The Basics of Post-Pandemic Part 137 Mediation

December 15, 2020 – NYCLA Part 137 ADR Training: Day 2

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Mediation: What Is It?

"A process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator's role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties."

Source: Nassau County Bar Association, *Mediation & Arbitration: Alternative Dispute Resolution Through the Nassau County Bar Association* (Brochure) (updated as of Feb. 3, 2017 and available at https://www.nassaubar.org/wp-content/uploads/2018/01/Mediation_Arbitration_Brochure_2_3_2017.pdf)

Mediation vs. Arbitration

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- No Final Decision
- Lowest Cost vs. Litigation
- No Set Procedure
  (More Informal)
- No Motion Practice
- Little to No Discovery
- No Court Enforcement Role
- Parties in Control
- Lawyers Optional

- Final Decision
- Lower Cost vs. Litigation
- Set Procedure
  (More Formal)
- Motion Practice
- More Discovery
- Court Can Enforce Decision
- Arbitrator(s) in Control
- Lawyers Usually Required

* *

Litigation vs. Mediation

Litigation = Legal Fees + Damages + 18 (min.) Months of Depositions, Discovery, Trial Prep + Trial

Mediation = 2 to 30 Days of Mediation Sessions/Caucus – Fees – Public Relations Risk + Confidentiality

Source: Ricardo Granderson, E-mail dated Aug. 18, 2017 to NYC-DR Listserv (John Jay College)

The Position Prison

"When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in 'saving face'—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties' original interests."

Source: Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books 3d ed. 2011) (Kindle Location 363 of 3669)

Needs and Interests

Keys to the Position Prison

- **Needs and Interests - Broader Than Positions**
  - **The "Orange" Dilemma**

    (with $ being just a green orange)
- **Creative Option Generation**
- **Preservation of Relationships**
- **Strategic Future Relationships**
  - **Avoids "Bridge Burning": Today's Adversary**

    May Easily Become Tomorrow's Ally

B.A.D.G.E.R.

A Mediation Process Summary

- **B – Begin the Mediation (Introductions, Rules)**
- **A – Accumulate Information (Case Statements)**
- **D – Discuss Needs & Interests and/or Develop Agenda**
- **G – Generate Movement / Options (Party-Driven)**
- **E – ESCAPE to Caucus (if necessary) –**

  E – Explore settlement options; S – Signal warning signs; C – Confirm movement;

  A – Attack recalcitrant party's BATNA ("Agent of Reality"); P – Pause; E – Evaluate
- **R – Resolve the Dispute**

Source: Prof. Joseph B. Stulberg, *Taking Charge Managing Conflict* 58 (1987) (and Prof. Lela P. Love (informally))

Learning How to B.A.D.G.E.R

- ✓ ***Success as a Mediator for Dummies*** **by Victoria Pynchon & Joe Kraynak (Apr. 2012) ("SAM-D") (available off Amazon)**
- ✓ **Shadow/Observe or Co-Mediate with Experienced Mediators (and not only in Part 137 Cases)**
- ✓ **Attend Part 146 40-Hour Basic/Advanced Mediation Trainings (frequently advertised on NYC-DR listserv by S. Baum & S. Hochman, S. Stalder, and others)**
- ✓ **Remember Polonius in *Hamlet*, Act 1 Scene 3: Do What Works for YOU (and not what works for others) – "This above all: to thine own self be true."**

SAM-D Success Sheet

- ✓ **Grasping the Mediation Process**
  - ❖ **B.A.D.G.E.R. Expanded**
- ✓ **Exploring Mediation Fundamentals and Techniques**
  - ❖ **Anchoring**
  - ❖ **Appealing to Higher Values**
  - ❖ **Asking Diagnostic Questions (and Active Listening)**
  - ❖ **Bracketing**
  - ❖ **Distributive Bargaining (a/k/a "How Much Pie Per Party?")**
  - ❖ **Forming Contingent Agreements**
  - ❖ **Framing (and Deflection)**
  - ❖ **Interest-based Negotiation**
  - ❖ **Logrolling**
- ✓ **Generating Business as a Mediator**

Source: Victoria Pynchon & Joseph Kraynak, *SAM-D Cheat Sheet*, https://www.dummies.com/careers/career-planning/changing-careers/success-as-a-mediator-for-dummies-cheat-sheet/

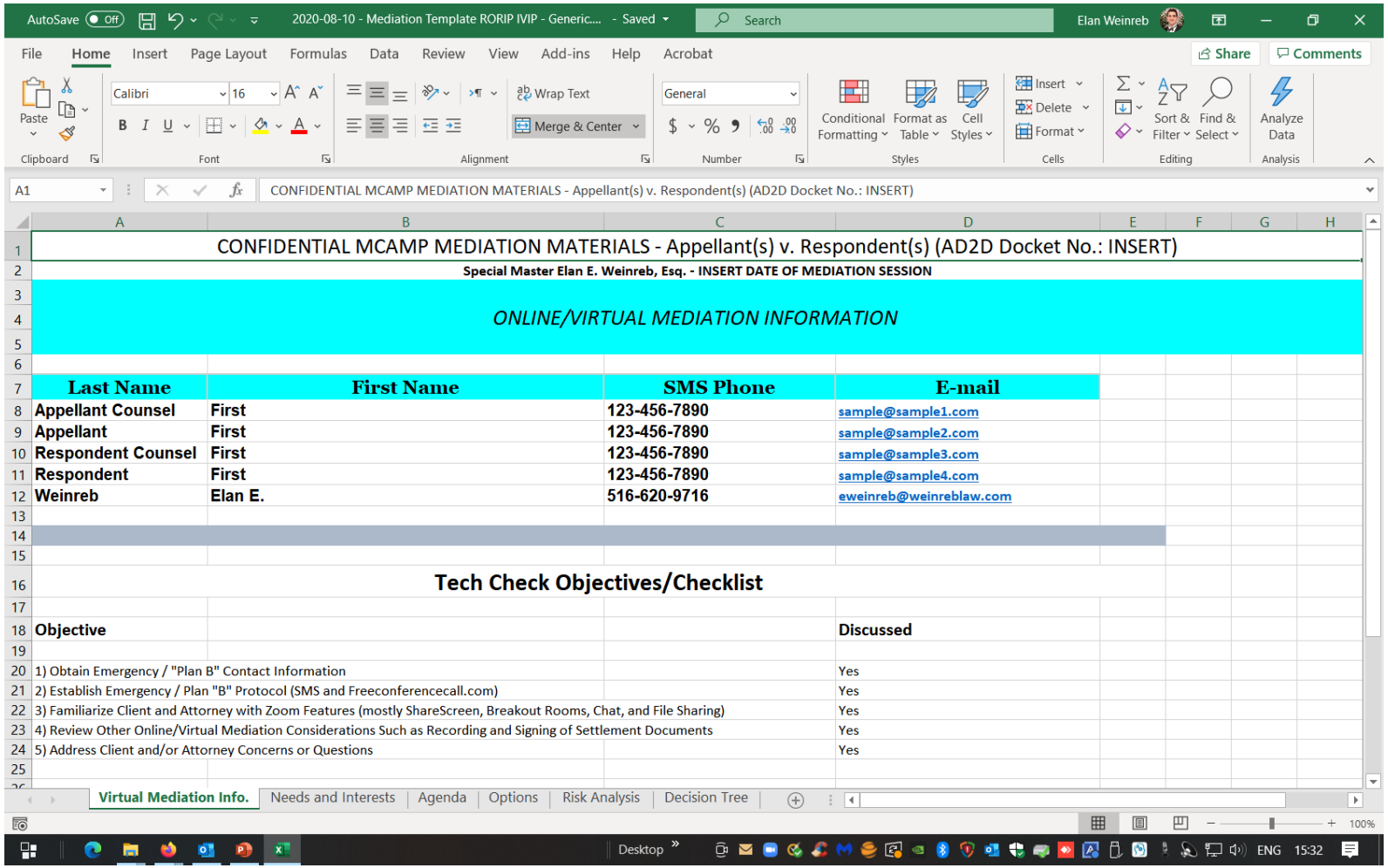
Performing the Tech Check (1)

IMPORTANT: All steps below apply to <u>BOTH</u> NYCLA Part 137 Arbitrations and Mediations!

1. **Obtain Emergency Contact Information (SMS/Text Phone Numbers)**
2. **Establish Emergency Protocol (and then DRILL, DRILL, DRILL!)**
3. **Familiarize Client and Attorney with Videoconferencing Features (ShareScreen, Breakout Rooms, and Chat)**
4. **Discuss File Sharing / Production of Additional Documents**
5. **Review NYCLA Part 137 Mediation Agreement and Establish Understanding as to Recording and E-Signing Settlement Documents**
6. **Set Date(s) for Initial Mediation Session, Pre-Mediation Statements and Document Productions**
7. **Address Client and/or Attorney Concerns or Questions (and explain that in mediation, *ex parte* communications are encouraged).**

Performing the Tech Check (2)

USE A TEMPLATE AND FILL IT IN REAL TIME



CONFIDENTIAL MCAMP MEDIATION MATERIALS - Appellant(s) v. Respondent(s) (AD2D Docket No.: INSERT)

Special Master Elan E. Weinreb, Esq. - INSERT DATE OF MEDIATION SESSION

ONLINE/VIRTUAL MEDIATION INFORMATION

Last Name	First Name	SMS Phone	E-mail
Appellant Counsel	First	123-456-7890	sample@sample1.com
Appellant	First	123-456-7890	sample@sample2.com
Respondent Counsel	First	123-456-7890	sample@sample3.com
Respondent	First	123-456-7890	sample@sample4.com
Weinreb	Elan E.	516-620-9716	eweinreb@weinreblaw.com

Tech Check Objectives/Checklist

Objective	Discussed
1) Obtain Emergency / "Plan B" Contact Information	Yes
2) Establish Emergency / Plan "B" Protocol (SMS and Freeconferencecall.com)	Yes
3) Familiarize Client and Attorney with Zoom Features (mostly ShareScreen, Breakout Rooms, Chat, and File Sharing)	Yes
4) Review Other Online/Virtual Mediation Considerations Such as Recording and Signing of Settlement Documents	Yes
5) Address Client and/or Attorney Concerns or Questions	Yes

The Pre-Mediation Statement

I ask the parties/counsel to address these items, but there is no mandate to follow this form or order or any other form or order.

1. The name and title, if any, of the party who will be attending the conference with counsel.
2. A brief statement of the key factual and legal issues involved in the dispute.
3. The main "sticking points" preventing settlement.
4. A description of any important rulings made or pending motions in the case which may affect settlement.
5. The status of settlement negotiations, including the last settlement proposal made by you and to you.
6. A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of arbitration/litigation.
7. Key documents necessary for the mediator to understand the case.
8. Why should you prevail and by what amount? (*E-mail only*)
9. Why should the other side prevail and by what amount? (*E-mail only*).

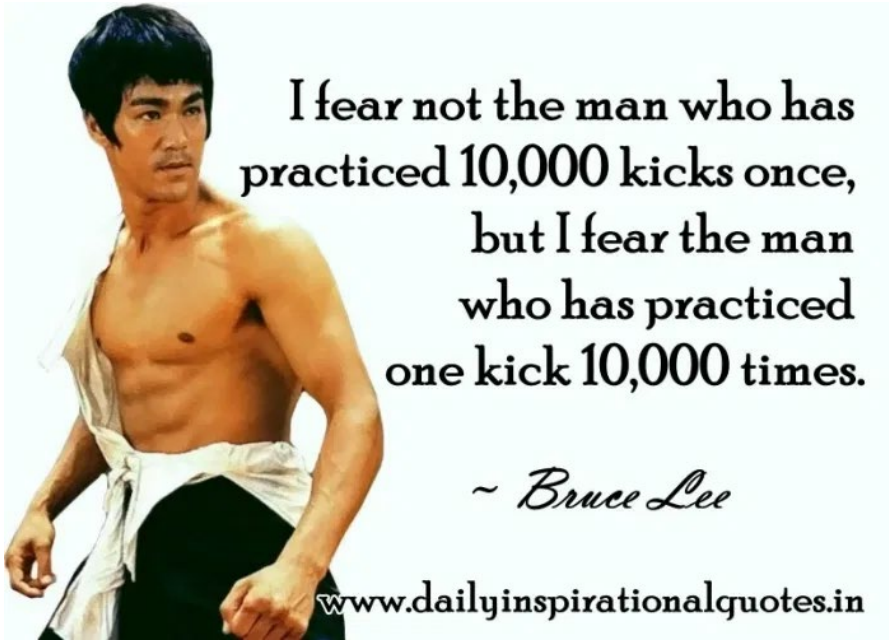
"The" Approach vs. "Your Approach" to Mediation: Facilitative, Evaluative, Transformative, Protean/Chameleon?

"**Overall Conclusions**. Looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater potential for positive effects than negative effects on both settlement and related outcomes and disputants' relationships and perceptions of mediation: (1) eliciting disputants' suggestions or solutions; (2) giving more attention to disputants' emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) using pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.

The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys' perceptions of mediation, but have the potential for negative as well as positive effects on disputants' relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects on settlement, and both sets of actions have the potential for negative effects on disputants' perceptions and relationships."

Source: ABA Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques*, at 4 (June 12, 2017)

Whatever Your Approach, Be Consistent and PREPARE!



Two Videos to Watch at Least **TWICE** to Prepare for the Initial Session

I. ***2020-05-07 - NYCLA ADR Committee Mock Mediation with Susan Guthrie***
(available at https://www.youtube.com/WeinreblawPLLC/videos and
https://vimeo.com/user27287947/review/420096804/5229c15407)

II. ***2020-06-25 – Anatomy of a Virtual Mediation (Nassau County Bar Assoc.)***
(available at https://vimeo.com/432986905)

Day of the Initial Session (1)

At your first "lead" mediation, you will likely feel nervous, and that's good. It means you genuinely care about the parties and recognize that much is at stake. It's now your turn to guide them through the rapids of their conflict, and you may not feel like you even have a paddle to assist them . . . but have confidence! Mediation is <u>THEIR</u> process, not yours. Follow the list below and then B.A.D.G.E.R. away!

A. Do not stay up too late the night before engaging in last-minute preparations. Get a good night's rest, and do not rely on caffeine and/or sugar in the morning. (If you're not allergic, nuts are great for breakfast).

B. Do not update your computer/tablet less than two hours before the initial session. Try to update it the day before the session, if possible.

C. Inform your office staff and/or anyone else who would otherwise contact you during the session that you will be busy throughout the day such that all calls should be sent to voice-mail to be answered later.

D. Turn your cell phone on to vibrate and keep it that way until the initial session is over. Try to avoid as many other noise distractions as possible.

E. Review in this order: the parties' Pre-Mediation Statements, Retainer Agreement(s) or Engagement Letter(s), Bills/Invoices, and finally, the Mediation Agreement.

Day of the Initial Session (2)

F. Send (or have the case administrator send) a test group-text/SMS message to everyone's phone number no later than one hour before the initial session to ensure that all emergency contact information is valid/operational.

G. Arrange to be present virtually (i.e., log on) at least 15 minutes in advance of the initial session, and in the extremely unlikely event that you're hosting without a case administrator off your own account, make sure that your videoconference security settings conform to those called for and/or implicated by the Mediation Agreement.

H. Are you appropriately dressed for the initial session? Is your virtual background appropriate and set correctly? If not, fix these issues pronto!

I. Under **NO CIRCUMSTANCES** should you ever enable or disable any new videoconferencing features that you have never used or have actively disabled. Now is not the time to run a second Tech Check.

J. If you have not already been given "Host" status/privileges by the case administrator, s/he should grant you that status.

K. Have your emergency contact list at the ready. Have all co-mediators arrived? If not, and it's less than 5 minutes to "showtime," contact them.

Day of the Initial Session (3)

L. Assuming nothing has gone awry with respect to co-mediators arriving (and if something has gone awry, try to wait on your colleagues to arrive), welcome in whoever is in the "Waiting Room" area by 5 minutes past the scheduled start time or at least send him/her/they a welcome broadcast message. In mediation, there is no issue with *ex parte* communications, so whoever is there can stay with you. Feel free to engage in "small talk", but do not discuss the merits of the case.

In contrast, in an arbitration scenario—even one involving a three-arbitrator panel—there can be no such "small talk." After identifying yourself, immediately proceed to place any party and his/her/their counsel into a Breakout Room and leave them there until all parties and counsel are present. You may explain before doing so that this procedure is being adopted to avoid *ex parte* communications and appearances of impropriety.

M. If by 10 minutes past the scheduled start time of the session, necessary parties or counsel are still not present, then assume technical failure and either have the case administrator attempt to contact absent parties/counsel or, in the absence of a case administrator, do it yourself. If possible, this should be done by group messaging to all involved for purposes of transparency and avoidance of *ex parte* communication, even where permissible.

Day of the Initial Session (4)

N. If one or more parties or counsel confirm having difficulty logging on to the session via group text message, then you must make a judgment call: if the problem is one that you have encountered before and can either be solved or circumvented quickly—within 60 seconds—then do so and announce this via group text message. If it cannot be quickly solved or circumvented, then group text message all to initiate the emergency technical failure protocol (a/k/a "Plan B") set up in the Tech Check, and follow that accordingly.

O. Once any login difficulties have been resolved and any parties or counsel who had difficulty logging into the session have logged in, close any Breakout Rooms that might be holding parties and/or counsel who arrived early (NYCLA settings provide for a 60-second warning countdown before Breakout Rooms are closed automatically).

P. Perform a quick ODR confidentiality check. This entails: (i) having each party and counsel confirm that they are alone in a private and secure environment (with allowances made for well-behaved children and pets **briefly** "passing through" on occasion); and (ii) reviewing the sections of the Mediation Agreement pertaining to confidentiality of the mediation process. If anyone who is not a neutral is using a virtual background, request s/he to temporarily disable that background and then pan his or her camera around in a 180-degree arc to demonstrate privacy (at least to some degree).

Day of the Initial Session (5)

Q. While you are technically still only on the "B" of B.A.D.G.E.R., it now makes sense to first quickly confirm that no recording of the session has occurred, is occurring, or will occur (unless everyone has agreed in writing otherwise) but then also to discuss the "endgame"—resolution of the dispute—by means of electronic signatures through e-signature providers like AdobeSign or DocuSign®. Doing this "primes" the parties into thinking about settlement even before they have engaged in the mediation process itself.

IMPORTANT NOTE: Recording is one of the few areas where there is a big distinction between ODR mediation and ODR arbitration. In the latter, at the arbitrator's discretion, *see Rhinestone v. New York City Transit Auth.*, 142 A.D.2d 562 (2d Dep't 1988); *Matter of Andersen Trading Co. v. Brimberg*, 119 Misc. 784 (Sup. Ct. New York County 1922), non-stenographic recording is permissible, but it should only be done in the cloud and not local. (For NYCLA Part 137 arbitrations, case administrators—not arbitrators— should at least start cloud recordings such that if something goes wrong with the recording, the arbitrator(s) are not directly involved).

R. **CONGRATULATIONS!** You're now ready to move on to the rest of the B.A.D.G.E.R. process, which is more fully spelled out in SAM-D and other mediation texts, although some basic pointers will be presented now to get you started mediating.

Mediator Techniques – RORIP & IVIP

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DISTRIBUTIVE VARIABLES

- **R**ights
- **O**bligations
- **R**emedies
- **I**ssues
- **P**ositions

EXPANSIVE VARIABLES

- **I**nterests
- **V**alues
- **I**dentities
- **P**ower

* *

"Rights – *Entitlements granted by law, custom, and agreement*; Obligations – *Duties required by law, custom, and agreement*; Remedies – *Legal solutions available in adversarial proceedings*; Issues – *Questions or topics that give rise to disputes*; Positions – *Opinions regarding an issue*; Interests – *Needs, desires, fears, preferences, priorities, beliefs, and motivations for the positions that people take*; Values – *Beliefs and principles that govern a person's behavior and choices*; Identity – *Characteristics that define a person, including groups the person feels she belongs to, such as Christian, Democrat, or baby boomer*; Power – *The need to win or at least feel that the outcome is fair*."

Source: Victoria Pynchon & Joseph Kraynak, *Success as a Mediator for Dummies* 208 (John Wiley & Sons, Inc. 2012)

Mediator Techniques – Active Listening: Beyond Reflection

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While there are many topics and areas in mediation upon which even expert mediators disagree, there is one skill that all mediators (as well as arbitrators) have come to revere, and that is one's ability to:

LISTEN (anagram for "SILENT")

Listening at a basic level involves comprehension and retention of that which is heard, what is often referred to as "passive listening."

At a more advanced level, **active** listening involves four steps (VECS):

1) Validate
2) Empathize
3) Clarify
4) Summarize (and Expand)

"**With active listening, we use open ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth**. A classic formulation is **VECS: validate, empathize, clarify and summarize**.

By this approach, the other party feels less alone and more willing to open up. **This is the royal way to learning their interests**. With that information, one can look for ways to create value in a deal – ways to satisfy the other party's interests and achieve satisfaction of one's own."

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Source: Simeon H. Baum, *Tips on How to Negotiate and Acquire Negotiation Skills* (Resolve Mediation Services) (available at https://mediators.com/news-resources/tips-on-how-to-negotiate-and-acquire-negotiation-skills/4/)

Mediator Techniques – Reframing

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"Perhaps the single most powerful tool of the mediator, reframing is the subtle but effective technique used to lessen conflict and reorient participants towards constructive conversations. While litigators use language as a sword, mediators can use it as a shield. You can utilize the comforting effects of reframing to minimize rather than heighten conflict in the discussions. . . . .

A classic reframe (or 'positive reframe', as it's sometimes called) is an intervention in which the mediator repeats back the sense of a statement or position of a person in slightly altered terms, designed to distill out the negative connotations and emphasize the positive. An example is when a divorcing spouse declares 'I insist on keeping custody of my child!', and the mediator reframes it by saying 'Okay, so I understand parenting is important to you...'"

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 122 (2020) (available for purchase directly from the author)

Mediator Techniques – Deflect / Pivot

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"A gentle response deflects wrath; a harsh word provokes anger."

Proverbs 15:1

30. PIVOT

WHAT: There are two types of pivoting used in mediation -- the micro maneuver of "Affirm & Pivot", and the macro move called the "Progress Pivot".

WHY: To transmute the negative energy from the past into positive momentum for the future.

HOW: ***Affirm & Pivot*** – Acknowledge the emotions expressed about the past, and then use the energy to gently point their faces towards the future: "Given the real difficulties I'm hearing this has caused in the past, how might you structure things so that it works differently going forward?"

Progress Pivot – Announce: "Okay, we've done a good job of exploring the issue of fault; now, let's get to the business of solving the situation."

WHEN: On the microscopic level, whenever someone's stuck discussing how difficult or painful interactions have been on this point.

On the macroscopic level, after the participants have had an adequate time to make their opening statements, tell their stories, and vent ...and you determine it's time to move on to working towards a solution

"מַעֲנֶה רַּךְ יָשִׁיב חֵמָה וּדְבַר עֶצֶב יַעֲלֶה אָף"

משלי טו: א

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 132 (2020) (available for purchase directly from the author)

Mediator Techniques – Re-Voicing

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38. RE-VOICE THE DIALOGUE

WHY: The way you phrase a question can -- and does -- subtly influence the answer provided… as well as how the recipient perceives your fairness.

HOW: Rephrase everything in a passive voice, so that "Henry is offering you $1,500 a month" becomes "Would $ 1,500 per month be a workable number, Wendy?"

Also, work around the inherent limitations of the English language. Don't ask "With whom will the child live?" when it's really not a binary question, but one of "When will the child be with you… and when with *you*?" Don't pose "Which of you will claim the child for the tax credits?" since implicit in that query is that it will be one OR the other; instead, craft the question as "How will the two of you handle the annual tax benefits from the child?" Don't put it as "Which of you will get the kids for Thanksgiving this year?", but rather "What's the family's plan for celebrating Thanksgiving this year?", avoiding the binary, win/lose competition.

WHAT: Re-present problems in the passive voice, and discuss solutions without attributing them to any particular author. Also, edit out any word choices in your questions that implicitly incorporate (or can be taken as pointing to) a limited answer.

WHY: People embroiled in a marital fight will tend to discredit any idea, proposal, or suggestion emanating from "the enemy" as worthless -- regardless of how brilliant, perceptive, or useful the comment might actually be. (The technical psychological term behind describing this instinctive rejection of "whatever you say, I'm against it" is "reactive devaluation".) Sometimes a messenger is considered so toxic that the message is discarded without even being heard, much less considered.

WHEN: When one or both members of the couple appear to be set in rejecting any ideas.

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 140 (2020) (available for purchase directly from the author)

Mediator Techniques – Strategies for Breaking Impasse (1)

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- **Ask diagnostic questions.** Ask questions like, "What do you believe would be the best solution for everyone?" or, "What could your opponent do to signal progress?"
- **Bracket your way to compromise.** Ask each party, "If the other party were to offer _____, would you be willing to offer _____ in return?" This approach often helps a party move into the range of reason without requiring the other party to move there first.
- **Encourage a party to make a concession and the other party to reciprocate.** When you name the concessions the parties have made and recite the reciprocal moves by the other, the parties feel more satisfied about the progress they're making and more hopeful about their ability to close the deal.
- **Perform a cost-benefit analysis.** Calculate the costs and benefits of any proposed solution as compared to the costs and benefits of the parties' failure to reach agreement.
- **Reframe the possible outcomes.** When a party refuses to make further concessions, to save face or avoid the impression that he's lost, reframe the resolution from loss to victory by stressing, for instance, that resolution is control over the conflict.
- **Soften a hard offer or demand.** Ask diagnostic questions to learn the reasons why a party refuses to make further concessions or is standing by an unreasonable offer or demand. Explaining the reasons for one party's intractability to her bargaining partner can soften what seems to be a hostile or unnecessarily adversarial position.
- **Use a decision tree.** Draw a flow chart illustrating the possible outcomes of the choices the parties have.

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Source: Victoria Pynchon & Joseph Kraynak, *Strategies for Breaking Impasse* (culled from SAM-D) (available at https://www.dummies.com/education/law/strategies-for-breaking-impasse/)

Mediator Techniques – Strategies for Breaking Impasse (2)

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40. EVALUATE

WHAT: Giving your opinion as to what you think they should do, or providing insight into what the Court would likely do regarding issue.

WHY: At some point, progress may be impossible unless a person can move from a fixed position based on erroneous assumptions of success or failure… or illogical thinking.

HOW: Ask "Would it be helpful to both of you if I were to share what I think ?" or "Would you each like to hear what I'd expect a Court would do on this question?". But remember -- you must get permission from both before you proceed, because while you may have concluded that this is What They Need, but if they don't agree... you were wrong.

WHEN: Ideally, only when you have something that EACH will be unhappy to hear...so that their disappointments can be balanced. But in any event, only when it's the only way to move forward…

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 142 (2020) (available for purchase directly from the author)

Mediator Techniques – Strategies for Breaking Impasse (3)

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32. COMFORT

WHAT: Comment directly on the emotions both people may be experiencing, and assure them it's perfectly normal and expected.

WHY: To ease their pain.

HOW: Point out that it's normal and acceptable to feel anger, despair, love, hatred, and fear during a divorce. Observe that many -- if not most -- couples working through a separation experience not only disagreement, but powerful emotions of both sadness and anger.

Establish through eye contact, by the tone of your voice, through your hand gestures and body language, that you empathize with what each is experiencing. Utilize "active listening" techniques to assure participants that they're being heard.

WHEN: Whenever the opportunity arises...

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 134 (2020) (available for purchase directly from the author)

Generating Options

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26. GENERATE OPTIONS

WHAT: Articulating possible solutions to a given issue or impasse, by either eliciting them from the couple or stating them yourself.

WHY: As one not embroiled in the controversy, it may be easier for you to spot possible solutions; as one with more experience with such issues, you may be able to share answers others have come up with for that problem. And, as the couple with the problem, they are uniquely situated to come up with creative solutions.

HOW: **YOURS:** Always put forth your ideas as hypotheticals about what they "might" do -- NEVER as statement of what they "should" do, remembering that anything *you* even suggest will tend to carry undue weight as the "right" thing to do. Always propose an idea in a manner that makes it clear that it's perfectly acceptable for either or both of them to reject it. The best approach is to list *all* the possible options and let the couple rank them as brilliant, acceptable, or terrible. Introduce your ideas with "There are three ways that I know that couples handle this..." or "Might you think about..." or "Have you ever considered...", or the all-time favorite: "What if you were to...?" Preface your first such suggestion with a disclaimer that "I generate good ideas and bad ideas -- only you two can identify which are which". Under extreme circumstances, you might even want to utilize the therapist's tool called a "paradoxical intervention"; it's a powerful, but tricky, technique of articulating a deliberately bad idea or suggestion -- just to stimulate their rejection of it and induce their own discussions of a better approach.

THEIRS: Channel negotiations so that each is invited to suggest what they – and not their spouse – might do to resolve the issue. Then keep asking for more possibilities – "And what else...?" until they've have truly run out of suggestions.

WHEN: Only when they seem to have exhausted their own abilities to come up with proposed solutions.

Only after you have asked each one what he or she (and NOT the other) might do that would provide a solution.

Only after you have waited for A FULL TEN SECONDS after the moment that you determine it appropriate and acceptable for you to offer a solution...

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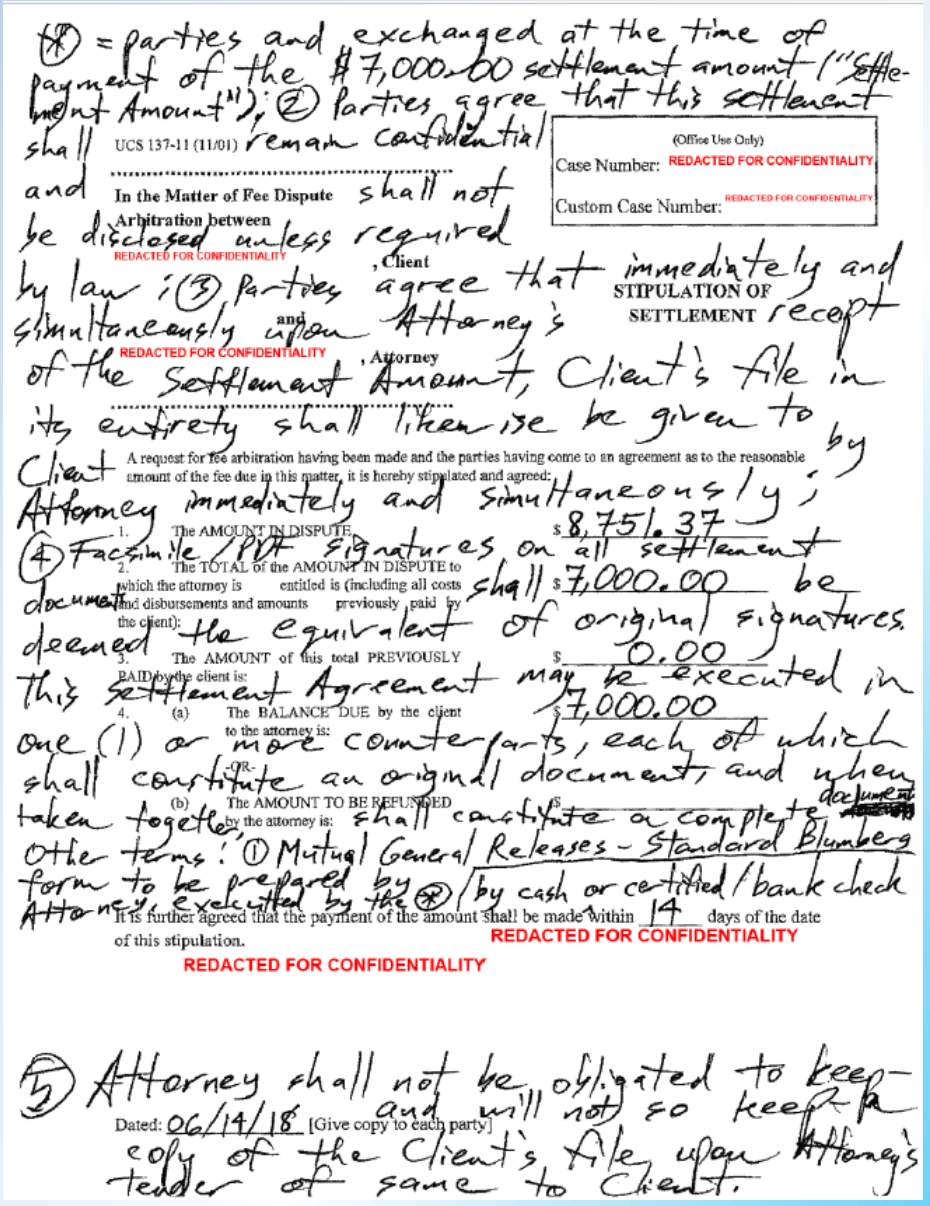
Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 128 (2020) (available for purchase directly from the author)

Resolving a NYCLA Part 137 Dispute by Mediation (1)



(*) = parties and exchanged at the time of payment of the $7,000.00 settlement amount ("Settlement Amount"); (2) Parties agree that this settlement shall remain confidential and shall not be disclosed unless required by law; (3) Parties agree that immediately and simultaneously upon Attorney's receipt of the Settlement Amount, Client's file in its entirety shall likewise be given to Client by Attorney immediately and simultaneously; (4) Facsimile/PDF signatures on all settlement documents shall be deemed the equivalent of original signatures. This Settlement Agreement may be executed in one (1) or more counterparts, each of which shall constitute an original document, and when taken together, shall constitute a complete document. Other terms: (1) Mutual General Releases - Standard Blumberg form to be prepared by Attorney, executed by the (*) by cash or certified/bank check

UCS 137-11 (11/01)

(Office Use Only)
Case Number: REDACTED FOR CONFIDENTIALITY
Custom Case Number: REDACTED FOR CONFIDENTIALITY

In the Matter of Fee Dispute Arbitration between

REDACTED FOR CONFIDENTIALITY , Client

and

REDACTED FOR CONFIDENTIALITY , Attorney

STIPULATION OF SETTLEMENT

A request for fee arbitration having been made and the parties having come to an agreement as to the reasonable amount of the fee due in this matter, it is hereby stipulated and agreed:

1. The AMOUNT IN DISPUTE: $ 8,751.37
2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled (including all costs and disbursements and amounts previously paid by the client): $ 7,000.00
3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $ 0.00
4. (a) The BALANCE DUE by the client to the attorney is: $ 7,000.00

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: $

It is further agreed that the payment of the amount shall be made within 14 days of the date of this stipulation.

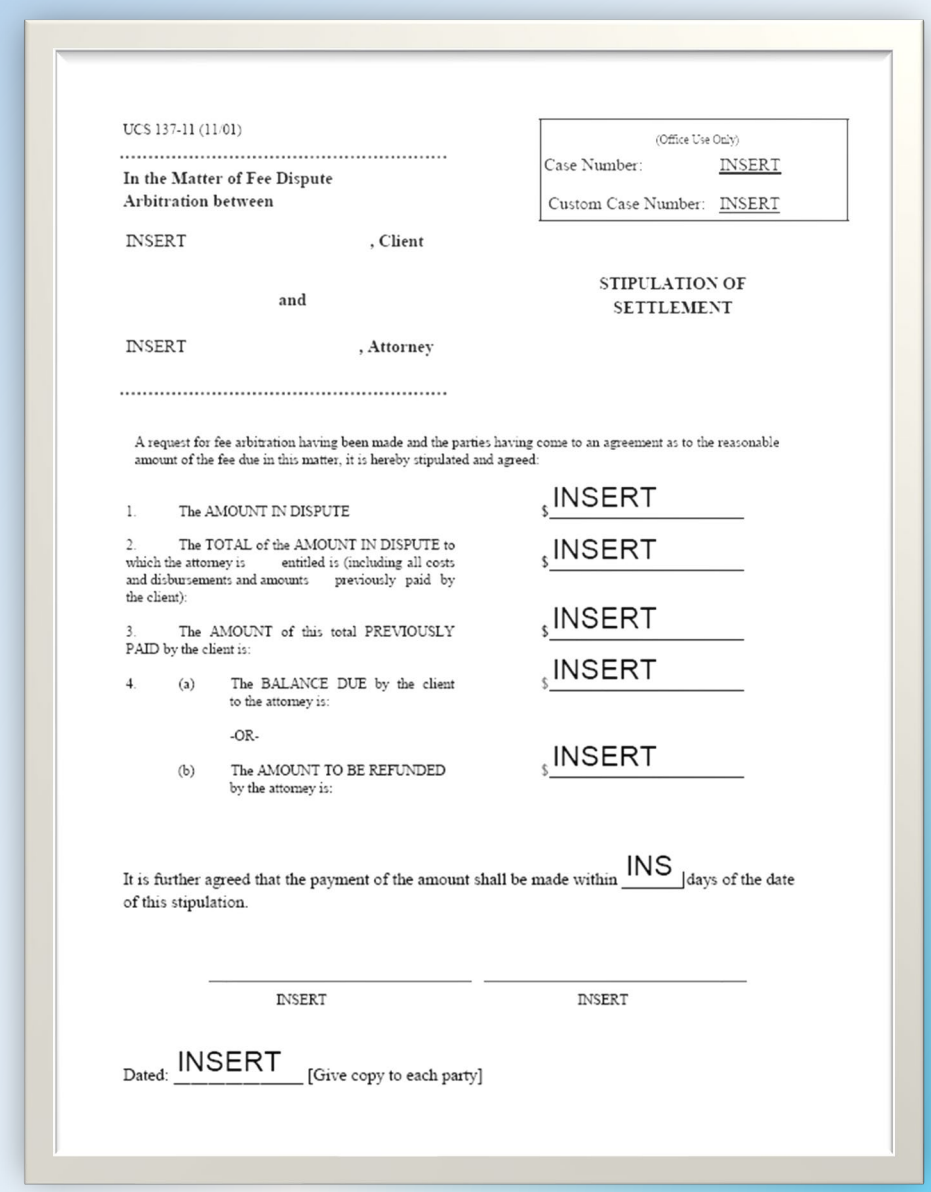
REDACTED FOR CONFIDENTIALITY

REDACTED FOR CONFIDENTIALITY

(5) Attorney shall not be obligated to keep and will not so keep a copy of the Client's file upon Attorney's tender of same to Client.

Dated: 06/14/18 [Give copy to each party]

Resolving a NYLCA Part 137 Dispute by Mediation (2)



UCS 137-11 (11/01)

(Office Use Only)
Case Number: INSERT
Custom Case Number: INSERT

In the Matter of Fee Dispute Arbitration between

INSERT , **Client**

and

INSERT , **Attorney**

STIPULATION OF SETTLEMENT

A request for fee arbitration having been made and the parties having come to an agreement as to the reasonable amount of the fee due in this matter, it is hereby stipulated and agreed:

1. The AMOUNT IN DISPUTE $INSERT

2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): $INSERT

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $INSERT

4. (a) The BALANCE DUE by the client to the attorney is: $INSERT

-OR-

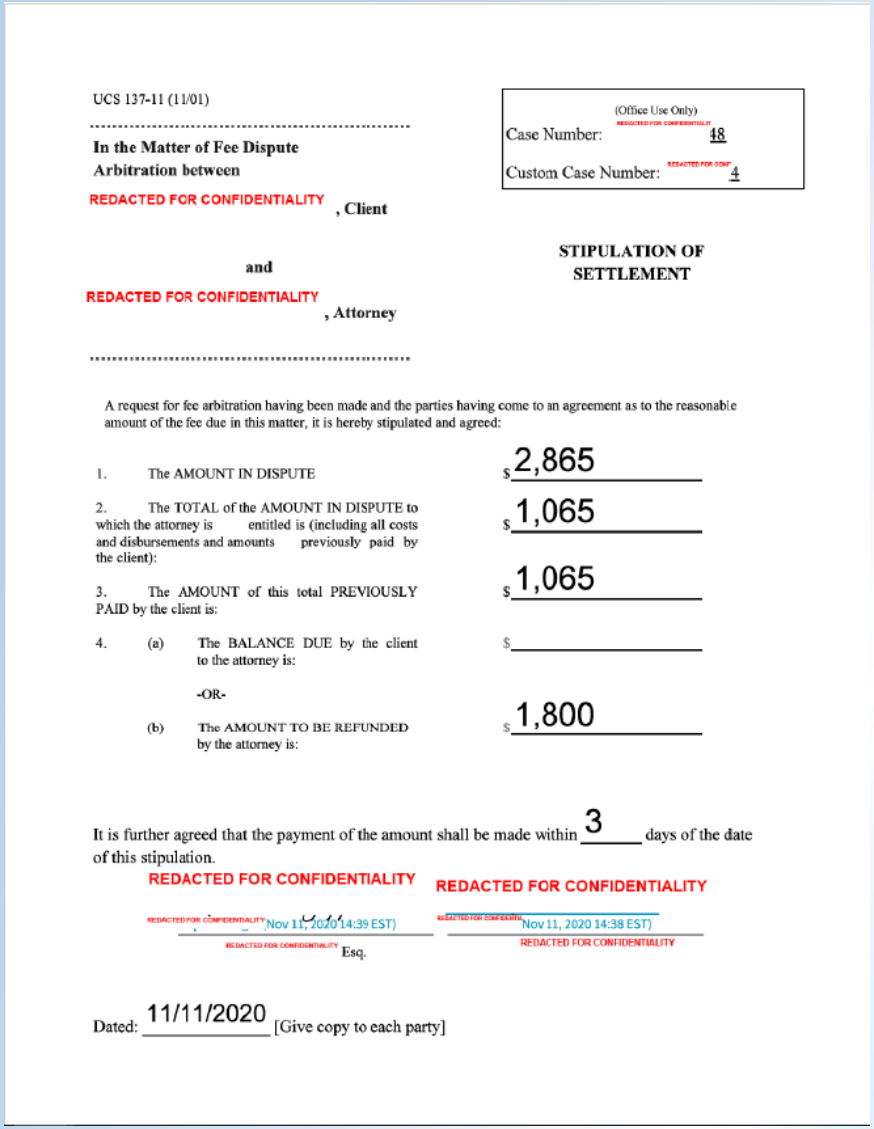
(b) The AMOUNT TO BE REFUNDED by the attorney is: $INSERT

It is further agreed that the payment of the amount shall be made within INS days of the date of this stipulation.

INSERT INSERT

Dated: INSERT [Give copy to each party]

Resolving a NYCLA Part 137 Dispute by Mediation (3)



UCS 137-11 (11/01)

(Office Use Only)
Case Number: [redacted] 48
Custom Case Number: [redacted] 4

In the Matter of Fee Dispute Arbitration between

REDACTED FOR CONFIDENTIALITY, **Client**

and

REDACTED FOR CONFIDENTIALITY, **Attorney**

STIPULATION OF SETTLEMENT

A request for fee arbitration having been made and the parties having come to an agreement as to the reasonable amount of the fee due in this matter, it is hereby stipulated and agreed:

1. The AMOUNT IN DISPUTE $2,865

2. The TOTAL of the AMOUNT IN DISPUTE to which the attorney is entitled is (including all costs and disbursements and amounts previously paid by the client): $1,065

3. The AMOUNT of this total PREVIOUSLY PAID by the client is: $1,065

4. (a) The BALANCE DUE by the client to the attorney is: $

-OR-

(b) The AMOUNT TO BE REFUNDED by the attorney is: $1,800

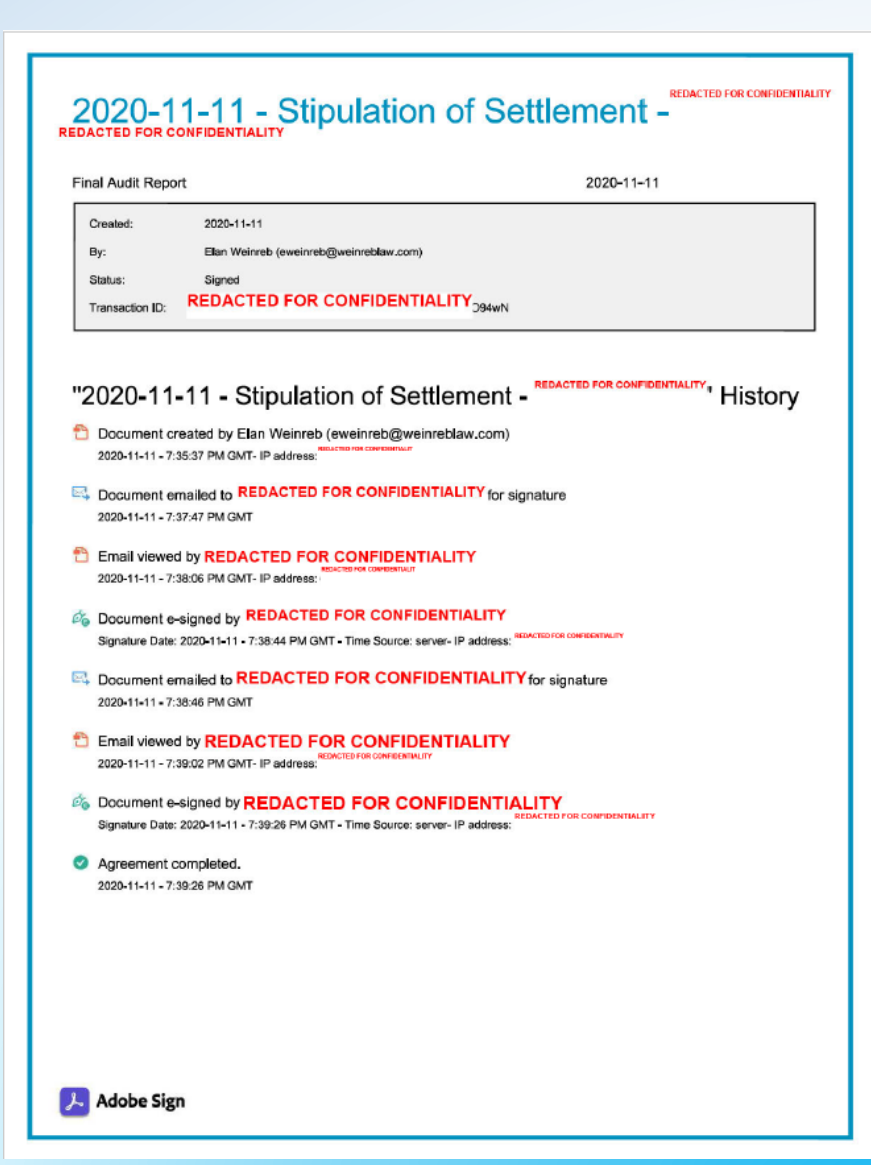
It is further agreed that the payment of the amount shall be made within 3 days of the date of this stipulation.

REDACTED FOR CONFIDENTIALITY

REDACTED FOR CONFIDENTIALITY (Nov 11, 2020 14:39 EST)
REDACTED FOR CONFIDENTIALITY Esq.

REDACTED FOR CONFIDENTIALITY (Nov 11, 2020 14:38 EST)
REDACTED FOR CONFIDENTIALITY

Dated: 11/11/2020 [Give copy to each party]



2020-11-11 - Stipulation of Settlement - REDACTED FOR CONFIDENTIALITY
REDACTED FOR CONFIDENTIALITY

Final Audit Report 2020-11-11

Created:	2020-11-11
By:	Elan Weinreb (eweinreb@weinreblaw.com)
Status:	Signed
Transaction ID:	REDACTED FOR CONFIDENTIALITY094wN

"2020-11-11 - Stipulation of Settlement - REDACTED FOR CONFIDENTIALITY" History

Document created by Elan Weinreb (eweinreb@weinreblaw.com)
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2020-11-11 - 7:39:02 PM GMT- IP address: [redacted]

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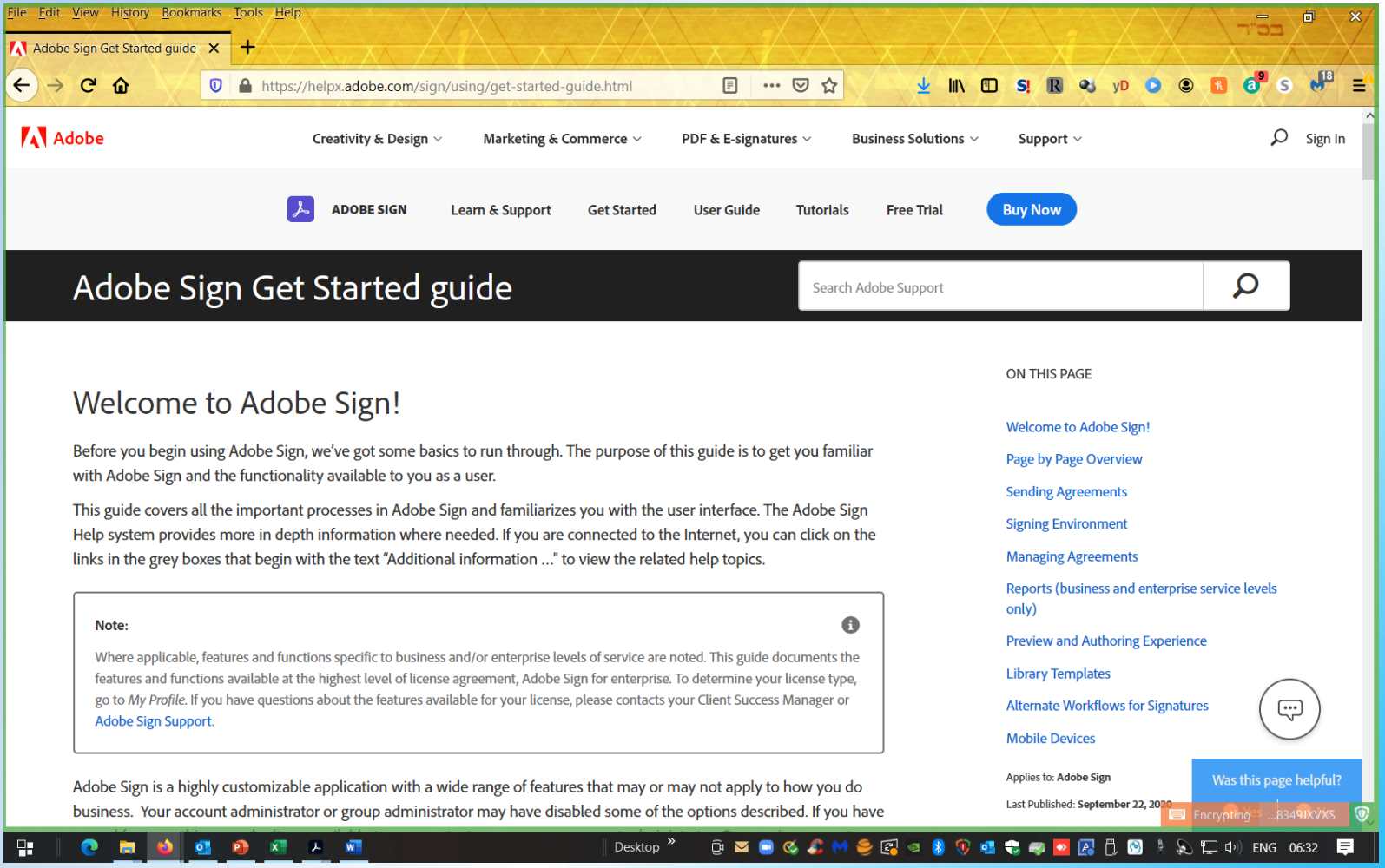
Signature Date: 2020-11-11 - 7:39:26 PM GMT - Time Source: server- IP address: [redacted]

Agreement completed.
2020-11-11 - 7:39:26 PM GMT

Adobe Sign

Resolving a NYCLA Part 137 Dispute by Mediation (4)

Head over to https://helpx.adobe.com/sign/using/get-started-guide.html to learn how to use Adobe Sign to create and sign PDF documents electronically.



The Bottom Line: Mediation Works

"Mediation is highly successful, with more than **85%** of mediated business cases resulting in settlement agreements."

Source: David J. Abeshouse, Esq., *Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases* (June 18, 2013) (emphasis added) (available at http://www.avvo.com/legal-guides/ugc/business-adr-arbitration-and-mediation-vs-court-litigation-for-commercial-cases)

Further Light Reading

- ✓ Robert D. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model*, Mediation Quarterly, vol. 13, no. 2 (Winter 1995)

- ✓ Elan E. Weinreb, *One Size Does Not Fit All – Ten Reasons Why Commercial Litigators Should Consider Commercial Mediation*, The Nassau Lawyer, March 2016 at 11-12 (available at https://www.weinreblaw.com/resources-articles/ ("TWLF Articles Page"))

- ✓ Elan E. Weinreb, *The Chameleon Mediator*, TWLF News & Views, Summer 2016 (available at "TWLF Articles Page")

- ✓ Robert D. Benjamin, *The Natural Mediator*, Mediate.com, Nov. 5, 2020 (originally published 2001) (available at https://www.mediate.com//articles/benjamin1.cfm)

If We Have Time . . . The "Judgement" of Solomon?

Source: Wikipedia, *Judgement of Solomon*, https://en.wikipedia.org/wiki/Judgement_of_Solomon (last visited Dec. 13, 2020)
Image Source: Gaspar de Crayer, c. 1620 , *The Judgement of Solomon*, https://upload.wikimedia.org/wikipedia/commons/0/0c/Gaspar_de_Crayer_-_The_judgement_of_Solomon.jpg (last visited Dec. 13, 2020)

Questions or Comments?

Why Use NCBA Mediation or Arbitration?

A backlog of cases in our courts frequently causes litigants to wait years for the final resolution of a case. Coupled with the fact that increasing costs to litigate in court may even exceed the amount in controversy, the legal relief originally sought may no longer be needed, or the value of the case might be permanently lost. Throughout the country, there is a growing recognition that court-based litigation may not offer the best remedy for all disputes. This fact has resulted is an increasing use of mediation or arbitration—the most commonly used alternatives to traditional litigation.

The Nassau County Bar Association's (NCBA) Mediation and Arbitration panels provide a way for attorneys and clients to benefit from these expeditious, time-saving, and cost-effective alternatives to resolve disputes that might otherwise be litigated in court.

The NCBA's Mediation and Arbitration panels are available to the public as well as to all legal professionals. Members are trained, highly skilled and qualified attorneys who have been admitted to the New York bar for a minimum of ten (10) years and screened by the NCBA's Judiciary Committee.

Rules and Applications

The NCBA mediation and arbitration rules and forms for commencing a mediation or arbitration proceeding are available online at www.nassaubar.org.

For further information, contact NCBA at 516-747-4070 or info@nassaubar.org.

Costs & Fees

Administrative Cost (per case)	$500
Non-refundable	
Arbitrator/Mediator Fees (per hour)	$300

In mediation, all costs and fees are shared equally by all parties unless the parties or their governing agreement provide otherwise. In arbitration, the claimant customarily advances the non-refundable administrative fee of $500. Arbitrator costs and fees are then usually shared equally by the parties unless the governing agreement provides differently, the parties agree otherwise, or the arbitration award allocates costs and expenses differently.

A deposit of $1800 is required in all cases to cover the first six hours' worth of mediator or arbitrator time devoted to the case. Where fewer than six hours are spent on the case, any unearned deposit is refunded. Where more than six hours are spent, the parties pay the mediator(s) or arbitrators(s) directly.

Deposits are refundable for up to three days prior to a scheduled date for a mediation session or an arbitration hearing.

Recommendations

Federal, state, and local judges encourage arbitration and mediation as alternatives to court litigation.

NASSAU COUNTY BAR ASSOCIATION
15th & West Streets • Mineola, NY 11501
516-747-4070 • 516-747-4147 (fax)
info@nassaubar.org • www.nassaubar.org

Mediation & Arbitration

Alternative Dispute Resolution Through The Nassau County Bar Association

NASSAU COUNTY BAR ASSOCIATION

The leader in providing legal information and community service on Long Island

516-747-4070
www.nassaubar.org

Updated 1/13/17

Alternative Dispute Resolution at the Nassau County Bar Association

516-747-4070 or info@nassaubar.org

What is the principal difference between mediation and arbitration?

Mediation is a process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator's role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties.

By contrast, in arbitration, the arbitrator (or a panel of three arbitrators if the parties wish) acts like a private judge, hearing testimony, receiving evidence and then rendering a binding award. A court can confirm that award, which can become an enforceable judgment.

What kinds of disputes are handled by the NCBA's Mediation and Arbitration panels?

Mediation or arbitration may be used to resolve disputes capable of being decided by a court. The subject matter of cases appropriate for mediation or arbitration is broad and includes commercial, breach of contract, product liability, labor, medical malpractice, negligence, divorce, estate and trust, and employment disputes, guardianship contests, and many others.

Who are NCBA's mediators and arbitrators?

NCBA's mediators and arbitrators are highly skilled, qualified attorneys who have been admitted to the bar for a minimum of ten (10) years and screened by NCBA's Judiciary Committee. The parties and their counsel are presented with a list of trained and experienced mediators or arbitrators whom they mutually select.

What are the benefits of NCBA MEDIATION?

√ Mediation is informal and confidential. The parties meet with a mutually selected impartial and neutral person who assists them in reaching a resolution of their differences.

√ Mediation is an alternative method to resolve a dispute quickly and satisfactorily, without the expense and delay associated with most court cases.

√ A mediation can be conducted at any time, whether before, during, or even after a court determination if the parties agree.

√ The mediator does not determine who is right or wrong and does not issue a decision in the case. Instead, the mediator works with the parties in seeking to resolve their dispute by developing their own solutions to their differences.

√ Mediation allows the parties to create their own solutions in ways which may not be available from a court of law.

√ A successful mediation can result in a binding agreement between the parties that permanently resolves their dispute.

What are the benefits of NCBA ARBITRATION?

√ Arbitration is generally considerably less time-consuming and more cost-effective than traditional litigation in resolving legal disputes.

√ The expenses associated with jury selection and appeals are eliminated.

√ Costly discovery proceedings are minimized and/or truncated.

√ The arbitrator's decision is final, legally binding, and can be made enforceable as a court judgment under federal and New York law.

√ Arbitration hearings can be scheduled at times and places convenient to the parties and their attorneys.

√ While usual legal rules applicable to trials in court are generally observed, arbitrators have greater latitude in the conduct of arbitration hearings.

√ The NCBA arbitration rules are designed to be user-friendly.

√ Under the NCBA arbitration rules, a decision must be rendered within 30 days after hearings are closed (unless the parties agree otherwise).

dummies

A Wiley Brand

Cheat Sheet

Success as a Mediator For Dummies Cheat Sheet

By Victoria Pynchon, Joseph Kraynak

To achieve success as a mediator, you need to be able to talk the talk, walk the walk, and show everyone in your market just how good you really are. You'll need to understand the mediation process and the fundamentals of being a good mediator. As with any business, you need to generate business, so follow some basic tips on finding new clients.

Grasping the Mediation Process

Having a structure in place helps ensure that parties stay on track and progress toward a resolution for their dispute. The process isn't always linear, but it does have several stages that go something like this:

1. **Convene the mediation.**

   Contact all stakeholders and their attorneys if they have legal representation.

2 **Introduce the participants.**

Have the parties and other participants introduce themselves.

3 **Explain confidentiality and your role as a neutral.**

Assure the parties that nothing they say in mediation can be used against them in the court of law and that you will remain neutral.

4 **Set the ground rules.**

Establish guidelines for polite conversation, or help the parties establish their own.

5 **Make an agenda.**

Help the parties draw up an agenda that breaks down the issues to be resolved and the interests to be served.

6 **Let each party tell her side of the story.**

In a litigated dispute, this may be the first time the parties have had the opportunity to tell their stories.

7 **Ask questions to clarify the issues.**

After each party tells his story, ask open-ended questions to obtain more details that will illuminate or reveal unspoken party interests.

8 **Brainstorm solutions.**

Assist the parties in coming up with possible solutions that serve each party's interests. Your goal is to "expand the pie" so the parties have more options than money alone.

9 **Choose or negotiate available solutions.**

Using the available solutions, help the parties come to an agreement that serves as many of each party's interests as possible.

10 **Close and memorialize the agreement.**

Assist the parties in putting the terms of their agreement in writing to make the agreement more durable.

Exploring Mediation Fundamentals

To be a master mediator, you need to master certain fundamental skills, strategies, and techniques.The following are all traits of a well-trained mediator:

- **Anchoring:** An *anchor* is any relevant number (or idea) that enters the negotiation environment. The party who puts the first number on the table, for example, anchors the negotiation in her favor throughout the course of the negotiation.
- **Appealing to higher values:** Using shared beliefs or principles to reach agreement, such as both parents' desire to do "what's best for the children."
- **Asking diagnostic questions:** To get the whole story, probe each party with open-ended questions that call for narrative (as opposed to yes/no) answers.These questions always begin with *Who? What? When? Where? Why?* and *How?* or *Tell me more about that.*
- **Bracketing:** The use of hypothetical offers and demands to narrow the gap that separates parties without requiring either party to commit to a number. For example, "If Party A were to increase his offer to $75,000, would you be willing to lower your demand to $100,000?"
- **Distributive bargaining:** A negotiation in which the parties bargain over who gets the biggest portion of a fixed pie of benefits. Even if you're facilitating an interest-based negotiation, eventually the enlarged pie of benefits must be distributed among the parties.
- **Forming contingent agreements:** Adding "If ...then ..." language to a contract to alleviate a party's concern over a future event that may undermine the party's interests.

- **Framing:** Change the parties' perspective to something more positive. Mediators often reframe the parties' dispute from an adversarial contest to a problem-solving exercise and from the identification of who's right to the search for solutions that make everyone happy.
- **Interest-based negotiation:** A negotiation in which the parties identify each other's interests (needs, desires, preferences, priorities, fears, and appetite for risk) and then seek to reach an agreement that serves as many of those interests as possible.
- **Logrolling:** Giving something that's low-cost for one party but high-value to the other party in exchange for something that's high-value to the first party but low-cost for the second party.

Generating Business as a Mediator

To be a successful mediator, you need to be successful, commercially. Consider the following strategies for generating business as you begin your career as a mediator:

- **Attend conferences and events that expose you to your mediation and market communities.** Attend at least one group event every other month.
- **Claim your online business listings.** Make sure you have a listing on Google Places and Yelp, claim the listings, and then flesh them out with additional content, including your website or blog address.
- **Join and serve in organizations that expose you to your mediation and market communities.** These may be mediation, industry-related, or community organizations. Be active in the organization. Take a leadership role to raise your profile.
- **Keep in touch with your clients.** The best place to look for new clients is through your current clients. Keep in touch with them via e-mail or regular phone calls. Checking in once or twice a year is usually sufficient.
- **Launch a website, blog, or both.** You need to have an online presence, and having a website or blog is an important first step.

- **Pass out and collect business cards.** Pass out business cards to everyone you meet, and collect their cards. Ask if they want to receive your newsletter and whether they prefer e-mail or standard postal delivery.

- **Post press releases and distribute newsletters.** Write articles that are relevant and of value to your market and use the Internet to post and distribute them.

- **Spread the word via social networking.** You should have a Facebook page dedicated to your mediation business, along with a Twitter and LinkedIn account. Get involved in LinkedIn discussion groups relevant to mediation and your market.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

HIGHLY CONFIDENTIAL – MEDIATOR "EYES ONLY" AND NOT TO BE SHARED OR DISCLOSED WITH ANY OTHER PARTY

Pre-Mediation Statement of PLAINTIFF

March 1, 2016

INSERT CASE (Sup. Ct. Nassau County)

1. The name and title, if any, of the client or authorized representative who will be attending the conference with counsel.

Client: INSERT CLIENT NAME, Plaintiff and Counterclaim-Defendant in the above-referenced Supreme Court action.

Counsel for Plaintiff: Elan E. Weinreb, Esq., of The Weinreb Law Firm, PLLC

Defendant is pro se.

2. A brief statement of the key factual and legal issues involved in the litigation.

Plaintiff contends (and has more than sufficient proof to support her contentions) that personal property at issue is effectively being "held hostage" by Defendant, especially in light of the latter's prior refusal to obey a court order to permit Plaintiff to retrieve her property. Plaintiff also has admissions from Defendant (and who has admitted in pleadings as well) that he intended to marry her and would pay her back for direct or indirect loans in the approximate amount of $30,000.00 made or extended to him on account of Plaintiff's assumption of some of his financial obligations.

3. The main "sticking points" preventing settlement.

Defendant has simply refused to give Plaintiff what is hers and what he promised to repay to her, regardless of his intent to marry her (which he did have). He is rather entrenched, largely because he maintains an erroneous belief that any

personal property in his domain automatically becomes his, notwithstanding that he did not purchase such property.

In addition, Defendant is perceived to be resentful of Plaintiff on account of the fact that Plaintiff has a pending parallel New Jersey family court proceeding and a soon-to-be-commenced New York child support proceeding that both involve Defendant. The general facts and circumstances of these proceedings will not be discussed here, insofar as they are not directly relevant to the commercial litigation that is the primary focus of mediation (i.e., the above-referenced action).

Defendant's current and short-term-future financial status/condition—he claims not to have any money available to compensate Plaintiff such that in his mind, he is judgment-proof—may also be a sticking point.

4. *A description of any important rulings made or pending motions in the case which may affect settlement.*

Defendant's initial Answer was stricken for failure to comply with CPLR pleading requirements. He revised his Answer and interposed four counterclaims. Two of those—the Third and Fourth Counterclaims for defamation per se and prima facie tort—have been challenged in a motion to dismiss currently pending before the Court. As Defendant did not submit opposition to this motion and has unequivocally defaulted on a stipulation that extended his time to submit opposition, it is expected that these two counterclaims will eventually be dismissed. The Court has adjourned the return date of the motion to dismiss to April 1, 2016.

5. *The status of settlement negotiations, including the last settlement proposal made by you and to you.*

No proposals have been discussed. Plaintiff is willing to engage in good-faith settlement negotiations.

6. *A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of litigation.*

A) Plaintiff requests the return of the following personal property:

- Plastic Stratosphere cups still in the plastic cover under the kitchen sink to the right inner corner.
- Nikon D7100 24.1 MP DX-Format CMOS Digital SLR Camera, accompanying 18-140mmf/3.5-5.6G ED VR AF-S DX "NIKKOR" Zoom Lens, and Nikon WU-1a Wireless Mobile Adapter
- Ipod
- Dyson Hand Vac (or money to buy a replacement)
- Canon Photo Printer
- 3 "App Controlled" Light Bulbs (special light bulbs that can be controlled from a computer or smartphone)
- Power Washer (stored in garage) (or money to buy a replacement)
- Ladder (or money to buy a replacement)
- Leaf Blower (or money to buy a replacement)
- 2 Black Chairs (stored in basement)

B) Plaintiff requests compensation or restitution for:

- PC Richard & Son Items (See Exhibit 2 to the Complaint)
- 27-Inch Apple "IMAC" Computer and Keyboard
- Apple TV and Remote Control (The subscription associated with this item is still under Plaintiff's name, and the item is still situated in Defendant's residence)
- Defendant's Tuition and Other Education-Related Expenses that she undertook to pay (and did end up paying)

C) Finally, Plaintiff also requests Defendant to sign baby passport papers so that JEFFREY [NOT REAL NAME] can receive a passport.

While this settlement proposal sacrifices much when compared to the relief sought in the Complaint, Plaintiff does not want to lose more time from work than she already has dealing with litigation and does not want to have to expend the resources that further steps in the litigation process would entail. She also realizes that in light of JEFFREY being Defendant's son, she (and eventually JEFFREY) will have to have a relationship with Defendant on some level going forward such that even a "cold truce" between the parties would be welcome.

7. *Key documents necessary for the mediator to understand the case:*

Pleadings, receipts, text messages, and credit card and bank statements. Plaintiff's counsel has already provided a copy of the pleadings. The remaining documents referenced here may or may not be disclosed at one or more mediation sessions, depending upon Defendant's willingness to proceed with the mediation process in good faith.

THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Negotiating Justice: Anchoring, Bias, Dad, and Sotomayor

by Victoria Pynchon

I do not recall the day on which I learned I spoke with an "American" or "West Coast" accent but I remember it coming as a surprise to me. As Cristof, the director of *The Truman Show* says of his "creation," the happily oblivious Truman Burbank, "We accept the reality of the world with which we are presented."

The fact that people question whether a woman, an African American, a Latina, or (gasp) a gay, bi-, Lesbian, or transsexual, jurist would be "biased" by his or her unique perspective is dispiriting to anyone who is not (you'll forgive my use of the term) an old white man. As many people in high (*The New York Times*, CNN) and low (Twitter) places rightly pointed out during the nomination hearings for Sonia Sotomayor, no one asks whether a white man will bring his prejudices to the bench. Why? Because white men "have no accent." The dominant culture does not think of itself in terms of race (it doesn't have to) and the people with power do not need to ask themselves thorny questions about their attitudes toward their own race and gender.

Here's an example from *The New York Times*: "Speeches Show Judge's Steady Focus on Diversity, Struggle"

> *WASHINGTON—In speech after speech over the years, Judge Sonia Sotomayor has returned to the themes of diversity, struggle, heritage and alienation that have both powered and complicated her nomination to the Supreme Court.*
> *She has lamented the dearth of Hispanics on the*

NEGOTIATING *continued on page 6*

Message from the Section Chair

by Simeon H. Baum

Over the last two quarters, since the launch of the first issue of *The Resolver*, the Board of the FBA's Alternative Dispute Resolution Section has convened monthly to reflect on the state of ADR and opportunities for the section. From the fortunate vantage point of this section's chair, I would like to share with *The Resolver* readers some reflections on the significance of ADR, a brief report on the activities of the past two quarters, and some observations and visions on the promise of the section and of the dispute resolution field.

The Promise of Dispute Resolution

A host of reasons drew us to law school. Of course, we all want to make a good and honorable living. But at the core, a healthy number of us hoped to *help others* through the practice of law and perhaps gain wisdom in the bargain. We *juris* doctors, like our medical counterparts, aim to relieve suffering, but through work on our social "mechanism." We repair breaches of faith, correct breaches of contract, and shift property or money to compensate wrongs and help those who have suffered from acts or omissions of others.

Labor in law, however, reveals life to be messy and multi-variegated. We find odd variations in the ladder of statute and *stare decisis*, and also observe that the wants and circumstances of parties do not necessarily fit into neat classifications of right and wrong, tort or breach.

Live parties in dispute call into question the uniform objective "mechanism." We also see the human, subjective realm all too often overlooked. Not hornbook black and white, or case law grey—human life is in living color. And the most significant enterprise might be not developing the objective legal structure (which, of course, remains critical), but helping the people involved.

How we practice law also matters. For years, the bar has highlighted the importance of civility in legal practice. Beyond the tone of siblings at the bar, there is also the question of consequence from litigation of disputes. We benefit mightily from the adversarial system. But do our goals *always* entail fighting oppression? Does pursuit of justice necessitate corpses on the floor?

CHAIR *continued on page 2*

WINTER 2010

Tips on How to Negotiate and Acquire Negotiation Skills

by Simeon H. Baum

When attempting to address the modest subject of how to negotiate and acquire negotiation skills, I am reminded of the narrator's comment in *Moby Dick*:

> One often hears of writers that rise and swell with their subject, though it may seem just an ordinary one. How, then, with me, writing of this Leviathan? Unconsciously my chirography expands into placard capitals. Give me a condor's quill! Give me Vesuvius' crater for an inkstand. Friends, hold my arms! For in the mere act of penning my thoughts of this Leviathan, they weary me, and make me faint with their outstretching comprehensiveness of sweep, as if to include the whole circle of the sciences, and all the generations of whales, and men, and mastodons, past, present, and to come, with all the revolving panoramas of empire on earth, and throughout the whole universe, not excluding its suburbs. Such, and so magnifying, is the virtue of a large and liberal theme! We expand to its bulk. To produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it.[1]

Hundreds of books have been written on this theme.[2] Moreover, all of us go through life negotiating in myriad circumstances. Thus all of us are experts in this area. What can one add that is meaningful for a brief article on this hoary forebear of all ADR processes?

What follows is an effort to capture key ideas and approaches that appear to have nearly universal applicability and to put them into a helpful, simplified framework. For starters, the simplest format follows and expands upon the advice of the ancient Greeks: know yourself, know others, know the world. It then turns Taoist and adds a fourth component, recognizing that negotiation is very much a process: "the Way."

NOSCE TE IPSUM (KNOW YOURSELF)

This phrase, inscribed above the entrance to the ancient temple of Apollo at Delphi, captures a core injunction for negotiators.

Know Your Interests.

In their well known negotiation model, Fisher and Ury—and the vast majority of proponents of joint, mutual gains, cooperative bargaining models—suggest that ideal negotiation involves the identification of the interests of each party, a search for options that will best satisfy those interests, and consideration of alternatives to any proposed deal in light of those interests. At the outset, in order to be effective, a good negotiator must be familiar with the interests that he represents—his own, his group's or his principal's.

Before starting any negotiation, it is useful to be clear on what one needs, and to give thought to how best one might satisfy those needs. "What do we need? What are we trying to accomplish?" should be expressly asked in advance. Are we trying to maintain a client base? Are we trying to avoid damage to good will or a reputation? In the labor context, are we trying to stay within budget in light of other material costs; increase productivity; cut down on health costs; improve our risk picture for experience rating by insurers; improve morale? Knowing the needs can direct the strategy and also can keep one alert to opportunities that might arise in the course of negotiations.

Keep a Tab on Your Emotions & Inner Life.

Beyond this, it is vital to be in touch with ones actual feelings, thoughts, and impulses at any point in time. In *Getting Past No*, Ury advises negotiators not to react to provocative actions or comments by one's negotiation counterparty. Reactions can lead to escalation. They can also cloud chances to learn about the other and can prevent the negotiator from responding positively to the needs and feelings of the other in a way that enhances the quality of communication, cultivates relationship, smoothes the bargaining, builds trust, and captures opportunities for mutual gain. The prerequisite for preventing undue reactions is sufficient self awareness to identify ones emotions and inner responses, including value judgments, before they are given expression.

Cultivate a Disciplined Self Consciousness.[3]

A disciplined self-consciousness is a negotiation treasure. Part of the discipline in not reacting is to know that there is a difference between having a feeling, thought, or even conviction, and acting on it. Knowing oneself is a first step in keeping the ego under control.

SKILL ACQUISITION: As with other functions in the practice of law, such as interviewing, client counseling, research, drafting, analytic thinking, and trial advocacy, effective negotiation requires the honing of particular

[1]Melville, *Moby Dick*, Ch. 104.

[2]Some recommended reading includes: Fisher & Ury, Getting to Yes; Ury, Getting Past No; Mnookin, Beyond Winning; Shell, Bargaining for Advantage; ABA Section on Dispute Resolution, The Negotiator's Handbook.

[3]The phrase "disciplined self consciousness," coined by John Ross Carter, Professor of Philosophy and Religion; Robert Hung-Ngai Ho Professor of Asian Studies, Colgate University, for use in connection with the comparative study of religion, has wide applicability in the context of negotiation as well.

skills.

Try Mindfulness Meditation.

How do we develop and increase the type of self-knowledge that optimizes our negotiation efforts? There are a range of activities and even exercises that enhance cultivation of self-awareness and promote self-knowledge. For nearly a decade, Professor Len Riskin[4] has been promoting mindfulness meditation as a way not only of reducing stress but also of increasing awareness of one's inner processes on the theory that this improves capacity as a negotiator or mediator. Sitting quietly, following the breath, being aware of bodily sensations, noticing and then letting go of thoughts and emotions as they arise—again, sensing the freedom of awareness without compulsive action—and, with bare attention, gaining a greater sense of presence and the richness of just being are all part of this type of exercise.

Catalogue Interests.

Reflective cataloguing of ones needs and interests in advance of a negotiation, and reconsidering needs and interests throughout the course of the negotiation, puts in the forefront of one's consciousness matters that should be addressed or that might enable one to seize opportunities for gain in the bargaining process.

Observe the Mirror of Others.

Beyond awareness of one's impulses, feelings, thoughts, judgments and interests, there is another type of self-understanding, all too often elusive, as expressed by the poet Robert Burns: "O would some power the giftie gie us to see ourselves as others see us."[5]

Particularly where one is engaged in negotiation, it is important to observe not only one's inner workings, sense of self, and recognition of one's own interests, but also the impact one is making on the other. How do they see us?

Catch Cultural Differences.

Understanding the perspective of, and our impact on, others becomes even more critical in negotiations between members of different cultures. Scholars like Professor Hal Abramson, who speak or write on cross-cultural understanding in the mediation context, identify unexpected differences between cultures in the most basic interpersonal expectations – such as eye contact. In certain South American cultures, *e.g.*, eye contact is seen as rude; yet for us, failure to make eye contact might be read as dishonesty, disrespect or a lack of self-confidence.

Be Alert to Conflict Handling Styles.

Even without major cross-cultural differences, there can be a substantial discrepancy between the way one believes one is behaving and the way others perceive it. Classic examples are disconnects between people with different styles of handling conflict. These often are classified in five groups: competitors, compromisers, collaborators, accommodators, and avoiders. Being aware of our conflict resolution "style" can alert us to reflexive responses and free us to try out different approaches. Understanding these modes leads to a better understanding of the negotiating counterparty, and also to an appreciation of how that party might perceive us.

SKILL ACQUISITION:

Test Drive the Thomas-Kilmann Conflict Mode Instrument.

The Thomas-Kilmann Conflict Mode Instrument[6] is a series of questions that reveals one's preferred style of handling conflict. The basic premise is that people vary in the degree to which they seek to assert their own interests even at the expense of others (compete), or to cooperate and promote the interests of others (accommodate). Some prefer to avoid conflict altogether, neither asserting their own interest in the particular dispute, nor satisfying the other's. Some seek a moderated satisfaction of their own interests and those of the other, through the shared sacrifice of compromise. Yet others maximize the promotion of both their own interests and those of the other through collaboration. Despite the apparent preference of negotiation theorists for collaboration – as the way to reach the Pareto optimum—the TKCMI advises that each of these modes of handling conflict has its own utility and drawbacks. It is a fascinating study, worth investigating.

For our purposes, in addition to the knowledge of self and other gained through familiarity with the TKCMI and its principles, there is an added insight into the way people of different mode preferences interact and understand each other. A classic example is the competitor matched with

TIPS *continued on page 10*

[4]*See, e.g.*, Leonard Riskin (C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) "The Contemplative Lawyer: On the Potential Relevance of Mindfulness Meditation to Law Students, Lawyers, and their Clients," Harvard Negotiation Law Review (May 2002). This was the centerpiece of a symposium entitled Mindfulness in Law and Dispute Resolution. Professor Riskin has provided training in mindfulness in law and dispute resolution at a wide range of venues including the Harvard Negotiation Insight Initiative, Harvard Law School, Straus Institute for Dispute Resolution, Pepperdine University School of Law, and Benjamin N. Cardozo School of Law.

[5](O would some power the gift to give us to see ourselves as others see us.) Robert Burns, Poem "To a Louse," verse 8. In this poem, Burns, who was the Scottish national poet (1759 - 1796), paints a scene of a haughty beauty at Church, unaware of the louse on her bonnet and of others' awareness of same.

[6]Thomas-Kilmann Conflict Mode Instrument—also known as the TKI (Mountain View, CA: CPP, Inc., 1974–2009), by Kenneth W. Thomas and Ralph H. Kilmann; *see*, kilmann.com/conflict.html.

TIPS *continued from page 9*

an avoider. Competitors like to seal deals. Avoiders prefer to take time. The result can often be an odd mix where competitors offer up a series of increasing offers, just to be frustrated by further delays by hesitant avoiders. Judgments can be added to the mix, with competitors thinking avoiders are not trying or not appreciating their efforts and avoiders thinking competitors are pushy and self-interested.

Try Being Proactive—Understand One's Impact

Awareness of differences in styles and preferences can help with self-understanding, as well. Beyond this, there are a host of behaviors and expressions that can have an impact on others and lead them to perceive us in manner different from the way we perceive ourselves. To the extent we are seeking to accomplish the goal of building an agreement that maximizes everyone's interests, we need to encourage the other to feel safe making disclosures about their interests, and to feel it is in their own interest to maximize ours.

NOSCE ALIUS (KNOW THE OTHER)

The dance of negotiation by its nature involves partners. The advice given for self-knowledge above, applies across the board to ones counterparties as well. Both to prepare for negotiation and throughout the course of negotiations, it is helpful to be alert to what is going on for the party across the table. What are their interests? How are they feeling? What is important to them? What are their cultural assumptions? What is their conflict style? What is their context? What is their sense of self, their hopes, dreams, and aspirations?

Only by understanding the interests of the counterparty can a negotiator work to develop options that can meet everyone's needs. One can learn these interests indirectly, through the application of logic, but even better through direct communication. The best way to learn of the other's interests is from what they say and do. The degree of disclosure by the other party will be influenced by the tone at the bargaining table.

SKILL ACQUISITION:

Set a Tone Conducive to Candid Disclosure; Be Effective as an Active Listener.

Active listening is a buzzword in ADR circles for good reason. Targeted questioning calls for answers to questions we already have, to promote our pre-existing goals. Active listening, by contrast, is more open-ended. The other party can drive that conversation.

With active listening, we use open-ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth. A classic formulation is VECS: validate, empathize, clarify and summarize.

By this approach, the other party feels less alone and more willing to open up. This is the royal way to learning their interests. With that information, one can look for ways to create value in a deal—ways to satisfy the other party's interests and achieve satisfaction of ones own.

Communication is Key.

Even First Amendment case law recognizes that communication occurs not only with words and speech but also in nonverbal ways. The effective negotiator is alert to, and uses, all forms of communication to advantage. Body language—the handshake, eye contact, posture, tone of voice—all communicate messages or attitudes. It is fundamental to communicate in a manner that builds trust and rapport.

Build Relationship & Trust.

Understanding that it takes two to tango in deal making and that we must learn what will satisfy the other in order for the other to meet our own needs, nothing goes so far as a relationship of trust to foster disclosure. To enhance relationship, people from various cultures give gifts or serve food prior to commencing talks, to signal good will and create a common bond. Shell, in *Bargaining for Advantage*, tells of an executive who gave his counterparty a gold watch prior to initiating merger talks.[7] This signaled a valuing of the other and, to paraphrase Claude Rains at the end of *Casablanca*, "the beginning of a beautiful relationship."

Watch for Dynamics of Escalation and De-escalation.

We have all seen it happen. An even toned conversation suddenly goes out of control. Tempers flare, people leave the room. Often these scenarios can be altered if the participants are aware of the factors escalating tensions as they arise. Points are made, counterpoints asserted, one-upmanship takes place, voice tone changes, expressions change, the pace of speech accelerates. If one sees this happening, there is no loss in taking a break, changing tone, slowing things down. Much can be said for the pause that refreshes. Silence is a gift.

Control the Spigot of Disclosure.

At the heart of communications in negotiation is the flow of information. This can range from communicating ones own interests, eliciting and confirming the interest of the other, learning about context, developing principles for fair resolutions, exchanging offers, discussing alternatives, assessing and evaluating legal options and even possible litigation outcomes.

There is a balance in disclosure. Social scientists have observed that disclosure by one party encourages disclosure by the other; and the opposite is true as well. It pays to be clear in advance of what are one's confidential facts, interests, concerns and analyses, and also of what one would like to learn from the other. These views should be revisited throughout the negotiation.

Disclosure Choices are Informed by Competitive or Cooperative Strategy and Behavior.

[7]G. Richard Shell, *Bargaining for Advantage—Negotiation Strategies for Reasonable People*.

In short, be artful in striking the delicate balance in disclosure. Share where possible, both to encourage sharing and also to enable one's counterparty to help think of options that might meet one's own needs. But be judicious as well, on disclosure of one's own weak points, points that give the other party leverage, feelings that might provoke, and arguments that might lead to escalation or corrective action shoring up the other party's position.

The fundamental difficulty entangled in the preceding consideration is the question of whether to engage in strategic behavior that is competitive or cooperative. Current negotiation theory has shown the greater advantages that can be gained by cooperative behavior. Only cooperation can enable both parties to learn and work together to meet the interests of all, and to maximize gain. A legitimate cause for hesitation in proceeding down the cooperative path is the view that one's counterparty is motivated by a purely competitive strategy or driven by ill will. The bind implicit in this assessment is that ill will or competitive approaches might change if one takes a risk and extends the olive branch. It takes courage and the ability to take a short term loss to make this long term advance.

There is no ultimate solution to this problem. In each instance one uses one's best judgment. But it pays to be aware of this set of choices and of the way the exercise by one party of choices to follow a competitive or cooperative strategy can itself be transformative for all parties.

Maintain Credibility.

Nothing can destroy trust and good will like the discovery that one has been lying or that one is operating with less than candor. Counterparties will clam up and be more inclined to resort to competitive approaches in self-defense if they perceive a negotiator to be dishonest or insincere. Crafty conduct can not only hurt one in the instant negotiation but also can wreak havoc on one's reputation in the long run.

Assess Commitment Levels & Risk Tolerance.

A classic image is the game of chicken. Imagine teenagers racing at each other in hot rods in some LA viaduct. Who will swerve out of the way? If I were driving, I know the answer. I tend to be highly risk averse. It is fascinating to watch commitment levels at play in negotiations. There is great strength in posing a credible threat. To the extent one is able to gage the counterparty's commitment to a certain course of action or deal element, one will understand whether a concession need be made. The capacity to understand the nature of one's own and the other's level of commitment, and also tendency to avoid risk in general and on the particular point at issue comes not only from understanding the person, but also from understanding their context. What happens to them if they give on a particular point? What interest is affected? What in the larger picture do they win or lose? This analysis should be applied for understanding of both self and others.

NOSCE MUNDUS (KNOW THE WORLD)

None of us lives in isolation. As indicated above, to understand ourselves, we must understand our context. This is true for understanding the other as well. An effective negotiator is sensitive to the context in which every party is suspended, recognizing the impact of context and using it as a strength.

Behold the Business Context.

Litigators in particular can be reminded to think beyond the case. Why did this case originate? What is driving the parties?

If one is negotiating a real estate deal, it certainly pays to understand the current real estate market, and even the broader economic climate as that affects property and resale values, demand for space, capacity to build, the ability to obtain loans, interest rates, and related issues.

More specifically, knowing a market enables the negotiator to arrive at more compelling standards for use when setting values. The uses of mutually acceptable standards is routinely recommended by proponents of principled negotiation. Once recognized, they give direction to a negotiation and support fair and doable deals.

Heed the Hierarchy.

The nationally recognized employment lawyer, Wayne Outten, when thinking about strategies for negotiating on behalf of employees, considers where those employees stand within the framework of their employer. Do they have political allies, "Rabbis," people willing to go to bat for them? Do they have "political capital," credibility with certain supervisors or others in management? Have they earned loyalty; would harm to the employee engender a sense of guilt?

Conversely, knowing where the opposing negotiator fits can be helpful. Is he or she trying to cover for their own mistake? Is he responsible for the P&L that is affected by this deal or litigation? Who in the chain of authority must be brought in to achieve closure? Is the negotiator at a level where he or she is trying to impress a superior, or trying to prove a point to a subordinate?

Assess Alternatives.

Any post-modern piece sketching the contours of the Leviathan of Negotiation would leave a lacuna larger than that great beast's blowhole if it omitted mention of the BATNA coined and popularized by Fisher and Ury. BATNA—the best alternative to a negotiated agreement—as well as its variants, all other alternatives, good, bad and ugly, can be used by negotiators to test whether a deal on the table is worth taking. If the likely, tangible alternative to that deal is superior, the rational negotiator keeps bargaining for something better or walks away.

The simplest example is of a currently employed party testing a proposal from a prospective new employer. If the job offer is for lower pay, at a shakier institution, doing less exciting work, with worse prospects for advancement, in a

TIPS *continued on page 12*

TIPS *continued from page 11*

less convenient location, with nastier colleagues, and a less impressive title than one's current employer, no rational worker will take that bait. When these and other similar factors begin to equal and exceed the appeal of those at the current job, then the new offer begins to seem worth taking. Of course, returning to self-knowledge, one still needs to be aware of one's risk tolerance. Even if the offer is better than one's BATNA, is one willing to move from the known to the unknown?

Analyze Risk.

Beyond the subjective condition of risk tolerance, in the context of pending or potential litigation, understanding alternatives to a deal requires an understanding of the probable consequence of litigation. This includes not only the like outcome after trial and appeal, but also the direct and indirect costs incurred along the way. These are often described as risk analysis and transaction cost analysis.[8] Careful counsel spend hours assessing the strengths and weaknesses of their case to guide clients in assessing the amount of payment that makes sense to put that matter to bed.

SKILL ACQUISITION:

Man Learns from Machine—Try the TreeAge Decision Tree Program.

As a general tool in decision making, it is helpful to identify areas of uncertainty and choice points that affect outcomes along the path of a predictable process. For example, in a case, there might be uncertainty on whether discovery will develop favorable or unfavorable information on a set of points; on whether the law characterizes a particular action or arrangement as legal or illegal; on whether one will win or lose on motions to dismiss and for summary judgment; on the range of damages that might be awarded under different standards at trial; and on likelihood of victory on appeal. Added to this mix, can be the litigation transaction costs—fees for attorneys and experts, transcripts, photocopying, preparation of exhibits and the like. These costs can be factored in along the way.

We all can rough out these factors and do our own math. If there is a 50/50 chance that we will win $1,000,000 after trial, we can loosely give that case a $500,000 value. Understanding it will cost the client $250,000 in fees to get there, we might reduce that value to $250,000 if that sum of cash were sitting on the barrelhead for the taking to end the suit.

When the factors get complex, we might explore a program that does the math on the factors of uncertainty and choices taken along the way—TreeAge. This software, available online at treeage.com, helps develop and test outcome through complex decision tree analysis.

Gather Information.

Across the board, information is the medium of negotiation. Information helps us identify our own and the other's interests. It is the basis of our understanding of the business, legal, or other risk context for assessing a deal. It is the *prima materia* with which we make any assessment of risk or value. Only with information can we discover and assess our leverage.

Assess Leverage; Engage in Logrolling.

Much has been written on leverage. When one controls the counterparty's access to a means of satisfying that counterparty's need, or if one can impede the satisfaction of that need, one has bargaining power. It is important to be clear on what those levers are on both sides of the table. It is further helpful to see if there are alternative means of satisfying, or jeopardizing, the need or interest in question; this liberates one from being hung up on a particular risk or issue.

There are a good number of times when it can cost one party little to satisfy a significant need of the other party. If each party can offer something of low value to the offeror and high value to the other party, this presents a wonderful opportunity for trading that will generate higher overall value in the deal. This type of trading, known as logrolling, can be a source of great satisfaction.

Crunch Numbers.

The risk analysis discussion above should already suggest that a good negotiator should not shy away from numbers. In deals there are often many moving parts, each with its potential economic value. It pays to try to price values, to calculate risks, to test principles and assumptions by working out their math.

Develop Principles and Standards.

At the heart of the Fisher-Ury model of negotiation—in addition to putting the parties into a cooperative frame of mind, focusing on the problem, identifying the issues, discovering underlying interests, and developing options to meet those interests, producing a deal that is superior to the BATNA—is the recognition that developing workable options and deals often depends upon arriving at principles which all parties can adopt. This fits into our "mundus" sec-

TIPS *continued on page 15*

[8]For helpful articles on decision trees and risk analysis, *see*, Douglas C. Allen, *Analytical Tools and Techniques: Decision Analysis Using Decision Tree Modeling;* Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice,* 11 Neg. J. 123 (1995); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy,* 40 Bus. Law 617 (1984-1985); Jeffrey M. Senger, *Decision Analysis in Negotiation, 87 Marquette Law Rev. 723 (2004);* David B. Hoffer, *Decision Analysis as a Mediator's Tool,* 1 Harv. Neg. Law Rev. 113 (1996).

TIPS *continued from page 12*

tion, because they are an effort at transforming the subjective into the realm of objectivity. Whether it is fair, doable, wise, legal, efficient, considerate, reciprocal, due—whatever the standard, it pays consciously to work to develop standards that can be discussed with and adopted by one's counterparty in order to address distributive issues or generally to work out a deal.

This can include finding an objective basis for assessments by turning to authorities in recognized texts—like the Kelley Blue Book for used car values—to experts, like appraisers or accountants, or to broader custom and usage in a particular industry or trade. The net result is bringing the discussion into an objective realm susceptible to shared, open analysis, and away from the subjective realm governed by the assertion of wills.

OPENING TO THE GREAT WAY

Having embraced the chiliocosm, framing out content and approaches through the vast domains of self, other, and the world, a comprehensive presentation on Negotiation Skills must finally recognize that we are dealing with what is fundamentally a process.

We recognize that there is a wide range of styles and approaches in negotiation that can differ and yet be both effective and legitimate. Having said that, I still might make a few recommendations. Since we engage in negotiation in all areas of life, there is something to be said for being bigger than the topic. Sometimes living with dignity and genuineness trumps a minor strategic gain. Moreover, with principled, joint mutual gains approaches, it is possible to hold one's own, and indeed improve the deal outcome, while still acting with decency and in a manner consistent with ones own values.

As we engage in this process, we can negotiate the process itself. If we find ourselves in a mode of interacting that seems inappropriate or unproductive, we can discuss our approaches with the counterparty. We are all too familiar with the frustration of negotiating the size and location of the table. Yet, while we do not wish to be hung up and frozen in our interactions, it can also be liberating—and good strategy—to be alert to process choices that might enhance relationships, information gathering, or the deal.

Negotiators should cultivate creativity, openness, and flexibility. We are participating in something greater than ourselves. Richer possibilities may emerge from a deal than we could have at first realistically have imagined. This attitude of openness makes us not only more humane and appreciative of others, it also opens us to reality and enables us to see and seize upon opportunities.

Along these lines, let a lively silence be your baseline. This helps in decision making on disclosure flow, preserves candor through eliminating impulsive misrepresentations, controls the expression of unhelpful emotional reactions, prevents reactive behavior overall, and encourages listening to others. It gives one a chance to consider before committing. Yet, this approach should not be at the expense of wholesome spontaneity and warm sharing.

Finally, negotiation, at its core, recognizes of the freedom and dignity of all participants. We all can take it or leave it, talk or walk. For this reason, it is a beautiful way indeed.

Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), is chair of the FBA's Alternative Dispute Resolution Section. He has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine*'s 2005–2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

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Strategies for Breaking Impasse

By Victoria Pynchon, Joseph Kraynak

When neither party is willing to make another concession to reach agreement, they are at *impasse.* To help break through impasse, a mediator should consider using one or more of the following strategies:

- **Ask diagnostic questions.** Ask questions like, "What do you believe would be the best solution for everyone?" or, "What could your opponent do to signal progress?"
- **Bracket your way to compromise.** Ask each party, "If the other party were to offer __, would you be willing to offer __ in return?" This approach often helps a party move into the range of reason without requiring the other party to move there first.
- **Encourage a party to make a concession and the other party to reciprocate.** When you name the concessions the parties have made and recite the reciprocal moves by the other, the parties feel more satisfied about the progress they're making and more hopeful about their ability to close the deal.
- **Perform a cost-benefit analysis.** Calculate the costs and benefits of any proposed solution as compared to the costs and benefits of the parties' failure to reach agreement.
- **Reframe the possible outcomes.** When a party refuses to make further concessions, to save face or avoid the impression that he's lost, reframe the resolution from loss to victory by stressing, for instance, that resolution is control over the conflict.

- **Soften a hard offer or demand.** Ask diagnostic questions to learn the reasons why a party refuses to make further concessions or is standing by an unreasonable offer or demand. Explaining the reasons for one party's intractability to her bargaining partner can soften what seems to be a hostile or unnecessarily adversarial position.
- **Use a decision tree.** Draw a flow chart illustrating the possible outcomes of the choices the parties have.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

Generating Business as a Mediator

By **Victoria Pynchon, Joseph Kraynak**

Part of **Success as a Mediator For Dummies Cheat Sheet**

To be a successful mediator, you need to be successful, commercially. Consider the following strategies for generating business as you begin your career as a mediator:

- **Attend conferences and events that expose you to your mediation and market communities.** Attend at least one group event every other month.
- **Claim your online business listings.** Make sure you have a listing on Google Places and Yelp, claim the listings, and then flesh them out with additional content, including your website or blog address.
- **Join and serve in organizations that expose you to your mediation and market communities.** These may be mediation, industry-related, or community organizations. Be active in the organization. Take a leadership role to raise your profile.
- **Keep in touch with your clients.** The best place to look for new clients is through your current clients. Keep in touch with them via e-mail or regular phone calls. Checking in once or twice a year is usually sufficient.
- **Launch a website, blog, or both.** You need to have an online presence, and having a website or blog is an important first step.
- **Pass out and collect business cards.** Pass out business cards to everyone you meet, and collect their cards. Ask if they want to receive your newsletter and whether they prefer e-mail or standard postal delivery.
- **Post press releases and distribute newsletters.** Write articles that are relevant and of value to your market and use the Internet to post and distribute them.

- **Spread the word via social networking.** You should have a Facebook page dedicated to your mediation business, along with a Twitter and LinkedIn account. Get involved in LinkedIn discussion groups relevant to mediation and your market.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

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OF NOTE

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Cost $10 • April 5, 6 & 7
9 a.m. – 4 p.m.
PLEASE NOTE: Existing Secure Pass holders do not need new photos and can now renew online at the OCA website www.nycourts.gov/attorneys/registration/securepass.shtml

NCBA COMMITTEE MEETING CALENDAR
Page 22

EVENTS

WE CARE
Dressed to a Tea
Wednesday, March 16, 2016
5:00 p.m. at Domus
SOLD OUT!

NASSAU ACADEMY OF LAW
Hon. Elaine Jackson Stack MOOT COURT COMPETITION
Tuesday & Wednesday
March 22 & 23, 2016 at Domus
Details pg 14

LAW DAY
Tuesday, May 3, 2016
5:30 p.m.
Details pg. 6

117TH ANNUAL DINNER DANCE
Saturday, May 14, 2016
Long Island Marriott, Uniondale
See page 6
Invitations mailed in March
For Journal Ad Information see INSERT

WHAT'S INSIDE

UPCOMING PUBLICATIONS COMMITTEES MEETINGS

Thursday, March 10, 2016 12:45 at Domus

Thursday, April 14, 2016 12:45 at Domus

Breaking Bread with the Bench

During the first luncheon between new lawyers and members of the Judiciary, NCBA President Martha Krisel asked District Court Judge, Hon. Andrew M. Engel, and all invited Judges, to speak to the lawyers on a variety of topics including practicing law, exploring other practice areas and becoming involved in the Bar Association. (Photo by Hector Herrera)

By Andrea M. Brodie and Jennifer L. Koo

One of the initiatives promulgated by President Steven J. Eisman was the creation of a task force to help foster connections between new lawyers (admitted less than 10 years) and the more active members of the Nassau County Bar Association, particularly the judiciary. This task force, now known as the Steven J. Eisman New Lawyer/Judiciary Relations Task Force, is co-chaired by the Hon. Jeffrey S. Goodstein of the Nassau County Supreme Court and Andrea M. Brodie, Esq. of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

One of the programs created by the Task Force is a monthly lunch between new lawyers and members of the judiciary. The Task Force and the New Lawyers Committee held its first lunch at Domus with Justices of the Nassau County District and Supreme Courts on

See BENCH, Page 9

Canvas and Wine

Channel Your Creativity at the Bar

By Adam D'Antonio

Discover your inner Rembrandt on the evening of Thursday, April 14, 2016 at 6:30p.m. when a professional artist guides us in creating masterpieces on canvas. NO ARTISTIC EXPERIENCE REQUIRED!

Adult paint nights are the new craze and we've managed to line up one of the best artists in town. Even the least artistic will be amazed at what can be created with a paintbrush in one hand and a wine glass in the other. All you need to bring is your enthusiasm! We'll supply the rest including a 16" x 20" canvas, easel, apron and supplies to create a moonlit skyline suitable for hanging in your home or office. Refreshments, including wraps, music and other surprises will round out this casual and fun-filled evening.

Tickets are only $35 per person, but seating is limited, so reserve your easel now. A portion of each ticket will support the Steven J. Eisman Memorial Building Fund.

Moonlit Skyline

Canvas and Wine follows on the heels of NCBA's wildly successful Oktoberfest and is sure to be another hit with members and their guests. Don't miss out on having your firm featured as an event sponsor, too. Contact Valerie Zurblis for sponsorship details at (516)747-4070 x204.

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For NCBA Members
Notice of
Nassau County Bar Association
Annual Meeting
May 10, 2016 ● 7 p.m.
Domus

Proxy statement can be found on the insert in this issue of the Nassau Lawyer. In addition to the election of Nassau County Bar Association officers, directors, Nominating Committee members and Nassau Academy of Law officers, amendments to the Nassau County Bar Association By-Laws will be voted upon.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org. Copies are available at the reception desk at the home of the Association or by mail upon request.

Richard D. Collins
Secretary

One Size Does Not Fit All – Ten Reasons Why Commercial Litigators Should Consider Commercial Mediation

Most commercial litigators love to litigate. Their fondness for the art of advocacy, competitive instinct, keen interest in pre-trial and trial strategizing, drive for personal satisfaction, and—let's be honest—love of lucre all drive these warriors' dreams of "scorched earth" legal victory. In some cases, their pugilistic desires are fine, even commendable. However, in other cases, these desires can lead to an endless descent into needlessly protracted proceedings. The negative consequences of such trench warfare include, but are not limited to inefficiency, waste, reputational damage, and public distrust of litigators.

Elan E. Weinreb

There are just some situations where litigation is not an appropriate form of dispute resolution (and exactly what those situations are is a topic well beyond the scope of this article). In such circumstances, mediation—"an informal and confidential process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences"[1]—can present itself as an optimal (at least initially) dispute resolution method for one or more of the following ten reasons.

10: Scheduling Flexibility

In any commercial litigation involving judicial intervention, the parties and their attorneys are at the mercy of at least one judicial schedule. In contrast, in commercial mediation, the parties and their attorneys generally remain in control of their respective schedules, rendering it a more attractive dispute resolution option.

9: Recognition for Problem Solving

According to one founder of a firm which specializes in representing entrepreneurs, the top reason why entrepreneurs generally hate to deal with lawyers is the perception that the latter cause problems instead of solving them: "Good lawyers are able to identify significant potential legal problems; great lawyers provide solutions to those problems.'"[2]

Commercial mediation defies this stereotype by its essence as an alternative dispute resolution modality controlled by the disputants, not their attorneys. As such, commercial litigators who support commercial mediation stand in support of "doing something"—problem solving—and not just "saying something"—problem identification.

8: Judicial Support

Judges abhor (at least) two administrative nightmares: (a) an out-of-control docket; and (b) reversal or significant modification of their decisions. Successfully mediated cases resulting in settlement prevent these nightmares from becoming reality. It follows that judges throughout the world ardently support mediation,[3] and commercial litigators who ignore this trend do so at their peril.

7: Speed

Mediation is simply faster. Business mediations "usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings)."[4]

6: Increased Law Practice Efficiency

The odds of a civil case ultimately proceeding to trial are not exactly high. "According to the National Center for State Courts, only about 7.6 percent of civil cases go to trial in the United States, and only 0.6 percent receives a jury trial."[5] In contrast, commercial mediation offers practically mirror-opposite odds: "more than 85% of mediated business cases result[] in settlement agreements."[6]

Considering these odds, allocating resources to mediation initiatives that can resolve more cases in less time is worthwhile and will likely increase law practice efficiency.

5: Confidentiality

In the Information Age, any case can be tried twice: once in the courthouse, and once in the court of public opinion. Blasting a 160-character text or tweet of trial testimony to cyberspace that "goes viral" can easily cost any client—regardless of mainstream media presence—thousands of dollars in reputational damage in less than 160 seconds. Such damage can even occur when a client prevails.[7]

However, unlike a public trial environment, with narrow exceptions,[8] commercial mediation is "entirely confidential."[9] While this designation of confidentiality is no guarantee against a wrongful disclosure of confidential information, it is certainly better than no protection at all. Furthermore, while the remedies for breach of mediation confidentiality are not particularly punitive,[10] courts do not take such breaches lightly.[11]

4: Neutral Assessment of Case Strengths and Weaknesses

The best commercial litigators recognize that an assessment of case strengths and weaknesses is an essential component of trial preparation.[12] A type of evaluative mediation known as "information centered mediation" is particularly useful in testing case strength.[13] This process involves the appointment of a mediator having practical or technical expertise who receives written submissions and significant documents from the parties in advance of meeting with them.[14] After reviewing these materials and hearing from the parties or their attorneys, the appointed mediator renders an opinion on "the likely outcome and value of the dispute," which he or she proceeds to defend.[15]

It is in the defense of the mediator's opinion that an astute commercial litigator can strike gold by exposure to the mediator's opposing perspectives on the case.[16] And even where a case returns to a litigation track, analysis of case strengths and weaknesses will have occurred as part of the mediation process.

3: Reduced Discovery Expenses

Clients often discover early that the discovery process "can be lengthy, expensive, intrusive, and frustrating."[17] While in commercial mediation, it is practically impossible to entirely eliminate discovery in advance of mediation sessions, "[e]ssential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred."[18]

2: "Win-Win" Potential

When judges, court attorneys, or even the parties' attorneys settle a matter without mediator assistance, it is often done in the limited framework of compromise—what is also known as a "win-lose" framework because the parties sacrifice items to gain others or avoid liability exposure.[19] This is largely because the restrictive structure of litigation limits available remedies and options. Courts, for example, are rarely able to compel parties to interact with each other outside of the scope of contractual arrangements that they have established or award remedies to them beyond those available at law.[20]

However, commercial mediators are not so limited and are often able to propose extra-legal, "out of the box" creative options that open the proverbial door to collaborative "win-win" conflict resolution.[21]

1: Client Retention Driven by Cost Savings

Finally, commercial mediation is often superior to commercial litigation because it offers a greater probability of client retention driven by cost savings.[22] In the United States, "parties spend $50,700 on average on each litigated case, [but] only $7,500 ($3,500 per party [in a two-party case]) for resolving their case by mediation, a cost-savings of approximately 85%."[23] Outside of the United States, the savings are similarly significant.[24]

Moreover, it is not only clients who stand in support of commercial mediation in light of these savings, but the transactional attorneys counseling them, who in turn affect the future retention of commercial litigators. Recently, Loretta Gastwirth, Chair of the NCBA's ADR Committee and a commercial litigator herself, advised that "inserting a mediation clause in a contract . . . is a no-brainer" in light of its potential to "save clients tons of money in the long run . . . ."[25] The proverbial stage for commercial mediation is thus now being set by clients' transactional attorneys prophylactically, well before any submission of pleadings.

Towards the Future

It bears emphasis that commercial mediation—or any dispute resolution process, for that matter—is no talismanic panacea. "One size does not fit all" applies equally to commercial litigation and commercial mediation such that either is optimal only in appropriate cases, not every case. It is for this reason that some practitioners refer to ADR as "Appropriate Dispute Resolution"[26] instead of "Alternative Dispute Resolution."

However, as ADR continues to grow in popularity, it is not a question of "if" but "when" commercial mediation replaces it as a "first-line" option for dispute resolution. And at the end of the day, even those commercial litigators who stubbornly cling to the gladiatorial mindset of days gone by may come to welcome the turning of the tide. After all, it was no less than the great Chinese general Sun Tzu who declared, "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."[27]

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2. Scott Edward Walker, *Top 10 reasons why entrepreneurs hate lawyers*, Venture Hacks, Jan. 14, 2010, http://venturehacks.com/articles/hate-lawyers (last visited Nov. 12, 2015) (emphasis in original).
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7. *See* Joshua E. Bienstock, *Students' Lawsuits Proliferate: Is Mediation the Cure?*, 65 Nassau Lawyer (No. 3) 7, 10 (Nov. 2015).
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11. *See id*.
12. *See* John Stuart Mill, *On Liberty* § II ¶ 23

See MEDIATION, Page 12

INSPECTIONS ...

Continued From Page 10

istration of taxes, can regulate businesses and individuals that engage in various commercial activities; it also has exclusive regulatory authority over businesses and individuals dealing in the wholesale and retail distribution of cigarettes and tobacco products, and regulatory oversight over the importation, transportation and sale of petroleum products, i.e., motor fuel (gasoline) diesel motor fuel,[6] and alcoholic beverages.[7]

In regards to cigarettes and tobacco products, Investigators have authority

> … to examine the books, papers, invoices and … records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale …as well as the stock of cigarettes or tobacco products in any such premises… (And), (t)o verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations.[8]

The Tax Department also has criminal enforcement authority with respect to certain taxes that it administers. In fact, Department Investigators are also police officers as defined under the New York State Criminal Procedure Law, regarding enforcement of such taxes.[9] Possession of unstamped, counterfeit–stamped or out-of-state stamped cigarettes 'for purposes of sale' is a crime and such cigarettes are seized whenever or wherever they are discovered[10] and vehicles if any, that were used to transport such cigarettes may also be seized for forfeiture.[11] The crimes of *Possession for Purposes of Sale or Sale of Unstamped or Illegally Stamped Cigarettes* range from Class D felony to Class A misdemeanor.[12]

In regard to sentencing, periods of incarceration or probation that may be imposed are based upon Penal Law criteria. However, under the Tax Law courts may impose fines substantially higher than those provided for in the Penal Law : for a felony, a fine not to exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $50,000, or, in the case of a corporation the fine may not exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $250,000 and for a misdemeanor the court may impose a fine not to exceed $10,000, except that in the case of a corporation the fine may not exceed $20,000.[13]

In addition to the criminal fines, it should also be noted that the Department has the authority to levy civil fines varying in severity, depending upon quantities of unstamped or counterfeit stamped cigarettes or counterfeit stamps found in possession of the defendant,[14] (even if the defendant is not convicted of the above mentioned crimes.)

Case Law

The lead case in New York addressing the Department's authority to do administrative inspections involving cigarettes and tobacco products, and which had Fourth Amendment ramifications, was *People v. Rizzo*.[15]

There, the Tax Department received a complaint that a Ronald Rizzo had been arrested in New Jersey in possession of approximately 400 cartons of untaxed cigarettes, indicating two New York addresses connected with him. During surveillance at one of the addresses, an investigator observed the defendant in the garage in possession of 30 cartons of various brands of cigarettes. The investigator entered the garage without Rizzo's consent, seized about 90 cartons of cigarettes in the garage and about 54 cartons from the trunk of his car and arrested the defendant for the crime of Possession of Untaxed Cigarettes.[16]

The trial court suppressed the evidence of the cigarettes as an unconstitutional search and seizure. The Second Department upheld the trial court's decision and the Court of Appeals followed suit. The Court confirmed that the investigator lacked probable cause to believe that the storage or sale of cigarettes was taking place on the defendant's property prior to entering the premises. It also outlined three situations[17] that could be considered guidelines for Tax Investigators while conducting administrative inspections involving cigarettes and tobacco products, as follows:

- Where the dealer is open and notorious either by license or holding himself out to the public, Tax Department Investigators are authorized to inspect records and inventory of that dealer.
- Where a party is engaging in regulated activity out of premises which are not publicly recognized as those of a dealer in that commodity and investigators have probable cause to believe that regulated activity is taking place, they may lawfully enter the premises and inspect records and inventory pursuant to their statutory power.
- However, where the regulated activity is in fact occurring but the investigators have nothing more than a suspicion (as opposed to probable cause) to believe that such activity is taking place, statutory authority will not suffice as the basis upon which to enter the premises under investigation.

The Impact of Inspections

Notwithstanding inspections of unlicensed individuals and businesses, such as the Rizzo case, the majority of the Department's regulatory inspections involve businesses to which it has issued licenses and permits: cigarette stamping agents, wholesale and retail distributors. The Department is very proactive in its efforts to enforce the law. For example, for calendar year 2014 the Department had seized 2,017 cartons of cigarettes, 254,723 cigars, 2,059 pounds of loose tobacco, 14,738 counterfeit cigarette tax stamps and $35,658 cash.[18]

Consider the following example of a store that was found in violation of the law during an inspection: On June 25, 2015… Tax Department Cigarette Strike Force Investigators conducted a cigarette inspection at Stop & Go Friend Corp. located at 730 South St., in Peekskill. In total, the investigators seized 159 packages of cigarettes with counterfeit tax stamps. Sultan Ahmed Mosleh Ali, 28 was charged with criminal tax fraud and felony possession of counterfeit tax stamps. The defendant was processed at the Peekskill Police Department and remanded to the Westchester County Jail.[19]

As in the above case generally,

- The store owner is either arrested or issued summonses,
- untaxed cigarettes are seized, and

the store's permit (license) to do business (its Certificate of Registration[20]) is also seized.

Confiscation of the Certificate of Registration translates into dire consequences for the business owner. Since Investigators have seized the store's Certificate of Registration, the store is prohibited from purchasing cigarettes from wholesale distributors or continuing to sell any such product (including existing inventory) to its customers. *Business is suspended*!!

- loss of customers!
- loss of income!
- financial loss in money spent for inventory of legally-stamped cigarettes that the proprietor cannot sell!

And, in some cases finality; the shut down and discontinuance of business.

Options After Suspension

A defendant whose Certificate of Registration has been suspended because of unstamped or counterfeit-stamped cigarettes discovered on its' premises has recourse. The Tax Law offers the business owner a procedure to apply for return of the store's Certificate of Registration and reinstatement of the store's authority to continue in business, i.e., the purchase and sale of cigarettes.

By filing a petition with the Department, the store owner has the right to have the seizure and suspension of the store's Registration reviewed. The Commissioner designates a Review Officer to hear the case. A hearing is conducted, during which the Petitioner may present evidence and witnesses in an effort to prove to the Review Officer's satisfaction a basis for lifting the suspension.[21]

Petitioner has the burden of proof, to prove by a preponderance of the evidence that the cigarettes were not unstamped or unlawfully stamped. However, based upon this writer's experience as a Department Review Officer, the Petitioner usually is unable to sustain this burden and the alternative is to present evidence of mitigating circumstances concerning the incident. Counsel's presentation of the case should include information such as:

- Period during which the petitioner operated 'in good' standing with the Department
- information identifying the distributors from whom the client regularly purchases product, with copies of invoices and receipts reflecting such purchases
- explanation as to how the untaxed product came to be on the premises
- and, if available, information the client may have concerning incidents of illegal trafficking in cigarettes.

The Review Officer will decide the period of suspension or revocation of the Petitioner's Registration and will submit findings to the Department's Commissioner. Thereafter, the Commissioner will issue a decision regarding the Petitioner's suspension. If the decision is to continue the suspension or revoke the Certificate of Registration, the Petitioner may appeal the Commissioner's decision by commencing an Article 78 against the Tax Department Commissioner, in Supreme Court in Albany, NY.[22]

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[1] United States Constitution, Fourth Amendment.
[2] New York State Constitution, Article One, § Twelve.
[3] New Criminal Procedure Law, Article 690, §§ 690.05 et. seq.
[4] *Colonade Catering Corp. v. United States*, 397 U.S. 722 (1970). The Supreme Court approved the statutory authorization of Internal Revenue Agents to conduct warrantless inspections of federally licensed dealers in alcoholic beverages.
[5] *United States v. Biswell*, 406 U.S. 311 (1972). Dealer engaged in the pervasively regulated business of firearms sales accepts a license to do so with knowledge that his business records and inventory will be subject to effective inspection.
[6] Tax Law Art. 12-A, §§ 281 et. seq.
[7] Tax Law Art. 18, §§ 420–445.
[8] Tax Law § 474(4).
[9] New York Criminal Procedure Law § 1.20(34)(q).
[10] Tax Law Art. 37, § 1846 et. seq.
[11] Tax Law Art. 37, § 1847 et. seq.
[12] Tax Law Art. 37, § 1814(a) et. seq.
[13] Tax Law Art. 37, § 1800.
[14] Tax Law § 481(1)(b)(i) et. seq.
[15] *People v. Rizzo*, 40 N.Y.2d 425 (1976).
[16] *Rizzo*, 47 A.D.2d at 470 (1975).
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[18] Press Release, NYS Dept. Taxation & Finance (Apr. 7, 2014)(on file with author).
[19] Press Release, NYS Dept. Taxation & Finance (July 1, 2015)(on file with author).
[20] Tax Law § 480-a(1)(a).
[21] Tax Law § 480-a(4)(b).
[22] Tax Law § 480-a(4)(c).

MEDIATION ...

Continued From Page 11

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14. *See id*.
15. *Id*.
16. *See id.*; Loretta Gastwirth, *To ADR or Not to ADR: That is the Question*, 65 Nassau Lawyer (No. 3) 16, 16 (Nov. 2015).
17. *Fact-Finding and Discovery*, FindLaw, 2015, http://litigation.findlaw.com/filing-a-lawsuit/fact-finding-and-discovery.html (last visited Nov. 17, 2015).
18. Abeshouse, *supra* n.4 at 24.
19. See Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy - For A Time,* 67 U. Colo. L. Rev. 259, 309 (1996); Gastwirth, *supra* n.16 at 16.
20. *See Am. Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dept. 1990) ("Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement."); *Caruso v. HSBC Private Bank*, No. 650347/2010, 2015 N.Y. Slip Op 30736(U), ¶¶ 12-15 (Sup. Ct. N.Y. Co. Apr. 29, 2015) (Singh, J.) (denying cross-motion to amend complaint where relevant contract proscribed recovery for consequential and punitive damages); Gastwirth, *supra* n.16 at 16.
21. *See* Harriette M. Steinberg & Elizabeth P. Donlon, *Using Mediation to Resolve a Will Contest (Maybe Even Before It Happens)*, 65 Nassau Lawyer (No. 3) 8, 22 (Nov. 2015).
22. Brand, *supra* n.13 (section entitled "Building a Practice").
23. Ytterberg, *supra* n.5, at 45.
24. *See* Arran Dowling-Hussey, *A Cheaper Way to Solve Disputes*, Retail News, May 2014, at 62, 63 (*available at* http://issuu.com/retailnews/docs/rn_may_2014).
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27. Sun Tzu, *The Art of War* 77 (Samuel B. Griffith trans., Oxford Univ. Press 1971).

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In This Issue:

The Chameleon Mediator

In this quarter's newsletter, Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, focuses on his particular mediation style—what he calls "chameleon mediation"—and offers some tips for mediators who have adopted or wish to adopt this particular style.

What the Amazing Chameleon Can Teach Mediators

Of all of G-d's magnificent creatures, one of the most amazing and admirable in my opinion is the chameleon (such as the one which appears on the right).

Wikipedia tells us that the creature is a lizard that presents itself in a variety of sizes and colors and often has the ability to change colors. Chameleons live in a variety of habitats that range from rain forest to desert conditions and are found in the wild in parts of Africa, Asia, and Europe. Adaptability and versatility are clearly their trademarks.

Scientific research from 2014 has revealed something interesting about how chameleons change colors, often but not always for purposes of camouflage. From the "Chameleon" Wikipedia page, we learn:

"*Chameleons have two superimposed layers within their skin that control their color and thermoregulation. The top layer contains a lattice of guanine nanocrystals, and by exciting this lattice the spacing between the nanocrystals can be manipulated, which in turn affects which wavelengths of light are reflected and which are absorbed. Exciting the lattice increases the distance between the nanocrystals, and the skin reflects longer wavelengths of light. Thus, in a relaxed state the crystals reflect blue and green, but in an excited state the longer wavelengths such as yellow, orange, green, and red are reflected.*"

"What the Amazing Chameleon . . . " — *cont. from Page 1*

The chameleon's color change thus constitutes not one, but two separate reflections that are a function of changing circumstances: (1) the reflection of external light; and (2) the reflection of the creature's internal mood.

Yet, notwithstanding such dramatic changes, the chameleon still remains at its essence a chameleon: the lizard that it was originally born. It does not compromise upon its internal identity, notwithstanding that the world around it may have been misled to believe otherwise (even to the extent of not being able to visually perceive it anymore), with the blood flowing through its body, irrespective of any color change, remaining the same all along.

There are some mediators such as yours truly who have learned much from this information about our polychromatic reptilian friend. Consciously refusing to align with any of the "big three" styles of mediation—facilitative, evaluative, and transformative (and for more on this, see Zena Zumeta's excellent article, entitled "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation" on mediate.com)—they choose to adapt rather than to adopt by choosing to use the techniques of all three styles at any time in the mediation process (and sometimes outside of it as well).

What determines their colors at any given time? At least three factors: (1) the personalities of the parties involved in the conflict; (2) the circumstances surrounding it; and (3) the potential for or prospect of creative solutions. Likewise, analogous factors determine the chameleon's colors: (1) the potential predators, prey, allies, or competitors in the field; (2) terrain and the relative strengths and weaknesses of the aforementioned players; and (3) the potential for survival opportunities.

Do the parties want to maintain their relationship(s) after the mediation process concludes? Best to use transformative and facilitative techniques. Do the parties want from you as a mediator an idea of how they would fare in court (what is sometimes termed a "mediator's proposal" or "reality check") so that they can adjust negotiation positions? Best to use evaluative techniques. Is there a power imbalance that is being exploited? Best to use facilitative techniques and caucuses (private meetings between the mediator and the party or parties on one side of the conflict).

And, of course, all of the aforementioned considerations and more can present themselves sequentially, simultaneously, or spontaneously in one or more mediation sessions. As such, the adaptive, evolving "chameleon mediator" has a distinct—and perhaps sometimes critical—advantage over mediators who rigidly follow only one mediation style.

Tips for the Chameleon Mediator

While being a "chameleon mediator" has advantages, it is not for every person. At the end of the day, Polonius' famous words in Act I, Scene 3 of Hamlet still ring true: "This above all: to thine own self be true." As such, if, for example, you are by nature facilitative and simply cannot bring yourself to be evaluative when the parties want you to be so, then don't force yourself to change. You will likely either fall short or—worse—be perceived by the parties as not being genuine. In this regard, the parties' trust of you as their mediator—somewhat analogous to the blood that runs through the chameleon's body—is paramount. Lose that, and all is lost.

Still interested in "chameleon mediation"? If so, here are three tips which I've found from experience to be helpful: (1) Solid Preparation — As is the case with many things in life, serious preparation for mediation sessions—meaning at the very least in-depth knowledge of relevant facts, occurrences, and transactions and a clear understanding of the strengths and weaknesses of all party positions—will allow you to better devote mental resources to appreciating the "flow of emotions" in the sessions and deciding when and to what degree to "change your colors" (i.e., your mediation approach); (2) Disclosure — To maintain trust and candor, tell the parties up front (without being too specific) in your introductory remarks that you will be using a variety of mediation techniques based upon several styles of mediation; and (3) Reflection (or Camouflage) — Without actually saying, implying, or doing anything to align yourself with party positions or interests, use active listening skills such as looping to slowly, accurately, and empathetically reflect back what the parties state to you (in both joint sessions and caucuses). There are times where reframing of statements will be necessary, but if possible, try to reflect your understanding of any statements before reframing them. With a little bit of practice, like the wisest of chameleons, you will soon learn to become virtually invisible and end up helping the parties help themselves all by themselves.

The Natural Mediator

by Robert Benjamin

Clear rules and simple answers have always been troubling for me. While I acknowledge the allure they hold, too often their application leads to greater confusion and unintended consequences, especially in complex matters. A good measure of my personal affinity and professional interest in negotiation and mediation is derived from the release I am allowed from the necessity of determining who is right or wrong and what is the right answer. I have found my naturally confused state of mind to be useful.

However, while I have found some refuge in mediation practice, I find the evolving belief in the profession about the nature and personality of a mediator to be too simple and bland. The conventional wisdom in the field is that a mediator is a humanistic, compassionate, patient, empathetic and rational listener, slow to anger and frustration and eternally optimistic that all issues can be resolved and have a right and proper resolution.

While I would like to believe I exhibit some of those traits sometimes, much of the time I fall short. Listening to other mediators discuss the subject, perusing conference workshop offerings, or reading literature in the field, often makes me feel even more isolated and out of step. Some have even suggested that natural mediators can be discovered through psychological testing using such tests as the Meyers-Briggs Inventory. Some mediation training participants come fortified by a career counselor who, after careful analysis, has determined the candidate to be well suited to mediate by virtue of the fact that he or she is a "caring individual and a good listener."

I think that what many say the character traits of a good mediator should be are not what they actually are. Some research has confirmed that there is a gap between what mediators say they think they are doing and what others observe them to be doing. As well, truth be told, my own experience suggests that mediators are not particularly thoughtful, empathetic or rational when dealing with their own conflicts. (Something akin, I suppose, to "the shoemaker has no shoes"). I do not intend to impugn the integrity of mediators-quite the opposite. I am only suggesting that the personality traits that best serve mediators may not be the most obvious or commonly presented.

In contrast to the conventional belief of which traits make a good mediator, (or perhaps as justification for my poorly evolved personality), I have distilled four important attributes of the natural mediator. They are as follows: (1) confused, (2) voyeuristic, (3) compulsive, and (4) marginal. Rationality and empathy are strategically useful but they are second tier attributes that can be learned if the first tier attributes are present.

CONFUSED.

Those who naturally possess this trait know who they are. There is a simple test: when confronted with the query, "Are you part of the problem or part of the solution?" you find yourself unable to respond. Like a deer caught in the headlights, you are immobilized. Not wanting to be part of the problem, you want to respond quickly and categorically, but upon hearing the solution set forth, just can't join the cause. Those of us of this ilk endure the chronic malady of a sore rear end from

constantly sitting on the fence. This confusion serves a mediator well-it allows him or her to naturally understand there are no easy answers and to help confuse parties who presume otherwise. The confused mediator more readily sees the validity to each person's perspective and more naturally resists aligning with any particular person. They recognize that heroes can be scoundrels, and victims can be perpetrators, and vice versa. It's never easy or clear.

VOYEURISTIC.
This attribute is troublesome; most assume voyeurism to be a form of sexual perversion. While it can be that, in this case it is associated with an endless fascination with how other human beings engage each other, construct their realities, and pursue their intimate relations. This attribute allows the mediator a greater ability to resist being judgmental, knowing that "there but for the grace of God, go I." How else to explain the popularity of Oprah Winfrey, Jerry Springer, and The National Enquirer? A mediator does not so much do disputing parties a favor by helping them settle conflict, but is rather being honored by being invited by them to aide in managing some of the most intimate matters of their lives.

COMPULSIVE.
This personality trait is probably the result of conflictual early toilet training. It is the penchant to bring order out of chaos. It should not necessarily be confused with the neurotic behavior Freud termed "anal compulsion," although that may be part of it. If one assumes that a good measure of conflict is less about allocation of resources and more about people being overwhelmed and fearful that they will be taken advantage of and made to look like a fool, then compulsive organizating-with the use of maps, charts, and a clear structure are essential. The mediator is the wilderness tour guide and must be well prepared. The mediator can't just wander along with them, but must instead sense and anticipate the parties' fears before they become overwhelmed.

MARGINAL.
I don't mean to suggest that mediators exhibit the characteristics of borderline personality disorder, although I suspect from time to time we have all wondered about ourselves. The implications of being marginal are that the mediator is not aligned or associated with any cause or purpose other than to help the parties make decisions for themselves. Groucho Marx said it best: "Any group that would have me as a member isn't worth joining." It means letting go of attachments to what life should be in a perfect world-one good for children, women, men, minorities, and other people of every stripe and kind. The mediator has to be on the fringe-an outsider-less concerned about what is right, than with what will work to settle a dispute in the present circumstance. Mediation is not about social justice.

Perhaps as mediators we try to hard to impose on ourselves unrealistic and artificial expectations of what we should be. In other words, we try to be saints when what may serve us the best is to recognize and use our basic nature. I suspect that many more of us are naturally confused, voyeuristic, compulsive and marginal than we are rational, patient and understanding in the path of conflict. The difference is that a good natural mediator has learned not to deny his or her basic nature, but rather to harness and use those amply provided attributes or vulnerabilities to our advantage.

Originally published by Mediate.com in 2001

Robert Benjamin biography and additional articles:
http://www.mediate.com/people/personprofile.cfm?auid=159

LEGAL GUIDE

Written by attorney David J. Abeshouse I Jun 18, 2013

Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases

Business contracts (/topics/business-contracts/advice)
Business litigation (/topics/small-business-litigation/advice)
Business legal disputes (/topics/small-business-legal-disputes/advice)

The American court system has been our forum for settling disagreements. This mostly worked, for a century or so. Early in the 20th century, new alternatives arose in reaction to many of the defects of our judiciary, and others globally. Now, 90 years later, Alternative Dispute Resolution (ADR -- including arbitration and mediation) has a firm and deservedly growing foothold in our business dispute resolution landscape, domestically and globally.

The vast majority of recent United States Supreme Court decisions encourage greater use of ADR in business cases. However, ADR is not yet sufficiently widespread in the opinion of those who see it as a better way to resolve more business conflicts without enduring onerous court procedures before an overworked judiciary.

Let's define what we are talking about here. Arbitration generally is a more streamlined, faster form of adversarial dispute resolution with greater finality than court litigation. Like court, there is a trial, and arbitration is binding - the Arbitrator issues an award, similar to a court judgment, determining who wins and who loses, and in what manner.

Arbitrators hear cases only within their subject area expertise, whereas most judges are generalists, hearing a wide variety of matters. Most arbitration are private, unlike the public-record court system.

Mediation, in contrast, generally is a more consensual, voluntary, negotiation-based process, with no mandatory resolution forced upon the parties. Rather, in mediation, the parties present their thoughts to each other and the Mediator (either with or without counsel), and the participants work together to reach a settlement that benefits all to the greatest extent possible, including by preserving relationships; civility trumps combativeness. The presence of the impartial Mediator changes the settlement dynamic, as (s)he helps the parties explore the issues, their positions, their interests, and the creative options for resolution. The participants enjoy the most open opportunity to be heard (and even "vent"), unrestricted by the rules of evidence. In mediation, the parties themselves ultimately determine the resolution of the dispute, often in a customized, cost-effective, win-win fashion. Mediation can be used instead of, or even during, an arbitration or court litigation. Mediation is highly successful, with more than 85% of mediated business cases resulting in settlement agreements.

One of the principal advantages of ADR is the speed (and accompanying cost savings) of its streamlined processes. A recent statistical review of 100 business cases filed with the American Arbitration Association with claims seeking more than $500,000 shows the median completion time as just 13 months. AAA Commercial Bulletin, Issue 6, Dec. 2010. Those same cases if filed in court likely would have averaged between 3 and 4 years to complete. Longer duration almost always equals more attorney hours expended, which translates to significantly greater expense, even after adding arbitrator compensation.

So what should business owners and their contract-drafting lawyers do if they want to benefit from ADR? With a bit of advance strategic thought, they can include a dispute resolution clause in their business agreements. Unfortunately, all too often, negotiating arbitration clauses is an afterthought, if it's considered at all. Parties tend to negotiate them minimally after the rest of the contract has been negotiated, although an arbitration clause becomes a key provision when a dispute later arises.

Many different forms of dispute resolution clauses exist, as ADR is a creature of contract and is flexible almost without limit. So it is a shame that most lawyers use an old "standard" (actually sub-standard) form dispute resolution clause, thereby squandering the opportunity to create a truly customized and helpful provision. Many resources exist for obtaining assistance in drafting, including sample clauses on the websites of various ADR providers such as the American Arbitration Association (http://www.adr.org (http://www.adr.org)), JAMS, NAM, and others. Perhaps the best course of all is consulting a knowledgeable ADR expert, to learn about what specific components of a clause might be used to the advantage of a client in a particular situation. Some experts even offer free consultations for drafting dispute resolution clauses, because this enhances appropriate use of ADR to resolve business disputes, and that rising tide floats all boats.

Please note that I am licensed to practice law only in NY. This guide is provided for general educational purposes only, and no attorney-client relationship has been formed. It should not be relied upon as legal advice. To the extent unique facts may exist in any give situation, the considerations might possibly change. The response given is not intended to create, nor does it create an ongoing duty to respond to questions. As they say, "Your Mileage May Vary." Best of luck.

Additional resources provided by the author

For additional information, please visit the websites of the major arbitration and alternative dispute resolution providers and forums, such as the American Arbitration Association: http://www.ADR.org (http://www.ADR.org)

American Arbitration Association (http://www.ADR.org)

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