwater, Bruce Blitman of Ft. Lauderdale, and Donna Doyle of Orlando. These attorneys and mediators brought a vast volume of experience to bear on a lively discussion of the impact various rules and decisions have on the way mediation is conducted. This discussion provided insight into the ethical challenges of mediation and the route to overcome them.

This Keynote Program promised to jump-start the 2012 program, and it delivered. The perspectives of litigator, corporate counsel, and mediator were focused upon the ethical challenges facing mediators in today's litigation environment. Thorny issues were laid bare and the wisdom of this panel provided practical and thoughtful suggestions for dealing with these challenges.

Mr. Dietz returned to the podium as the luncheon keynote speaker with a fast-paced Prezi presentation on critical moments in history, examined from the mediation perspective. Mr. Dietz' overview reinforces the dynamic power of mediation and how the effective mediator can assist parties in writing their own history of their dispute.

Two very successful mediators, each of whom has built a dynamic mediation practice through best practices and strong reputation, discussed mediator marketing. Charles Castagna, of Clearwater, discussed the rules and opinions which constrain mediator advertising, including opinions from the Mediator Ethics Advisory Committee (MEAC). He provided substantive advice on how to define the market for your practice, and how to differentiate your practice from others. Thomas Glick, of Miami, shared the "secret" of building a practice; that is that there is no "secret" nor is there any one way to do it. He shared tools, tips, and tricks that he has used to build his reputation and practice over the years.

Dr. Beverly Pennachini delivered a lively and interactive presentation titled "Applying Dale Carnegie Principles to Mediation." She was joined by mediators AnnaMarie Kim and Stuart Suskin. The presentation outlined some of the key points of Dale Carnegie's principles, and suggested how those could be effectively applied in the mediation setting. These widely renowned techniques for interacting effectively with people will provide attendees with another tool for helping parties resolve disagreements and objections.

Perhaps one of the most unique breakouts was a program moderated by attorney William Pipkin. This panel, including Pati Caldwell of the Willis Group, Mike Mattix of Armed Forces Insurance Co., and Donna Urbanski, an independent claim consultant, "pulled back the curtain" and provided insight on how insurance companies make decisions. Often, a challenge to mediation is overcoming the conclusions that have been made by an insurance company or other payer. This group of insiders helped attendees understand how and why those payers make the decisions that they do. This information will be invaluable to the attendee faced with overcoming insurance company objections and concerns, in reaching agreement.

Continued, page 16

"Recap" from page 14.

Haley Cutler, a dynamic speaker and inspiring discussion leader, addressed the challenges of domestic violence. Her delivery was engaging and riveting, as she addressed the dynamics of domestic violence, and the impacts that affect the mediation process.

James A. Edwards addressed the effects of the internet on business, and discussed how that technology could be leveraged to simplify the mediation process and practice.

It has been said that "getting there is half the fun," and mediation is a journey towards an amicable resolution. Two distinguished judges, the Honorable John Lazzara and the Honorable Jonathan Ohlman, addressed the challenges they have encountered when mediation agreements are not well drafted, and are therefore litigated. These two judges, with a wealth of personal experience as mediators and judges, shared invaluable information with attendees, who will be better agreement drafters as a result of their attendance.

Robin Caral-Shaw, Ross W. Stoddard, III, and Larry Langer, each an attorney and mediator, shared their perceptions of mediation participants and their agendas. They helped attendees with understanding how to discover the agendas with which parties present for mediation, and how to determine which of their goals are sacrosanct and which are not. This experienced panel was replete with practical tips and suggestions to arm attendees to deal with the hidden agendas and critical issues.

Two industry leaders, Geoff Hudson of Axiom and Rafael Gonzalez of Gould & Lamb, addressed the ever complicated involvement of Medicare in personal injury types of litigation. When and why Medicare is implicated are complex issues and challenge attorneys and parties alike. The prepared mediator has an understanding of these challenges, and this program provided precisely that foundational knowledge.

The Diversity panel was an outstanding part of the program. With three dynamic "a-list" speakers on a the panel, this discussion was enlightening and provided multiple new perspectives. Edward Almeyda, , Diana Santa Maria of Ft. Lauderdale, Markel Arrizabalaga, and David Dreszer all of Miami, shared their personal experiences in mediating and representing people with racial, gender, cultural, language, and perspective differences. Their explanations of body language, cultural differences regarding perspectives on injury and litigation, and various perspectives on relationships were informative and will help attendees build rapport in mediation settings.

Not every mediator understands the process of State oversight of mediator ethics and the Mediation Ethics Advisory Committee (MEAC). Panelists Kahlil Day and Jake Schickel, each an attorney and mediator, broke it down and laid it out for attendees. With their experience through MEAC and Bar service, this panel was uniquely prepared to educate attendees on both the "why" and the "so what" of that process.

David Henry, an attorney and mediator, presented the challenges of the commercial case. With case complexity come an additional set of potentials for conflict and conversation. From rapport building with sophisticated participants to the challenges presented by a multitude of parties with different sophistication and goals, Mr. Henry outlined the hot topics and provided insight from experience on how to meet and overcome those challenges.

Three attorney mediators, Clem Hyland of Orlando, Michael Orfinger of Daytona Beach, and Christine Harter of Ocala addressed mediator ethics from the perspective of concrete hypothetical situations. These illustrated the challenges of mediator ethics and provided reminders and advice from the rules for certified and court appointed mediators, as well as appropriate MEAC advisory opinions.

The Program concluded on Thursday. John Trimble delivered an insightful program on the unique challenges of mediating government liability claims, followed by a panel comprised of Rod Max, Gary Toole and John Leighton with suggestions on how to break an impasse.

The entire 2012 program was a resounding success, with the credit going to our speakers and the attendees with their participation.

Our thanks also to our Board, listed on page three of this issue. See you next year on August 21, 2013!

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We welcome you writings and ideas for this newsletter. Please submit any suggestions or articles, notices, announcements, of interest to mediators to pmi360@pmi360.com

We are beginning our planning for the Professional Mediation Institute 2013 Seminar in Orlando, August 21, 2013. If you have suggestions for topics, speakers or sponsors, email us at pmi360@pmi360.com

Thanks Again to our 2012 Seminar Speakers!

Markel Arrizabalaga
Bruce Blitman
Pati Caldwell
Charles Castagna
Haley Cutler
Kahlil Day
Robert Dietz
Donna Doyle
David Dreszer
James A. Edwards
Thomas Glick
Rafael Gonzalez
Christine Harter
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