Plenary 1

A Roundtable on Mediation Impasse-Breaking Techniques

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New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

An ALM Publication

Alternative Dispute Resolution

WWW.NYLJ.COM

VOLUME 259—NO. 52

MONDAY, MARCH 19, 2018

Mediating **Highly Emotional** Workplace Disputes

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SHUTTERSTOCK

Workplace disputes provide fertile ground for intense emotional conflict. While the #MeToo movement has focused attention on workplace harassment and the psychological impact of sexual misconduct, many other types of workplace disputes generate emotional turmoil. Discrimination and termination claims, allegations of pay disparity and even claims of unpaid wages often are impacted by strong emotions.

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, but emotional reactions that are definitely not "one size fits all." Workplace conflict that leads to anxiety and depression in one employee may promote anger and outrage in another. Nor are individuals identically resilient. The same experience that engenders a long-term traumatic reaction within one individual may give rise to only mild discomfort within another. Coworkers or supervisors accused of misconduct will also have intense, but not identical, reactions. Deciding whether or how to address varied emotions that stand in the way of resolution often is a key to a successful mediation.

Doing so does not mean that the mediator acts as a psychotherapist. Although mediation and psychotherapy address the ways in which individuals feel, think and make decisions, they are far from synonymous. This may reassure those who contend that the resolution of legal disputes should be grounded solely on facts and the law. As a former psychotherapist, employment lawyer and now mediator at JAMS, I have been asked two critical questions: Are the intense emotions generated by employment disputes really pertinent to settlement of the legal claims and, if so, why? After all,

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some assert, the prima facie case for discrimination under Title VII of the Civil Rights Act of 1964, or workplace harassment under state and city laws, does not include "intense emotions" as a formal element of a claim.

The response is straightforward, with a caveat. Attending to intense emotions in employment disputes increases the chances of resolution. Emotions affect not only the way in which individuals *feel*, but the way in which they *think,* and therefore the manner in which they negotiate. Instead of impeding resolution, intense emotions often provide opportunities for the mediator to convey a measure of understanding and respect for the parties. This, in turn, supports the parties' ability to examine the legal claims and defenses from different perspectives, consider their options and make clear-headed decisions. That said, it is important for the parties, attorneys and the mediator to recognize the distinctions between the roles of mediator and therapist.

The Impact of Intense Emotions

Although many people strive to separate facts from emotions, strong emotions often influence an individual's perception of the facts, and "what happened." Understanding how the parties' feelings impact their perception of their legal claims and defenses is one of the mediator's tasks. Emotions and cognition directly influence each other. On the one hand, emotions create beliefs and may distort memories. On the other hand, thoughts and memories impact the way individuals feel. Together they have a substantial impact on behavior, including not only the manner in which individuals interact, but the strategy and tactics they adopt while negotiating with each other.

Individuals who bring harassment, discrimination or retaliation claims and believe they have been victimized may experience feelings of anger, anxiety, helplessness and depression. See, e.g., Reed, M.E., Collinsworth, L.L., Lawson, A.K. et al., "The Psychological Impact of Previous Victimization: Examining the 'Abuse Defense' in a Sample of Harassment Litigants," Psychol. Inj. and Law (2016) 9: 230. Even claims for unpaid compensation grounded on wage-and-hour law technicalities or the interpretation of contracts and workplace policies may involve strong emotions. Claims alleging pay inequality, promotions denied, or unwarranted terminations are often grounded on fundamental disagreements over the value and utility of individuals, not inanimate objects. These disagreements may impact an employee's self-esteem and cause significant distress.

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, **but emotional reactions that are definitely not "one size fits all."**

Employees who bring claims do not have a monopoly on strong emotions. Reactions by those accused of discrimination, harassment or retaliation may include anger, anxiety, embarrassment and depression. Co-workers or managers accused of wrongdoing are not emotionally insulated simply because they may have acted on behalf of their employer. Some feel insufficiently supported or even abandoned by their co-workers and employer, fearful that their job, reputation and future prospects will be irretrievably damaged. This, too, causes distress for those accused.

Mediation, Not Psychotherapy

Psychotherapy generally involves the treatment of mental or emotional disorders or related bodily ills by psychological means. See, e.g., Definition of Psychotherapy, Merriam-Webster.com. Mediators, in contrast, assist individuals involved in conflict to come to an agreement, rather than focusing on psychological "disorders" or "illness." Attending to the emotions that motivate parties to bring, maintain, and ultimately let go of their legal claims and defenses does not require a mediator to formulate diagnoses or even think in terms of pathology. Rather, the mediator understands that emotions influence the ways in which individuals think and, therefore, the manner in which they negotiate.

A mediator has the opportunity to attend to strong emotions by actively listening and openly acknowledging a party's emotional experience. One of the mediator's goals is to respectfully convey compassion for employee and employer alike. There is no specific formula or magic phrase for the mediator to use when acknowledging strong emotions. Timed well, a simple

statement that the mediator understands that a party feels outraged, or wounded, for example, may be just right. Active listening and acknowledgment are not the same as encouraging a party to simply "vent," which under some circumstances in mediation may be quite counterproductive.

The distinctions between a mediator's and psychotherapist's role are varied. While mediators may have more than one meeting with parties and their counsel, they do not have the therapist's opportunity to develop trust and rapport through sustained discussions. They must do so quickly.

Therapists often focus on the impact that prior experiences have had on an individual's emotions and decisions. They may interpret patterns of prior behavior, or an individual's current thoughts and emotions, in ways that differ from and expand their clients' self-perception. Mediators focus on the past to ensure that they understand the relevant factual and legal issues and their impact on the parties. Understanding the chronology of events and the emotions they generate is far different than analyzing and interpreting them for a client. In mediation, the former will likely be welcome, the latter unwelcome.

Therapists rely primarily, sometimes exclusively, on their client's subjective reports regarding past and current events. Although mediators adhere to certain rules and protocols regarding confidentiality, they have access to information from all sides to a dispute. This enables them to talk with the parties relatively quickly about different perspectives on the facts and the law and to encourage the parties to step into the proverbial shoes of the judge and jury. It also allows the mediator to explore the risks inherent in the parties' positions. In my experience, this fundamental difference between the mediator and therapist role benefits all who attend mediation.

Cultural Influences On Emotional Expression

A discussion of emotionally laden disputes is incomplete without mention of cultural differences in the manner in which individuals experience and express their emotions. If overlooked or misconstrued they make such disputes more difficult to resolve.

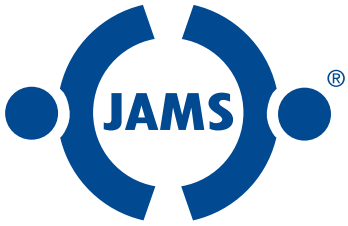
The basic premise is that culture influences how individuals understand, interpret and express their emotions. Norms specific to a given culture impact how an individual within that culture feels he or she *should* express emotions. In mediations involving a party who suppresses his or her expression of negative emotions, it would be a mistake for the mediator or counsel to assume that a calm demeanor signifies the absence of emotional turmoil. Of course, a mediator typically does not have an opportunity to conduct, prior to mediation, a thorough assessment of the impact of the parties' respective cultures on their emotional styles. There are opportunities, however, to seek clues. During separate pre-mediation conference calls, for example, the mediator may ask each party's counsel about the client and how the client is coping with litigation.

This does not mean that the mediator should presume that an individual's cultural background dictates or guarantees a particular emotional posture in an employment mediation. To presume so risks stereotyping individuals.

A Greater Chance of Success

Attention to the parties' emotions helps not only the parties but the mediator. Understanding the parties' emotional styles and concerns enables the mediator to employ a line of reasoning that the parties are most likely to find compelling. An individual uncomfortable with the outward expression of intense or negative emotions, for example, may not find arguments based on strong emotion persuasive. An individual who expresses intense emotions with ease may not be impressed by a highly intellectual line of reasoning. A mediator's approach should be in tune with each party's emotional style and comfort level.

Mediators and therapists share the goal of empowering individuals to make important decisions *informed*, not *dictated*, by their emotions. Doing so allows the parties to consider perspectives different than the ones they brought to mediation, and to consider their options well informed as to the potential outcomes of their dispute.



Changing Faces to Change Positions

Ruth D. Raisfeld, Esq.

Summary: Successful mediations require flexible negotiators

Successful outcomes in mediation are not dependent on any one person or any one factor. The parties and their counsel hire a mediator because they need help, not because they do not want a role or part in the dispute resolution process. However, the mediator may be the only person in the process who is capable of observing and evaluating what roles each of the individuals in attendance can play at the negotiation. The mediator should never assume that he or she must be the focal point or sole agent of all discussions. Indeed, many mediators subscribe to the view that the mediator is there to let the parties negotiate and only to intervene when necessary.

A critical skill for the mediator, but also for the attorneys and parties, is to assess who should be in the joint session, separate caucuses, and how to reconfigure the individuals who participate in the discussion as necessary. The mediator must constantly be a subtle stage manager to sense when a change in negotiating agents might be helpful to change negotiating positions.[1] A variety of permutations on changing the composition of the negotiators should be considered.

I. Traditional First-Approach: Mediator and Counsel

Typically, one, both or all counsel, initially contact the mediator to determine the mediator's availability and readiness to serve in a particular matter. Even during this initial call or e-mail, counsel may reveal a negotiating style or may disclose whether or not they intend to bring clients to the mediation and why. The mediator may initially ask the open-ended question: *"Who will be attending for your client in addition to you?"* It is important for the mediator to listen carefully to counsel's answer for this may disclose whether counsel has fully thought through this issue and what counsel's preference may be. Counsel may also seek the mediator's view. Even at this early stage, the mediator should be thinking about helping counsel to select the right representative to be in attendance.

It is also possible during the initial phases of convening a mediation that counsel may have a timid, anxious, or angry client who is either unwilling or resistant to attending a mediation. This is an opportunity for the mediator to offer to be available for a pre-mediation conference call to afford the client an opportunity to "meet" the mediator and learn more about the process and the mediator's protocols so that the client will be more comfortable submitting to the mediation process.

[1] Following a successful mediation of a difficult employment dispute, one of the attorneys who participated wrote me: "somehow we all felt like actors on your stage. I am not complaining, just acknowledging. Thanks for making it happen."

Further, the mediator may learn in the initial stages that one or both sides will not proceed in the absence or presence of another individual. While the mediator may have certain best practices in mind with regard to whether it is essential for one person or another individual to be present, the mediator should at least have some basic information if not more about the matter before taking a position or making a recommendation as to who must be in attendance. The mediator should be open-minded and not doctrinaire about attendees until the mediator is aware of the issues.

II. Joint Session: Mediator, Counsel, Client Representatives

While the trend in some camps is to dispense with a joint session, I am a proponent of joint sessions except in the most difficult circumstances: it is important for both sides to demonstrate that they can be in the same room together in order to conduct an effective dispute ending resolution. Further, it is almost always an opportunity to learn something new about someone or something. However, the joint opening session is an important opportunity to consider appropriate representatives. For example, counsel should give consideration to balance of power. If counsel or the party is going to take the position in an opening that *"we are here in good faith but think this case is a nuisance,"* they may want to refrain from bringing extraneous people or multiple attorneys to the joint session which typically signals that the case is anything but minor. On the other hand, a particularly strong show of force during the opening session may disarm the other side and signal that hard-bargaining lies ahead.

Similarly, deciding who will speak for a party in a joint session is almost as significant as what to say. While lawyer advocates view the joint session as an opportunity to press the strengths of legal arguments and the weaknesses of the opposing side's case, it is a critical opportunity for clients to speak. Whether they read from a prepared statement or answer questions from their counsel, clients who wish to speak should be prepared and the mediator should set ground-rules that the client is not there to be deposed.

Given the many permutations that may take place both during a joint session and in subsequent caucuses, it is a good practice for mediators to mention in their opening remarks that the mediator may meet separately, together, or with different representatives at different times of the day and that attendees should not be surprised by this or draw any conclusions from it. By mentioning this before-hand, the mediator will encourage the parties themselves to consider "mixing it up" and to offer such ideas to the mediator. It is also a good idea for the mediator to build trust with the attorneys by noting that he or she will not speak privately with their clients without first asking permission to do so. Mediators must remember that the attorney-client privilege is inviolate even if the mediator believes that an attorney is a stumbling block. The mediator should not be so zealous in the efforts to settle a case as to undermine an attorney-client relationship.

III. Separate Caucuses: Mediator, Counsel and the Clients

Another hallmark of mediation is the separate caucus which occurs when the parties and their counsel retreat to separate conference rooms for private, confidential discussions with the mediator. Here the mediator receives information and argument in support of bargaining positions and interests may be identified. These separate caucuses may continue in a "shuttle diplomacy" sequence for many hours, and may result in agreement even without ever bringing the parties together again or staging any alteration in process. However, sometimes the mediator may feel that issues are too delicate or too personal for the message to be carried by the mediator. This is

when creativity on the part of the mediator, counsel or the parties as to changing faces to change positions comes to play.

A. Mediator takes Counsel aside, separately

A mediator may ask to speak with counsel outside the presence of the client under a variety of circumstances. The mediator may sense that counsel is taking too hard a position in front of the client which interferes with the mediator's ability to make progress; on the other hand, the mediator may wish to seek the counsel's view of whether the mediator needs to try a different tack in communicating with the client. Similarly, the mediator may wish to test an approach with counsel before revealing it to the client or taking it to the other side and wants to give the counsel an opportunity to assess it without doing so in front of the client. This gives both the mediator and counsel an opportunity to "rehearse" an idea before playing it out.

Taking counsel aside may also give the client a "breather" and may give the client an opportunity to think things through without being "counseled" and without being distracted by conversations with counsel or the mediator. Often the entire dynamic may change just by giving the intense "attorney-client relationship" a rest.

B. Mediator takes Counsel aside, together

Sometimes it is helpful to call an "all attorneys" meeting. Once again, this gives the "attorney-client" relationship a break. Further, it enables the attorneys to have a meeting on a "lawyer's level" where cases, statutes, and legal risks can be spoken of without talking "over the heads" of the clients. Further, the reality is that the mediator is "new" to the case; the attorneys have been living with it and will live with it if the case does not settle. All attorneys want to feel like they are representing their clients zealously and want to feel like they are capable of steering the train into the station. So at an appropriate point, the mediator may want to bring the attorneys together to discuss a particularly thorny issue or to allow one of them to drive a point home. There is no reason why the mediator has to do all the talking or be the only one to carry offers and counter-offers back and forth.

C. Clients talk to each other, with or without Counsel, with or without the mediator

Both in commercial and employment cases, there may be so much "law of the shop" that it is beneficial for the clients to get into a room and talk to each other in an attempt to find a resolution. Whether it is a business-to-business dispute, a family business dispute, or an employment dispute, the circumstances leading to the dispute are best known by those who were involved in the events. In appropriate situations, it is helpful to allow the disputants to speak directly with each other. The setting of the stage and the timing are issues the mediator must address.

1. Clients talk to each other, without Counsel or the Mediator

Depending on the circumstances, it may be appropriate for the disputants to speak with each other privately. In a family dispute or an employment dispute, there may be circumstances that the disputants want to discuss and that they do not want to share with their attorneys or the mediator. The mediation provides a safe, confidential setting in which they can have this conversation. The mediator must help to set the ground rules: where will this talk take place, will they take notes, will the attorneys be nearby, etc.? Often this conversation enables the parties to share perspectives and heart-felt personal messages (whether friendly or hostile) that need to take

place before the legal dispute can be addressed. If counsel is particularly risk-averse, it may take some mediator facilitating to frame the private conversation in such a way that all feel comfortable that subsequent legal positions will not be compromised.

Examples of client-client conversations that have broken impasse and set the stage for successful negotiations include:

- sexual harassment case that followed the break-up of a consensual relationship settled once the alleged victim had an opportunity to tell the harasser just how difficult the relationship was and the harsh impact of the subsequent termination of the relationship and employment relationship;

- former partners sat together in a conference room together divvying up the clients upon dissolution of the partnership;

-a financial services executive seeking a finder's fee on a big deal sat alone with his former boss and discussed ways they could do business together if the compensation dispute could resolve.

2. Clients talk to each other, with Counsel and the Mediator present

Often during the course of a mediation clients may feel that the lawyers and mediators are doing all the talking and they may feel that they have not had "their day in court" or an "opportunity to be heard." The offers that are passed back-and-forth seem sterile to them or that their message is not being communicated as they had intended. This provides an excellent opportunity for another joint session, with particular ground rules, that will enable the clients to have a face-to-face conversation. The mediator should lead the individuals back to a joint conference area and should remind the parties that this is their opportunity to speak, that lawyers will not be taking notes or asking questions, but are merely "potted plants," there to listen but not react. The clients feel empowered and protected in this setting and may be therefore able to have a cathartic conversation that leads to resolution.

IV. Participants consult with an outsider

A. Mediator talks to a third-person, who is not in attendance at the mediation setting

The dreaded scenario is the absence of the real decision-maker or the absence of an influencer who has not had an opportunity to hear the give-and-take or sense the atmosphere in the negotiations. This may be the principal of a company who does not attend the mediation session and has given his representatives limited authority. It can be the central player in the dispute whose presence may be seen as inflammatory. It can be someone whose presence is critical but not feasible due to illness, geography or competing demands. In such circumstances, it may be appropriate for the mediator to get on the phone with this person to give a report on the progress or impediments to the process that are operating during the mediation. Sometimes this mediator's report, or mediator's ability to hear and understand another perspective, refuels the process and can help lead to a settlement. Typical of the outside, but influential, third party is an insurance company which may have access to additional funds but needs to hear for him or herself a good reason for authorizing the proposed settlement. In other cases, a trusted advisor – spouse, partner, clergy member – may be able to reframe the consequences of not settling for the party who is resistant and the mediator can bring this person into the mediation setting even if they are not in attendance.

B. A Subject Matter Expert helps with disputed issue

It is also possible to have an expert – an appraiser, accountant, physician, or other third party witness – attend the mediation or provide a report on an issue that distances the parties. This can be arranged in advance, or can be scheduled to break an impasse.

V. CONCLUSION

The mediator must be the eyes-ears-sensory perceiver for the parties to a negotiation. Mediation is a process and part of the process may require changing faces to change positions.

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 25
MONDAY, FEBRUARY 8, 2016

Outside Counsel

Expert Analysis

Overcoming Impasse at Mediation: Bargaining with Brackets

By **Michael D. Young**

And **Marc E. Isserles**

Imagine this familiar mediation scenario: Plaintiff makes an initial demand of $2 million. Defendant counters with $50,000, to which plaintiff responds by moving to $1.6 million. Defendant then moves to $95,000, and plaintiff responds with $1.4 million. It is now 3 p.m. After six hours of negotiating, the parties are tired and frustrated and appear to be at an impasse.

Plaintiff thinks it has shown flexibility and a willingness to compromise, and is disappointed that defendant will not put "real money" on the table. Defendant, however, sees the negotiation quite differently. It thinks the $2 million demand was "completely unrealistic," and that plaintiff's movement to $1.4 million, which is still "way too high," shows only that plaintiff is "unwilling to accept reality." Defendant, after much prodding from the mediator, reluctantly agrees to move to $125,000 but says that, if plaintiff does not respond with a "legitimate number," the mediation is over. Upon hearing defendant's last move, plaintiff tells the mediator it is time to call it quits.

What can be done? The parties have told the mediator privately that they have significant room to negotiate; however, neither side is willing to make a significant move because of the perception that the other side has not moved far enough. And because the gap is so large, both sides believe it would be pointless to continue making small moves. The parties find themselves with a sizable gap yet seemingly no way to bridge it.

In this situation, the mediator might suggest a number of tools to help break the impasse. One of the most effective negotiation tools available to the mediator and the parties is a "bracket." A "bracket" is a conditional proposal in which a negotiator says: "We will go to X if you will go to Y." X and Y create a "bracket" between which the offering party proposes to limit negotiations.

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In the scenario laid out above, plaintiff could respond to defendant's last offer by saying, just by way of example: "We will come down to $800,000, if defendant agrees to go to $350,000." Defendant may choose to accept the proposed bracket, in which case the parties would negotiate within that range. More likely, defendant would offer a "counter-bracket" proposing a different negotiation range. For example, defendant might say: "We reject your bracket. But we will come up to $250,000 if you will come down to $400,000." Typically, when parties agree to bargain with brackets, they will trade proposed brackets and counter-brackets for at least several rounds of negotiation with the aim of moving closer to a mutually agreeable negotiation range.

> Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives.

Effective Tool

There are five reasons why bracketing is such an effective tool for breaking impasse.

1. Communicating Signals About Where a Party Is Heading. Proposals that take the form of an unconditional number typically provide very little information beyond the number itself. Limited to such proposals, the parties in our scenario lack a tool for communicating signals about where they might be heading and how far apart they actually are from each other. A bracket provides that tool.

By exchanging one round of brackets, our hypothetical parties have communicated, at a minimum, that plaintiff would accept $800,000 and defendant would pay $250,000. That might not be enough information to settle the case. But it is valuable information—which the parties might never have received without bracketing—that could break the logjam.

A bracket also communicates helpful information about the parties' expectations. Bargaining without brackets can involve a fair amount of guesswork. A party may think it is making a significant move but then learn its counterpart was expecting much more, leading to frustration and disappointment on both sides. However, when our plaintiff offers a bracket with a lower end of $350,000, it is clearly communicating: "We think $350,000, although not enough to settle the case, is a reasonable next move for defendant to make." That information helps defendant formulate an offer that will have predictable consequences—the closer defendant is to $350,000 on its next move, the more likely plaintiff will react positively. The same holds true for defendant's counter-bracket: it sends the message that plaintiff must come below $400,000 to be in what defendant regards as a "reasonable" settlement range. In this way, brackets help reduce the guesswork and resulting misunderstandings that can derail a mediation.

Finally, a bracket communicates useful data about the potential significance of a party's "midpoint." In our hypothetical, the midpoint of plaintiff's $800,000-$350,000 bracket is $575,000; the midpoint of defendant's $250,000-$400,000 bracket is $325,000. The party offering a bracket might be signaling a potential settlement at the midpoint. Sometimes parties say that expressly, for example: "The midpoint of our bracket is

meaningful." But the party offering a bracket may not be willing (at least not yet) to go to the midpoint, and so might deliver a very different message with the bracket: "Do not interpret this bracket as a signal that we will take (or offer) the midpoint; we won't!"

As with any message in a negotiation, statements about the midpoint should be taken with a grain of salt. Indeed, because bracketing is typically a multi-round process, the midpoints of the parties' brackets tend to move closer together over time. And regardless of what a party says about the midpoint's significance, it ultimately may be willing to go past the midpoint of an early bracket to get a deal done. At the same time, the midpoint of any given bracketed proposal remains a useful data point because it gives the recipient some idea of where the offering party might be prepared to go.

2. Shifting Focus. Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives. When parties fixate on the size of the other side's movement, they tend to get trapped in a vicious cycle of "tit for tat," reactive bidding in which the moves, and the chances for resolution, get increasingly smaller.

The exercise of constructing a bracket helps parties break free from that counterproductive dynamic and strike a positive, constructive tone. By offering a bracket, a party in effect says: "What really matters is not the size of the moves so far, but the number that can settle this case. Here is a bracket defining what we think is a reasonable negotiation range."

3. Encouraging Significant Moves. Because a bracket is a conditional ("if, then") proposal, it provides a kind of protection that tends to encourage "significant" moves. A party contemplating a significant, unconditional move will typically worry about what happens if the other side refuses to reciprocate with a significant move. It might be concerned about "running out of room," "signaling weakness," or having the number used against it (setting a "floor" or "ceiling") in future negotiations. These concerns, while valid, tend to eclipse all other considerations and limit a party to making small moves, which may not be the most effective strategy.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement. By bracketing $800,000 with a demand that defendant come up to $350,000, plaintiff can signal a dramatic movement—dropping from $1.4 million to $800,000 in one move—without jeopardizing its bargaining position. The same holds true for defendant's counter-bracket: It allows defendant to signal a substantial move (doubling its offer from $125,000 to $250,000) without making a firm commitment to settle at that amount.

4. Generating Momentum. By encouraging significant moves, bracketing tends to create a positive negotiating atmosphere and the possibility of a "domino effect" of significant movement. Because brackets tend to represent significant movement, they tend to be interpreted as a signal that the offering party is "serious" about settlement. And although parties worry about making large moves that go unreciprocated, large moves frequently induce large moves by one's counterpart.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement.

When our plaintiff proposes a bracket in which it offers to move all the way to $800,000 (albeit with a condition), defendant is likely to interpret that proposal as significant movement. That can trigger a reciprocal response from defendant, which is likely to be interpreted as significant by plaintiff. For example, even though our defendant rejected plaintiff's bracket, plaintiff is nonetheless likely to respond positively to a counter-bracket in which the bottom number is twice the amount of, and $125,000 more than, defendant's last unconditional offer. After trading a series of significant, bracketed moves like these, the parties would likely experience a sense of real progress and negotiating momentum that could be instrumental in settling the case.

5. Keeping Negotiators at the Table. Brackets work because they often keep parties negotiating until they are ready to signal or reveal their true bottom lines. Parties typically will not (and indeed should not) reveal their best numbers when a settlement seems out of reach. By the time our hypothetical mediation threatens to fall apart, it is probably too late in the day to continue to exchange unconditional numbers productively, yet far too early in the day for the parties to reveal to each other "best and final" numbers.

Bracketing works as a kind of bridge that helps carry negotiators far enough toward the other side, and far enough into the negotiating process, that they are prepared to reveal their cards and see whether resolution is possible. It serves the very practical function of keeping parties at the table when further bargaining seems, but is not in fact, hopeless.

Timing

A final word about timing. Parties sometimes express reluctance to use brackets "too soon." Because a bracket is neither a firm commitment from plaintiff to settle, nor "real money" from defendant, parties may not experience a sense of actual progress until they exchange a few rounds of unconditional numbers. However, we have also seen brackets used effectively during the early stages of negotiations that could not have otherwise gotten off the ground. In our view, it is never "too soon" to consider brackets—at least if the negotiation might end without them.

When is the right time to stop using brackets? After a certain point, an exchange of "if, then" brackets and counter-brackets can take on a kind of surreal quality, and one or both of the parties, or the mediator, might propose reverting to actual dollars. This usually happens when the parties have made enough progress narrowing the gap with brackets, and moving the midpoints of those brackets closer together, that they are optimistic about getting a deal done. Indeed, the very idea of shifting from brackets back to unconditional numbers is often a signal that brackets have done their job and carried the parties far enough along that they are prepared to make the final push toward settlement.

Conclusion

Mediation negotiations tend to bog down in familiar ways when limited to a traditional exchange of unconditional numbers. Bracketing is a highly effective negotiating tool for breaking that impasse. Brackets are not for everyone, and negotiators may have strategic reasons for deciding not to use them in a particular mediation. But we would encourage negotiators to consider the many upsides to bracketing before rejecting what is, in our view, an indispensable tool in the negotiator's, as well as the mediator's, toolbox.

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 30 NO. 6 JUNE 2012

ADR Skills

The Mediator's Proposal: Whether, When and How It Should Be Used

BY STEPHEN A. HOCHMAN

As most neutrals know, a mediator's proposal is a settlement offer that the mediator makes to all parties, and each party is requested to accept or reject it on the exact terms proposed, in a confidential communication to the mediator.

It calls for either an unconditional "yes" or "no" response, without modification, and the mediator is not permitted to disclose the responses that he or she receives unless both responses are "yes." Thus, if one party says "yes" and the other party says "no," the one who said "yes" will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later litigation stage.

This article assumes that the dispute that is the subject of the mediation is *ostensibly* a money dispute that is either in litigation or, if not settled in the mediation, would proceed to litigation (or arbitration), and that all parties are represented by counsel. The reason I state that the dispute is *ostensibly* about money is that, in almost all cases—including the money cases—there is an emotional component. That is why, as noted below, it is important for the mediator to permit the parties to vent their feelings—usually anger at their adversary. It is also important for the mediator to validate those feelings, whether or not the mediator considers those feelings rational, before beginning the mediation's risk analysis and reality testing phase.

For simplicity, I will assume that there are only two parties and one dispute, which could involve more than one issue, but a mediator's proposal can also work when there are multiple parties and multiple disputes.

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WHEN IS THE RIGHT TIME?

A mediator's proposal should be used only as an endgame—that is, only after all other attempts to avoid impasse have failed. Before considering the use of a mediator's proposal, the mediator should first avoid making what I consider the 10 mistakes that even good mediators may make. Those 10 mistakes are:

1. Failing to get the right persons to the table.
2. Failing to explain the mediator's role as "agent of reality."
3. Permitting settlement negotiations to begin prematurely– i.e.,
   a. prior to permitting the parties to vent; and
   b. prior to risk analysis and reality testing.
4. Failing to orchestrate the negotiations
   a. by discouraging "out of the ballpark" offers or demands; and
   b. by discouraging moves that send the wrong signal.
5. Failing to recognize that unrealistic expectations must be lowered gradually.

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6. Being evaluative (a) too early or (b) in a joint session.
7. Failing to suggest ways to avoid reactive devaluation of sensible settlement proposals from the adversary.
8. Believing "bottom line" offers or demands.
9. Failing to "test the waters" before making a mediator's proposal.
10. Being impatient or failing to be persistent or giving up prematurely.

Although a full examination of these 10 mistakes is beyond the scope of this article, some of these mistakes will be discussed below.

It is important to emphasize that every other possible impasse-breaking technique should be used by the mediator before resorting to a mediator's proposal, including attempting to narrow the gap by using the conditional offer technique. For example, by asking the defendant in caucus, "If I could convince the plaintiff to reduce its demand to $X, would you be willing to increase your offer to $Y?"

Conversely, in a caucus with plaintiff, you can ask "If I could convince the defendant to come up to $Y, would you be willing to come down to $X?" The mediator may know from a confidential caucus communication that a party is willing to come down to $X or up to $Y, but an offer that a party perceives that its adversary needs to be convinced to make may have a greater psychic value to the party than if that offer was freely given by the adversary.

The longer the negotiation process continues, the easier it becomes to close the gap and help the parties reach agreement without the need to resort to a mediator's proposal. That is because the more time that the parties have invested in the mediation process, the more they are motivated to have it succeed rather than fail.

In cases where the definitive settlement agreement is likely to have contentious issues—for example, provisions relating to confidentiality, noncompetition and non-disparagement, and provisions for liquidated damage or other remedies if those provisions are breached—it may make sense to suggest that the parties first try to agree on the terms of the definitive settlement agreement, leaving the dollar amount blank for later negotiation.

Once the parties have agreed on the terms of the definitive settlement agreement, the likelihood of reaching agreement on the dollars increases because the parties are more motivated to avoid a failed mediation in which

they have already invested the time to agree on the non-monetary issues.

WHEN SHOULD IT NOT BE USED?

My preference is to suggest the idea of a mediator's proposal, and wait to see if either party objects, rather than first asking permission from the parties to allow me to make a mediator's proposal. That is because I am less likely to get an objection if I first state my belief that a mediator's proposal is likely to overcome the impasse and avoid a failed mediation.

Some mediators believe it would not be appropriate to make a mediator's proposal if either party objects after the mediator suggests a mediator's proposal. Because either party is free to reject the mediator's proposal, I do not believe that either party should have a right to veto the neutral's use of a mediator's proposal as a last resort to avoid a failed mediation. However, if one party requests the mediator to defer making a mediator's proposal because it believes that further negotiations might succeed without it, that request should be honored.

WHAT ARE THE DISADVANTAGES?

The main reason that many mediators oppose using the mediator's proposal is that if a mediator gets a reputation of using a mediator's proposal as an impasse-breaking technique, the parties are likely to spin the mediator by posturing and taking unrealistic positions in order to create an impasse rather than being candid with the mediator and negotiating in good faith by admitting their weaknesses. However, the parties rarely admit the weaknesses in their case. Instead, they do their best to convince me that they have a winning case in the hope that I will make their arguments when caucusing with their adversary and lean in their direction if and when I make a mediator's proposal.

Another reason that some oppose the use of a mediator's proposal is their belief that it is directive rather than merely evaluative, and thus inconsistent with the principle of party autonomy, which means that each party should make its own decision free from the influence of the mediator. However, most parties want the mediator to help them be realistic about their litigation alternative. They hope that a mediator's proposal will influence their adversary's decision toward settlement at least as much as it may influence their own decision.

The reality is that, by making a mediator's proposal, the mediator is not interfering with the parties' unfettered right to make their own independent decisions to choose between "the lesser of the two evils"—i.e., a less-than-ideal settlement compared to the uncertain and expensive litigation alternative.

Another objection expressed by some critics is that the mediator's proposal may create the appearance that the mediator is not impartial because one or both parties may perceive that the proposal is more favorable to its adversary than its own interests. That misperception can be overcome by the mediator making it clear that the proposal represents his or her independent and objective evaluation of the dispute and best effort to recommend a settlement that is better for both parties than their litigation alternative.

Breaking Through

The problem: The mediation is at impasse. Nothing has worked.

The last attempt: A mediator's proposal can unstick the parties.

The drawbacks: They are minor. But it's not simple. This article describes how to carefully maximize the potential for a last-chance resolution.

Whether or not the parties anticipate that I will, if necessary, make a mediator's proposal to avoid a failed mediation, they rarely tell me their weaknesses because they want me to focus on the strengths of their case when I caucus with the other party. Nor do they tell me what they consider to be their bottom line or worst-case settlement alternative to litigation.

Whenever parties tell me their bottom line, I thank them for sharing with me their present thinking. Most attorneys experienced in mediation advocacy will spin the mediator to some degree because they are hoping to get a better result for their client than a worst-case settlement. The most experienced attorneys, however, will avoid insulting the mediator by claiming to have a bottom line that is totally out of the ballpark of reality. As discussed below, in deciding on the terms of a mediator's proposal, I avoid being influenced by what the parties tell me is their bottom line in our private caucuses.

PREPARING THE DELIVERY

Before making a proposal, it is important that the mediator explain that part of the neutral's job is to play the role of "agent of reality" and thus avoid making mistake No. 2 in the above list of 10 mistakes.

It is important for the parties to understand that, in the confidential caucus with each party, part of the mediator's job is to focus the party on its case's weaknesses, rather than its strengths—and that does not mean that the mediator is favoring their adversary. I repeatedly remind the side that I am caucusing with that, when I caucus with their adversary, I will similarly be playing the devil's advocate role with them.

In my introduction to the mediation, I usually explain to the parties that I am the only person in the room with no stake in the outcome. To emphasize my impartiality, I make it clear that I have no interest in whether the case settles on the high end, in the middle, or on the low end of the possible settlement ranges. My only agenda, I tell the participants, is to help the parties settle on terms that both parties decide is better than their litigation alternative.

It has been clinically proven that those with a stake in the outcome, including the attorney/advocates, cannot be totally objective in evaluating their likely litigation outcome. Because the lawyers are hired to focus their efforts on supporting the strengths of their client's case, they tend to underweight the weaknesses. They often fall in love with their most creative arguments. So it is not uncommon for the lawyers to have "advocacy bias" that anchors them to their initial evaluations and to devalue and reject what they hear from their adversary. They are at least more likely to listen to and objectively evaluate what the mediator says.

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FORMULATING CRITERIA

Most mediators try to choose a number for their mediator's proposal that they believe has a chance of being accepted by both parties without taking into account what the mediator believes is the value of the case. It is preferable for the mediator to try to select a number that, in addition to having a chance of being accepted by both parties, is in the win-win range based on the mediator's objective analysis of the case value.

An example of the win-win range: If the mediator believes the plaintiff has a 50-50 likelihood of winning $1 million at trial, and the parties will each spend $100,000 to get a court to give them an all-or-nothing decision, the win-win range is $400,000 to $600,000. It is not unusual for both parties in a 50-50 case to come to the mediation believing that they are at least 70-75% likely to win. Of course, they cannot both be right. That is why it is important for the mediator to avoid making mistake No. 3.b. in the list of 10 mistakes, by being sure to do risk analysis and reality testing before permitting the parties to begin negotiating numbers.

I believe that the dollar number that the mediator proposes should be based on the mediator's independent judgment as to the case value, based on an objective decision-tree analysis and not on the midpoint between what the parties claimed to be their respective bottom lines. Ideally, the mediator should propose a number in the middle of what he or she believes is the win-win range—$500,000 in the above example. I would not be comfortable in the above example of proposing a number below $400,000 or above $600,000 merely because I thought it might be accepted by both parties. The issue is not what the mediator believes is fair—a totally subjective standard—but what the mediator objectively believes is better for both parties than their litigation alternative.

I never believe bottom lines that are outside of the objective win-win range. Of course, even if both parties in the above example honestly believe they are more than 60% likely to win despite the risk analysis and the reality testing that they heard from the mediator in caucus, they still may accept a $500,000 mediator's proposal based on their nonmonetary interests and needs, including the need to avoid risk and put the dispute behind them.

Before revealing the dollar number of the mediator's proposal, it is important for the mediator to avoid making mistake No. 9, which is failing to "test the waters" in caucuses with each party before revealing the dollar number of the mediator's proposal. For example, if the mediator tells the plaintiff in the above example that she is considering a number it the range of $450,000 to $500,000, the mediator can gauge the plaintiff's reaction. Similarly, the mediator can gauge the defendant's reaction to a number in the range of $500,000 to $550,000. If the plaintiff rejects the $450,000 out of hand more strongly than the $500,000, and the defendant similarly rejects the $550,000 more strongly than $500,000, the mediator can feel that there is a good chance that both parties will accept a $500,000 mediator's proposal.

Often a party will agree to the dollar number in a mediator's proposal even though it would never have agreed to the same number if it were an ultimatum by its adversary. Because the number is the mediator's number and not the adversary's, it eliminates reactive devaluation, an effect that causes some parties to reject offers because of who they come from, not for the content. It often boils down to the parties choosing between the lesser of the two evils—either a less-than-ideal settlement or an uncertain and costly litigation.

PROPOSAL ADVANTAGES

The most important advantage is that a mediator's proposal can overcome the posturing that often goes on in negotiations. Of course, there is a number below which the plaintiff would be rational in refusing to accept, and there is a number above which the defendant would be rational in refusing to pay. However, the parties rarely offer to settle for that worst case number and prefer to shoot for a better number. The beauty of using the mediator's proposal as a last resort is that, from the plaintiff's perspective, the money is "on the table," at least conditionally. Both parties may accept it, albeit reluctantly, even if it is slightly worse than what they considered their worst case number during the negotiation process.

The fact that the parties know that the mediator will not choose a number that is outside of the objectively determined win-win range often will increase the likelihood that it will be accepted by both parties. That is because it comes with a stamp of objectivity and legitimacy, assuming the parties respect the mediator's competence and integrity.

DEALING WITH THE HOLDOUT

On the rare occasion that only one party accepts my mediator's proposal, I might ask the accepting party if it would be willing to release me from the pledge of confidentiality and let me tell the rejecting party that the accepting party would be willing to make a slight improvement in my mediator's proposal in the interest of avoiding a failed mediation.

In a case where the defendant gave me permission to make a second mediator's proposal if it was no more than 10% above my mediator's proposal, the plaintiff agreed to accept that slightly increased number. That was because it met the emotional need of the plaintiff to feel that it squeezed the proverbial "last nickel" out of the defendant, who the plaintiff felt had treated him unfairly.

Even in cases that are ostensibly only about money, I have found that the percentage of those cases that have an emotional component is, give or take . . . 100%.

PARTIES' RESPONSES

I always prefer to get the answers to my mediator's proposal from both parties at the same time, and I usually ask each party how much time it thinks it will need to decide on their answer. By getting answers at the same time (*e.g.*, by asking each party to send me a one word "yes" or "no" E-mail between noon and 5:00 PM on the agreed date), it avoids the situation where I am reluctant to continue my attempt to explain to the more unrealistic party why I believe my proposal is better than its litigation alternative.

If the unrealistic party finds out or suspects that I previously received an answer from its adversary—who I believe is more likely to accept my proposal—continuing my attempts to do reality testing with the unrealistic party

could compromise the confidentiality that I promised to both parties when I said that I would not disclose the answers to my proposal, either by words or actions, unless both parties responded with a "yes."

In the box at right is an example of instructions that I sent to counsel for both parties explaining the procedure for replying to my mediator's proposal in a case that I knew would be difficult for the plaintiffs to accept because of their unrealistic expectations as to the case's value. It was a case where I spent many hours with the parties helping them agree on the wording of a complicated definitive settlement agreement. I knew it would be difficult to help the plaintiffs realize that my proposal's dollar number was preferable for them than their litigation alternative.

Fortunately, the plaintiffs' attorney realized that my mediator's proposal was clearly better for his clients than their litigation alternative. However, he needed my help in convincing his clients to overcome their anger at the defendant and avoid what would most likely be a worse result for them if the case went to litigation.

Because I expected that it would take much time for me and plaintiffs' counsel to convince the three plaintiffs in the matter to accept my proposal, I instructed the parties to each let me know when they were ready to give a "yes" or "no" answer. But I also asked them to refrain from telling me what that answer was until I was told that both sides were ready to give their answers. That way, I could continue to help the plaintiffs' counsel convince his clients to accept the proposal as being preferable to the litigation alternative without causing the plaintiffs to suspect that the defendants had previously accepted the proposal.

* * *

I believe that the mediator's proposal is an effective endgame to break impasse for those mediators who are willing to be evaluative when necessary. I find it almost always works. To give up without attempting to use the mediator's proposal as a last resort is a missed opportunity, assuming that the parties hired the mediator to help them settle their dispute on terms that they ultimately decide are better than their litigation alternative.

Instructions for Replying To a Mediator's Proposal

Here is a form letter from the neutral designed to find out whether the parties will agree to the mediator's proposal, while maximizing the likelihood of reaching an agreement:

Dear [Plaintiffs' attorney] and [Defendants' attorney],

Now that you both know that $_____ is the dollar amount that I propose be inserted in the previously agreed final draft of the Settlement Agreement, I want to explain the procedure for communicating to me, in confidence, your clients' "yes" or "no" response to my mediator's proposal.

I realize that neither of your clients will be happy with the number I proposed. One definition of a good settlement is when both sides are equally unhappy. Particularly because I know that both sides will be unhappy with my proposal, it is important that neither side make a hasty decision as to whether to accept or reject it.

In order to give both sides ample time to make a rational business decision, I am requesting each of you to let me know **when** your client has reached a decision, without telling me at that time **what** that decision is. Once I hear that both sides have made a decision, I will then ask each of you to simultaneously send me a confidential email in which you indicate your client's decision, which must be either an unconditional "yes" or "no." The reason that I do not want to know the answer from either side prior to knowing the answer from the other side is to give me an opportunity to do some additional risk analysis with one side without that side believing that I would not be doing that risk analysis if the other side had not previously said "yes." Getting simultaneous responses will enable the side that says "yes" to be sure that, if the other side says "no," the party that said "no" will not know whether the other side said "yes" or "no." That way, if we don't end up with a settlement that is acceptable to both parties, the party that said "yes" will not be prejudiced in any possible future settlement negotiations.

As I previously explained, the mediator's proposal is an "end-game" which a mediator should use only after all other efforts to settle have failed and the parties have reached an unbreakable impasse in the negotiation process. It is a last resort effort to see if we can salvage what would otherwise be a failed mediation. Although it is a non-negotiable "take it or leave it" settlement proposal, it represents what I believe should be better for both parties after factoring in the risks, uncertainty and costs of the litigation, including the intangible costs. In the more than 350 cases that I have mediated, there were only seven in which I did not get two yeses to my mediator's proposal. In six of those cases I got one "yes" and one "no," and in all of those six cases the side that said "no" ended up with a worse litigation or arbitration result than it would have had if it had accepted my proposal.

My hope is that we can avoid that happening in this case so that neither side will end up having "non-settler's remorse."

Please feel free to contact me at any time with any questions, and I hope to be having conference calls with you and your clients in the near future.

Sincerely,

Stephen A. Hochman, Esq.
[Address]

CHAPTER NINETEEN

THE TECHNIQUE OF NO TECHNIQUE: A PAEAN TO THE *TAO-TE CHING* AND PENULTIMATE WORD ON BREAKING IMPASSE

Simeon H. Baum, Esq.

Mediators and ADR aficionados love to discuss impasse. Transformative mediators remind us that fostering party empowerment and recognition—not settlement or problem solving—should be the mediator's driving purpose.[1] Still, we confess that for many of us, impasse remains a bugaboo. Those of us who seek to maintain and generate "constructive" discussion and even problem solving in a mediation aptly value the treasure trove of techniques and suggestions that can be found in a book like this one.

[19.0] I. TECHNIQUES

While recognizing the value of these suggested "how-to's," a compendium of impasse breakers for mediation is well served by a final corrective: the technique of no technique. About a dozen years ago, this author moderated a program titled "Impasse Breaking," hosted by the New York County Lawyers' Association. That night, four excellent, experienced mediators presented one technique apiece.

Professor Lela Love suggested that when the parties are snagged on one issue, the mediator can change the agenda. The parties can "pin" the frustrating issue for the time being, lifting a phrase from the entertainment industry, and shift to another potentially more workable issue. With a history of success behind them, they can later return to the troubling issue if, in fact, it has not dissolved or morphed into a more easily resolvable form.

Margaret Shaw suggested applying standards coupled with a transaction cost analysis. In her example, drawn from the employment context, one could derive a back pay number from considering the standard that would be applied by a court, and then compare it to the cost of litigation (which might be even greater).

Judge Kathy Roberts suggested use of the "mediator's proposal." While Steve Hochman develops this concept in his chapter within this compendium, Judge Roberts differed from Mr. Hochman by selecting "doability" as the standard for her proposal—is it likely to settle the case?—rather than fairness or predicted case outcome. This proposal generated a very interesting debate with Professor Love on whether use of a mediator's proposal distorts the mediation process. There were multiple concerns. First, Professor Love questioned whether it is even the media-

1 See, for example, Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994), which sets out this transformative manifesto.

tor's role to provide evaluative feedback or direction to the degree reflected in the mediator's proposal. Moreover, where parties have been encouraged to be candid, exposing case weaknesses and settlement thoughts in caucus, there is a question of whether they might regret that candor if it were now factored into an endgame solution. Conversely, if parties anticipate that there will be a "mediator's proposal," there might be excessive emphasis on spinning the mediator—whether it is with their thoughts on what might settle the case (in the doability model) or their thoughts on legal risks (in a case outcome or fairness model). Over time, its use could stifle candor and creativity. Overall, there is a risk that mediation would shift from partycentric to mediatorcentric. Rather than fostering party empowerment and recognition, or joint, mutual gains problem solving, using the mediator's proposal as the cherry on top of the ice cream sundae threatens to convert that open, fluid, meaningful, and enriching process into an alter ego of court or settlement conferences, where the mediator, and not the parties, is the star of the show.

Roger Deitz suggested use of a "ball and chain." He advises parties at the commencement of the mediation that there might come a time when they wish to leave the mediation. He extracts, *ab initio*, a commitment from each party that if that time arises, he or she will stay if so requested by the mediator. Considering that one of the most valuable services rendered by the mediator is keeping people at the table, this is a useful thought indeed.

[19.1] II. NO TECHNIQUE

At some point that evening, I had the opportunity to suggest the approach I raise here, terming it the "technique of no technique." The core point was that the greatest value a mediator brings to the table is not a set of skills or a bag of tricks; rather, it is the character of the mediator, and particularly the ability to communicate and engender trust. Cultivating trust in the mediator encourages the development of trust among the participants. Essential to this is the mediator's presence. The mediator brings a quality of open awareness that is expressed in all conceivable ways. It is not simply what the mediator says or does. It includes posture, bearing, tone of voice, eye contact, and the power of omission. It involves a sensitive awareness, deep listening, flexibility, and a genuine quality of connectedness or relatedness. The mediator models a mode of being with the parties that implicitly communicates a message. The silent message is we are all decent, capable people of good will who are all in this world together, and can work through this problem together. Underpinning this

message is the sense that there is a force in and embracing us that will work it out, if we persist and let it happen.

Now, this might sound a bit vague or even otherworldly. But the power of attitude cannot be overrated. This intuition finds support in two recent studies by Margaret Shaw and Stephen Goldberg. In a study they did in 2007 polling users of mediators with no judicial background, and in a more recent study they did with Jeane M. Brett, which included users of former judge mediators, they received responses from hundreds of lawyers on what made the mediator effective in moving a matter to resolution. The researchers grouped answers into three broad categories: (1) confidence-building skills (the ability to gain the trust and confidence of the parties), (2) evaluative skills (the ability to encourage agreement by evaluating a party's likelihood of achieving its goals in court or arbitration), and (3) process skills (skills by which a mediator seeks to encourage agreement, not including evaluative skills). By far, the greatest source of success of was confidence-building skills, with 60% of the responses identifying this quality. This was followed by process skills (35%) including patience and perseverance, with evaluative skills being the least significant (33%).[2]

[19.2] A. Attitude

A core takeaway from the Shaw-Goldberg studies is that trust and confidence is key to success in mediation. The highlighted attributes that build trust and confidence relate to character and attitude: "Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions"; "High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional." There are many traits and acts that can be identified. Yet, central to all, I would submit, is the fundamental attitude—call it the mediator spirit—described above, before our mention of this study. The point of using this type of term is to emphasize that there is something whole, something integrative, something at the heart of the mediator that cannot be divided, manipulated, juggled and parsed—a gestalt, to borrow from Fritz Perls[3]—that is essential to the mediator's power. That power, of course is the spe-

2 Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three,* 23 Negotiation J. 4, 393–418 (Oct. 2007). Confidence-building attributes included interpersonal skills of empathy, friendliness, caring, respect, trustworthiness, integrity, intelligence, the readiness to find solutions that comes with obvious preparation. Process skills included patience and persistence, good listening, and diplomatic tact.

3 *See, e.g.*, Frederick S. Perls et al., Gestalt Therapy: Excitement and Growth in the Human Personality (1951).

cial power that comes precisely from powerlessness. In place of judicial or other form of authority, might, or coercive force, is the quality of the mediator that fills this void. That is a power of trust—trusting and trustworthiness, cultivating trust in others. An attitude that values freedom and recognizes that the parties themselves are the valued decision makers. It is a letting go that brings with it the embrace of the whole.

The aspect of the mediator highlighted here affects atmospherics. It does not have to be showy. (Hopefully it is not!) But it makes a major difference in keeping people in the room. It supports communication and creativity. It communicates positive regard for the participants, reinforcing their willingness to continue what can be a difficult discussion.

[19.3] B. Non-Doing

A central point of the "technique of no technique" is not that the various approaches and methods are not valuable. They certainly are. Still, there is something perhaps more essential. There is a time-honored term drawn from China, *wu wei*, which can be translated as "non-doing." This loaded term can be found in the 2,500-year-old classic, the *Tao-te Ching*. If there is any text which could serve as the mediator's bible, my vote would be for this one. Attributed to Lao Tzu, there are hundreds of English-language translations of this seminal text in the Taoist tradition.[4] Discussing the meaning and philosophy of the *Tao-te Ching* and its application to mediation is a major topic that could support a book and is beyond the scope of this chapter. Moreover, there is certainly no intent here to persuade readers that one must adhere to a particular religious or cultural tradition in order to be an effective mediator. But, in *wu wei*, the

4 Two lovely translations of the *Tao-te Ching* are Stephen Mitchell, *Tao-te Ching* (Harper & Row 1988) (with broad poetic license) and Wing-tsit Chan, *The Way of Lao Tzu* (*Tao-te Ching*) (Prentice Hall 1st ed. 1963).

Taoists supply us with a very useful and suggestive concept.[5] One insight of *wu wei* is that sometimes one makes greater progress by not interfering with the activities of others. Rather, letting a course of events develop on its own, as it were, with patience, confidence, and open, accepting attention, can permit the being or event to develop as it should. *Wu wei* suggests stepping out of the way, rather than directing, controlling and manipulating events. To draw on an overused term, it suggests a holistic approach, where the mediator recognizes that larger forces are at play and permits, encourages or assists in their constructive movement.

There are many practical applications of "non-doing" with which we are all familiar. We all know that sometimes it makes sense to hold one's tongue. We all have experienced moments when, by letting someone struggle with a problem, we permit them to arrive at a solution which our intermeddling might have blocked. Our silence can permit a truthful expression or insight to develop in a dialogue that our speech might have stifled. Tact is based on non-doing.

[19.4] C. Stepping Aside

In negotiation, the negotiators have an inner drive towards resolution. They want a solution that will meet their needs. They have their own fears and concerns about legal outcomes. Moreover, extrinsic forces and circumstances support resolution. Costs continue to mount. All the forces of the business, legal, and broader community continue to operate and impinge on the players. Time ticks away. These things are already operating without our encouragement. Non-doing simply helps them find a way of expression, of recognition, and then of choices to take action to dissipate concerns and satisfy needs, to limit risks and reduce costs which no rational or even emotional actor genuinely wants to incur.

5 At least 10 of the 81 chapters (or quatrains) of the *Tao-te Ching* specifically recommend or observe the benefits of *wu wei*. *See* W.T. Chan, *The Way of Lao Tzu (Tao-te Ching)*, chapters 2, 3, 10, 37, 38, 43, 48, 57, 63 and 64. *Wu wei* involves action so integrated with larger reality that the actor is more like one participating in a dance to a universal tune. This actor does not claim credit (Ch. 2), and effectively lets things happen without imposing his will on them or taking possession of them (Ch. 10). This actor does not rely on her own ability (Ch. 2) and has a quality of tranquility (Ch. 57), simplicity (Ch. 48, 57), and softness (Ch. 38): "The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of *taking no action*." Some clues to *wu wei* are found in recommendations to pursue a "stitch in nine" philosophy—dealing with problems before they become too large—and fractionation—breaking down big problems into more workable component parts (Ch. 63, 64). The approach of *wu wei* implies a profound discernment of the power of spontaneous transformation (Ch. 37). To proceed with *wu wei* is to proceed with no *a priori* plan or purpose, and, at a minimum with a high degree of flexibility, sensitivity and adaptiveness.

The preceding examples are just a fraction of the meanings which can be drawn from *wu wei*. A classic image from the *Tao-te Ching* is water. It moves without effort or conscious force, finding the low places, from shape of terrain and force of gravity. The mediator's presence can similarly have influence, without any particular effort on the mediator's part. A handshake, a smile, a nod. We can point to these things and note what a difference they might make in reducing the interpersonal temperature in a room. Yet often, like leaves falling in autumn, they are simply a natural consequence of the mediator's overall character and nature—a character that is supported by disciplined self consciousness.

Continuing with the Taoist theme, while we are at it, we can take another example from *tai chi,* a martial art itself imbued with the philosophy found in the *Tao-te Ching*. We have seen tai chi players in the park, with their flowing, continuous, graceful movements. One component of that martial arts practice is "push hands." Push hands involves two players standing facing each other. As party A places his hands on the other's arm, party B senses the force. As party A presses, party B shifts direction and recedes, so that at no time does he confront or oppose party A's force. Party B, in turn shifts to press party A, who likewise shifts direction and recedes. The main objective in the execution of the four simple push hands moves of "ward off, rollback, press and push" is for the players to maintain contact throughout, forming a harmonious whole, with no more than four ounces of pressure building up at any time. While this practice can be used as a model of non-confrontation, the most significant point to be derived here is of continuous relatedness or connection.

Like a push hands player, the mediator preserves a gentle connection with all participants through the mediator's presence and broad, affirming awareness. The importance of this presence to preserving continuity of constructive dialogue cannot be underestimated. Just as, when things get knotty in push hands, the skilled player neither breaks away nor erupts with force, but maintains sensitivity and lets the form work itself out, so too, the mediator neither breaks off the session, nor necessarily rushes to caucus, nor desperately argues the parties into doing something. Most effective is gently remaining present, perhaps just waiting, listening

deeply, and sensing what is happening, what perhaps is driving this interaction, while also seeing the broader context.[6]

In one employment mediation, conducted a decade ago, an attorney complained that "the mediator did nothing; we settled it ourselves." Assuming the mediator was there throughout and supported continuing talks, staying out of the parties' way, this, too, is non-doing. It is well beyond the role of simple message bearer. One quotation from Stephen Mitchell's translation of the *Tao-te Ching* is apt here:

> When the Master governs, the people
> are hardly aware that he exists.
> Next best is a leader who is loved.
> Next, one who is feared.
> The worst is one who is despised.
> If you don't trust the people,
> you make them untrustworthy.
> The Master doesn't talk, he acts.
> When his work is done,
> the people say, "Amazing:
> we did it, all by ourselves!"[7]

6 With apologies to transformatives who assert that a mediator should maintain a microfocus—not seeking the "big picture"—this statement is made with a recognition that both ends of the microscope and telescope may reveal an opening to something that can move people from the snag of apparent impasse. But living with the impasse is the heart of non-doing. To quote mediator Barry Berkman (of the Himmelstein Friedman school), it is the "paradoxical nature of change" that change can develop when we recognize and accept the reality of a given situation—even of one that seems undesirable.

7 Stephen Mitchell, Tao-te Ching, Ch. 17. Here is Wing-tsit Chan's translation:

> The best (rulers) are those whose existence is (merely) known by the people. The next best are those who are loved and praised. The next are those who are feared. And the next are those who are despised.
> It is only when one does not have enough faith in others that others will have no faith in him.
> (The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow Nature.

Wing-tsit Chan, The Way of Lao Tzu (Tao-te ching), Ch. 17. Although both versions of Chapter 17 speak of the ruler's acting, it is noteworthy that this is seen as others doing it themselves or the ruler's just following Nature. *Cf.* citations in note 4, *supra.*

In 2010, Gerald Lepp, ADR Administrator for the mediation panel of the United States District Court for the Eastern District of New York, held an "ADR Cross Cultural Workshop" structured and facilitated by Hal Abramson of Touro Law School, with Dina Jansenson and Jeremy Lack as panelists. Professor Abramson presented a number of scenarios depicting cross-cultural misunderstandings and elicited suggestions from the audience/participants on how to correct them. At the end of this session, Dina Jansenson wisely observed that most of the time in mediation, the mediator will, appropriately, do nothing more than be aware of the dynamic.

There is much to be said for recognizing that often, less is more. We do not have to fix everything. Beyond this, silence itself is a tremendous force. As noted above, refraining from filling the void is often the greatest wisdom. It leaves space for meaning, creativity, and a host of valuable and significant expressions to emerge.

Professor Len Riskin made a splash in the mediation field in the mid-1990s with his seminal article, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed."[8] "Riskin's Grid," which created a typology of mediators ranging from evaluative and directive to facilitative, and from narrowly to broadly focused, fostered great debate on whether it was within the mediator's purview to conduct evaluations or to direct parties at all.[9] Since 2002, Riskin has embarked upon another groundbreaking path within the legal and ADR field: promoting mindfulness meditation.[10] Drawing on Buddhist Vipassana teachings, Riskin observes that disciplined practice of awareness of one's breathing, and of one's physical, emotional and mental states, can increase relaxation, calm, alertness, and sensitivity to others. He suggests that this can enhance the humane practice of the law and of dispute resolution.

8 1 Harv. Negot. L. Rev. 7 (1996).

9 *See, e.g.,* Kimberlee K. Kovach and Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997). Riskin's 1997 poetic rejoinder can be found online at: http://www.law.fsu.edu/journals/lawreview/downloads/244/riskin.pdf.

10 *See, e.g.,* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients,* 7 Harv. Neg. L. Rev. 1 (2002); Leonard. L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution,* 54 Journal of Legal Education 79 (2004); Leonard L. Riskin, *Knowing Yourself: Mindfulness,* The Negotiator's Fieldbook—The Desk Reference for the Experienced Negotiator (A. K. Schneider, C. Honeyman, ed.) (ABA Section of Dispute Resolution 2006).

Interestingly, I remember years ago reading about a Zen master who mediated a deadly dispute between warlords in medieval Japan. He remained calm, gave recognition to each party, identified interests, promoted a resolution that permitted the saving of face, and was detached from identifying with one side or the other. While, unfortunately, I have not been able to recover this reference, I recall that it struck me at the time as not insignificant that the practice of meditation supported this function. Profound awareness of self enhances calm and deep awareness of others. That, in turn, supports connection and presence.

The "technique of no technique" includes the suggestion that mediators not be stuck on any one technique or approach. In the ABA Dispute Resolution's *Negotiator's Fieldbook*, Peter S. Adler exhorts negotiators not get boxed into a single type defined by two pairs of opposites—moral or pragmatic, competitive or cooperative—but rather, remain flexible: the Protean negotiator. The same recommendation applies to mediators facing impasse. Definitely, we should peruse our bag of tricks. But, whatever our preferred strategy, style, or approach, we might be alert to the possibility that it makes sense, under the circumstances, to break the rules. Even the attentive, trust-generating, integral, flexible, supportive mediator—who modulates presence and relatedness—ought to be ready, at times to try one of the approaches recommended in this compendium.