2020

Advanced civil mediation practice: adding tools to your box

Indiana Continuing Legal Education Forum (ICLEF)

Advanced Civil Mediation Practice: Adding Tools to Your Box
November 16, 2020
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ADVANCED CIVIL MEDIATION PRACTICE: ADDING TOOLS TO YOUR BOX

November 16, 2020

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ADVANCED CIVIL MEDIATION PRACTICE:
ADDING TOOLS TO YOUR BOX

Agenda

8:55 A.M. **Welcome & Introduction**
- *Michael P. Bishop*, Program Chair

9:00 A.M. Biased? Who, Me?! A Candid Look at the Problem of Implicit Bias
- *David Hoffman*

All of us have biases, and some biases have served us well as a species, protecting us from danger and enabling us to make routine decisions quickly. Other biases have not served us well in a modern, diverse society, where the tendency to feel more comfortable with people who are like us creates blinders of which we are often unaware. This presentation will explore the origins of biases, how they can be measured, and how we can counteract biases regarding race, gender, class, and other factors in ourselves and others.

10:30 A.M. **Coffee Break**

10:45 A.M. Let's Get Evaluative…How and When Do We Do It?
- *Dwight Golann*

Good mediators constantly evaluate what is happening in our cases. And we keep our opinions hidden—or do we? Data shows that mediators regularly convey their viewpoints, indirectly and even unconsciously. We'll show video examples and ask you to discuss in small groups: When do you provide direction to parties? On what topics, using what techniques? Do you ever "leak" a viewpoint, intentionally or not? This is a chance to reflect on what you do, and to hear from colleagues about this charged topic.

12:15 P.M. **Lunch Break (on your own)**

1:15 P.M. Making the Most of Zoom: Screen Sharing and Other Tips for Mediators
- *Robert M. Daisley*

A practical demonstration of various Zoom features, like Screen Sharing, to caucus and finalize agreements. As well, how mediators can use Excel, along with Screen Share, to keep track of the negotiations.

2:45 P.M. **Coffee Break**

3:00 P.M. Ethics in Mediation: Real Case Scenarios
- *John C. Trimble*

A fruitful discussion on a variety of common scenarios that challenge the ethical obligations of mediators. As well, appropriate outcomes and the rules that apply will be shared.

3:45 P.M. Lessons I Have Learned
- *Brian C. Hewitt*

A presentation on sometimes hard-earned and valuable lessons learned from 30 years of mediating.

4:30 P.M. **Adjournment**

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ADVANCED CIVIL MEDIATION PRACTICE: ADDING TOOLS TO YOUR BOX

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Michael P. Bishop
Cohen Garelick & Glazier, Indianapolis

Named as an *Indiana Super Lawyer* in the area of litigation beginning in 2004, *Michael Bishop* concentrates his practice in the areas of mediation, arbitration, and probate and trust litigation. He is recognized by *Best Lawyers in America* in Alternate Dispute Resolution and Arbitration and Trust and Estate Litigation since 2006. In 2008, he was selected as a Member of the *American Arbitration Association National Roster of Neutrals*. Michael has an AV Peer Rating from *Martindale-Hubbell*.

Michael received his Juris Doctorate from Indiana University Robert H. McKinney School of Law in 1980. Following graduation, he served as Law Clerk to the Honorable James E. Noland, United States District Court, Southern District of Indiana. Michael is a Fellow of the International Academy of Mediators, Fellow of the *American College of Civil Trial Mediators*, and Fellow of the *National Academy of Distinguished Neutrals*.

Mr. Bishop is a member of the faculty of the *Indiana Trial Advocacy College* and is the Chair of the annual *Advanced Civil Mediator Training course* in Indiana. Michael was a founding member of the IBA Settlement Week in 1986. He served as Chair of the ISBA ADR Section, was a member of the Board of Directors for Indiana Continuing Legal Education Forum and is Past President to the Board of Directors for the Indiana Bar Foundation. Michael received the “Excellence in Continuing Legal Education Award” from ICLEF, its highest award of achievement for commitment to continuing legal education.

Michael is also past President of the Sagamore American Inn of Court, where he continues to serve as one of the founding Benchers of the Inn.

Robert M. Daisley
Daisley Mediation, Tampa, FL

Robert Daisley is a full-time mediator who mediates approximately 300 cases a year in a wide range of subject matters including insurance, construction defect, professional liability, contracts, business, employment and personal injury. He has mediated over 3,000 cases in state court, federal court and arbitration since becoming certified in 2004 by the Florida Supreme Court and U.S. District Court for the Middle District of Florida. He is a Distinguished Fellow, Board member and Membership Chair of the International Academy of Mediators. He also serves on the Executive Committee of the National Academy of Distinguished Neutrals. He graduated Phi Beta Kappa from Dartmouth College at age 20 and Order of the Coif from the University of Virginia Law School at age 23. Before becoming a full-time mediator, he practiced civil trial law for 22 years. Rob lives in Tampa, Florida and Breckenridge, Colorado with his wife Chantal. They have four children and three grandchildren. Rob is a certified Les Mills Body Pump ™ instructor and in the summers guides canoe trips in the northern Ontario wilderness for Camp Temagami.

Dwight Golann
Suffolk University Law School, Boston, MA

EDUCATION

- BA, Amherst College
- JD, Harvard University

COURSES TAUGHT

-Dispute Resolution
- Financial Services

Brian C. Hewitt,
Hewitt Law & Mediation LLC, Indianapolis

Brian Hewitt is a highly respected trust and estate litigator who has practiced in Indiana for more than three decades, describing himself as a "specialized generalist" because of his diverse areas of expertise. Named to the distinguished list of Indiana Super Lawyers every year since 2009, Brian has represented financial institutions and other fiduciaries in some of the state's most high-profile cases, including the estates of Indianapolis Colts owner Robert Irsay and commercial property mogul Melvin Simon.

Brian is an accomplished litigator, but his first and greatest love is mediation. He relishes the opportunity to resolve a complex legal situation in just a single day—and to help the people involved avoid expensive, messy, and emotionally draining litigation. Brian's colleagues will tell you that he has an unbelievable gift for understanding people's needs and charting a course that allows both sides to leave mediation feeling satisfied. His track record will tell you the same: he has settled nearly 1,000 trust and estate cases and hundreds of real estate, commercial, and professional malpractice cases, with a success rate of more than 90 percent.

Brian is a frequent speaker and author on important topics related to trust and estate mediation and litigation, giving regular presentations to the American College of Trust and Estate Counsel (ACTEC), the Indiana State Bar Association, and the Indiana Continuing Legal Education Forum. As a recognized expert in the field of trust and estate law, he is regularly asked to consult or testify as an expert witness in cases involving trusts, estates, commercial law, malpractice, and civil procedure.

Outside the office, Brian writes music for voice and guitar and is an avid supporter of the Indianapolis Children's Choir, where two of his children sang for many years. He and his wife, Veronica, are active members of Resurrection Lutheran Church.

David A. Hoffman
Boston Law Collaborative, LLC, Boston, MA

David A. Hoffman is the founding member of Boston Law Collaborative, LLC, where he serves as a mediator, arbitrator, and collaborative law attorney. He also teaches three courses at Harvard Law School, where he is the John H. Watson, Jr. Lecturer on Law: Mediation; Diversity and Dispute Resolution; and Legal Profession: Collaborative Law. David was named Boston's "Lawyer of the Year" for 2016 in the field of Mediation by the book *Best Lawyers in America* and U.S. News & World Report and one of its Best Lawyers in ADR, Family Collaborative Law, Family Law Mediation, and Civil Collaborative Law. 2016 marks the tenth year that David has been named a Best Lawyer in at least one field. In 2014, the American College of Civil Trial Mediators gave David its Lifetime Achievement Award, and in 2015, the American Bar Association Section of Dispute Resolution gave David its highest honor, the D'Alermberte-Raven award.

John C. Trimble,
Lewis Wagner, LLP, Indianapolis

John maintains a practice that is dominated by catastrophic, complex, and class action litigation in the State and Federal Courts. He focuses much of his time on insurance coverage disputes, bad faith defense, lawyer and insurance agent malpractice, business litigation, and catastrophic damages caused by all types of casualty risks, including transportation, construction, product liability, fires, and governmental liability, to name a few. He has also argued numerous appeals in the State and Federal appellate courts as counsel for a party and as amicus counsel for lawyer and trade associations. Through the years, he has been admitted pro hac vice in more than 30 jurisdictions, and is frequently hired by out-of-state firms to serve as local counsel in Indiana.

For nearly 30 years, John has earned a reputation as one of Indiana's most sought after mediators. Because of the complexity of his litigation practice, John keeps the mediation to a manageable level, but he is frequently hired by judges and lawyers to mediate some of Indiana's largest and highest profile cases. He is also frequently named as an arbitrator in bodily injury, business dissolution, employment, and commercial disputes.

John has distinguished himself as a bar leader. He has been president of the state defense bar, and is a past Defense Lawyer of the Year honoree. He has also served on the Board of Directors of DRI, the largest national association of defense lawyers. In 2000, DRI named John its outstanding defense bar leader of the year. More recently, John has chaired DRI's national Judicial Task Force to explore and offer recommendations on how DRI can assist in maintaining a fair and impartial judiciary. John is a Past President of the Indianapolis Bar Association; President-Elect of the Indianapolis Legal Aid Society; and a past Chair of the Board of Visitors of Indiana University Robert H. McKinney School of Law. He is also President of the Texas based Association of Attorney Mediators.

John has been repeatedly listed in state and local polls of attorneys as one of the top lawyers. Since 2004, he has been selected for inclusion in *Indiana Super Lawyers*® and ranked number one overall in Indiana from 2011-2019. He was also selected by his peers for inclusion in *The Best Lawyers in America*® in the fields of Insurance Law; Mediation; and Personal Injury Litigation - Defendants. He was named Best Lawyers' 2013 Indianapolis Insurance Law - Lawyer of the Year, Best Lawyers' 2015 Indianapolis Personal Injury Litigation – Defendants - Lawyer of the Year and Lawyer of the Year, Best Lawyers' 2019 Indianapolis Person Injury Litigation - Defendants, Best Lawyers' 2020 Indianapolis Mediation - Lawyer of the Year.

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Section One

Biased? Who, Me?! A Candid Look at the Problem of Implicit Bias

David A. Hoffman
Boston Law Collaborative, LLC
Boston, Massachusetts

Section One

Race & Ethnic Fairness in the Courts

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

August 2009

ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Jerry Kang is Professor of Law at UCLA School of Law. He has written and lectured extensively on the role of implicit bias in the law. For more information on Professor Kang, please visit jerrykang.net. The Primer benefited from the review and comments of several individuals working with the National Campaign, including Dr. Pamela Casey, Dr. Fred Cheesman, Hon. Ken M. Kawaichi, Hon. Robert Lowenbach, Dr. Shawn Marsh, Hon. Patricia M. Martin, Ms. Kimberly Papillon, Hon. Louis Trosch, and Hon. Roger K. Warren.

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Implicit Bias: A Primer

Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias"

includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
    - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
    - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we

should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

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Section Two

Let’s Get Evaluative…
How and When Do We Do It?

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Section Two

Neutrals' Skills

How Mediators Evaluate, Through Words, Participants' Gestures and Sometimes Silence

BY DWIGHT GOLANN

Do you give evaluations when you mediate?

I suspect most of us do, although we may not consider what we do to be "evaluation" at all. At this link, excellent mediators present their viewpoints about a wide variety of topics, and in different ways: tinyurl.com/GolannEval. As I viewed these videos, I was surprised by what I found.

First, even mediators I had been told were strongly evaluative never placed a specific value on a case. No one said, for example, "Based what I've heard today, I think the court is likely to return a plaintiff verdict of around $500,000," or, "I see a four out of 10 chance of your winning," much less that "this case should settle at $900,000."

Almost everyone limited themselves to adjectives, saying at most, and only after hours of mediation, "I see a real risk here that a judge or jury might. …"

The only exception is me, demonstrating decision analysis—although even then I give only a range of probabilities ("I can't predict what would happen any one time, but if this case were tried, say, 10 times...the trial value might be in the $150,000 to $200,000 range, in the American court system") and then ask about litigation costs for both sides that exceed the likely recovery.

DIFFERENT INTERPRETATIONS

This vagueness has a consequence: We know that disputants interpret what they hear differently, depending on their situations and states of mind. To test this, ask any group what an opinion like "real risk" means in percentage terms. You'll find the answers almost always cover a spread of 30 to 40 points.

Avoiding numbers, in other words, allows disputants to put their own meaning on what a mediator says. In a sense, neutrals speaking this way expect to be misunderstood, allowing room for disputants to hear only as much of a viewpoint as they are ready to accept. We know we can make our opinions more specific later if necessary, but that it's almost impossible to take back a precise statement once it's out in the room.

Mediators often deliver opinions without using use words at all. The videotaped mediators raise an eyebrow, frown, pause, squint, dip their head, or lean back, using expressions and body language to express viewpoints silently and tactfully. These allow the listener to accept bad news gracefully, or even ignore or fail to perceive an opinion they are not ready to accept.

I wonder, though, if we were usually aware of the signals we are sending. Teachers tell novices how important it is to take note of disputants' body language, but how often do we observe our own?

In the "Gestures" segment of the videos at the link above, for example, you'll see me momentarily close my eyes as a CEO reacts to insulting language from an opposing lawyer. (I call it my "Dr. Birx moment.") I was never aware of it, however, until I reviewed the video. (On the other hand, when I responded by dropping my head and pushing my chair back, I certainly knew what I was signaling.)

Perhaps at a future CPR Institute Annual Meeting we could point cellphones at ourselves as we engage in difficult discussions. [The CPR Institute publishes this newsletter with John Wiley & Sons.] We might learn from what we see.

Facilitative mediators advocate responding to unrealistic disputants with exploratory questions and "reality testing," taking care not to do so in a way that could be seen as evaluative.

But again, I wonder. Deborah Kolb, co-Director of the Negotiations in the Workplace Project at the Program on Negotiation at Harvard Law School, once observed that deciding to reality test implies that the mediator has developed an opinion about what reality is, the disputant's view is different, and the mediator thinks the disputant's view would benefit from testing.

IMAGINARY BUBBLES

As I observe mediators talking with disputants in what seems on the surface to be a facilitative dialogue, I often see different statements made in imaginary bubbles above the neutral's head.

For instance, when a videotaped mediator, in response to a low first offer, asks the lawyer and executive in a thoughtful tone, "What do you *suspect* their response is going to be?" some might say she's simply encouraging them to assess their counterparts' thinking.

(continued on next page)

Reality Speaks

The technique: Mediator evaluation.

The analysis: What's the bubble over the participants' heads saying?

The tactics: The author discusses how questions and gestures can display the neutral's opinion in the case.

The author, an active mediator and trainer, is a professor at the Suffolk University Law School in Boston and a Scholar in Residence at the International Academy of Mediators. This article has been updated and expanded from an Academy blog post. The full videos from which these examples are taken are available to teachers for use in the classroom at no cost at www.adrvideo.org.

Neutrals' Skills

(continued from previous page)

The disputants, however, understand exactly what the mediator is saying, responding respectively "Who knows?," with a chuckle (executive) and "I don't think they're exactly going to be *thrilled* with it. …")(lawyer).

And even if questions themselves are neutral, if you return to a topic repeatedly disputants will read a message into it, i.e., "You notice he keeps asking about causation—I don't think he's buying our argument. …" As I think about my own efforts to raise questions in mediation, I can't help but wonder what bubbles the disputants have been placing above my own head.

And even if questions themselves are neutral, if you return to a topic repeatedly disputants will read a message into it.

Offering opinions through questions, I hasten to emphasize, is often good practice. Like gestures, questions allow listeners to hear a viewpoint without having to confront it directly. Your tact may be appreciated, especially in a high-context culture in which people don't want others to "put all our cards on the table," as we Americans like to say.

Again, if a viewpoint expressed indirectly is especially hard to accept, the listener can politely ignore or not perceive it at all.

* * *

No one who hires a mediator expects them to be merely a "potted plant." Sophisticated parties know that we're constantly evaluating as we work. They expect us to keep our opinions to ourselves, however, exhibiting our views only as, and to the extent needed, to help the process move forward, all while preserving the parties' dignity.

Expressing opinions well is, I think, one of the most important ways in which we practice our craft.

Arbitration

Integrity and Efficiency in the Decision-Making Process: Suggested Solutions for Addressing Significant Hurdles

BY TERESA GIOVANNINI

Users expect the arbitration process to be both fair and efficient in terms of time and costs.

In that regard, as put by one of my learned Swiss colleagues, Dr. Berger, from the parties' perspective:

- You know the arguments and motions put forward in the proceedings, which is the input;
- You can see the result in the form of the dispositive section of the award, which is the output; and
- You can try to understand the reasons given for the decision in the award, which will be the transfer element.

"All the rest that may have happened in the deliberations remains undisclosed and undiscovered[. …]" Bernhard Berger, "The Legal Framework: Rights and Obligations of the Arbitrators in the Deliberations," in Bernhard Berger and Michael E. Schneider (eds.), Inside the Black Box; How Arbitral Tribunals Operate and Reach their Decisions, ASA Special Series No. 42, 7 (2014) (available at https://bit.ly/2VYZwgt).

THE DELIBERATIONS

As set out by Richard M. Mosk in his remarkable study on arbitrators' deliberations, "an important component of any dispute resolution mechanism involving more than one decision-maker is the deliberation." Richard M. Mosk, "Deliberations of Arbitrators," in David D. Caron, et al., Practising Virtue: Inside International Arbitration (Oxford University Press, 2015) (available at https://bit.ly/355KD04).

What is being recalled here is that statistically, a vast majority of international arbitration tribunals are composed of three members, a setting that constitutes the fallback rule (Article 10.2) in the UNCITRAL Model Law that has been adopted by many arbitration countries.

Deliberations are mandatory in most national laws. As noted by the Paris Court of Appeal:

> [T]he requirement of deliberations is a fundamental principle of the procedure which guarantees the judicial character of the decision reached by the arbitral tribunal […] the principle of collegiality assumes […] that each arbitrator will have

The author is founding partner of Lalive, in Geneva, Switzerland, and is a member of the ICC International Court of Arbitration and the Council of the ICC Institute of World Business Law. The article is updated and adapted from a keynote address she presented in May 2019 to the CPR European Conference on Business Dispute Management in London (more information at https://bit.ly/2S59zj0), as well as two other keynote addresses, "Lifting the Curtain on Arbitral Tribunals' Decision-Making: Practical Tools to Enhance the Reliability of the Process," the Harvard International Arbitration Conference, Harvard Law School (Feb. 23, 2019); "Reasoning as Evidence of Legitimacy of the Award" at the Sixth Annual GAR Live Dubai (Nov. 21, 2019), and participation as a panelist for "Reasoning in Arbitral Awards, Why? How? Control and Sanction under Swiss Law," 39th ICC Institute Annual Conference, Paris (Dec. 17, 2019).

Beyond Abstinence:
The Need for Safe, Impartial Evaluation in Mediation

Professor Dwight Golann and Professor Marjorie Corman Aaron[1]
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For too long there's been a schizophrenic split in our field about the wisdom, value, and ethics of mediator evaluation. Many academics and trainers argue that evaluation is improper, some courts bar or discourage it, and ethical standards waffle on the topic. Lawyers, by contrast, consistently say that they value mediator evaluation.[i]

Most of this debate has concerned a mediator's direct evaluation of legal issues. We are concerned that the argument over whether this type of evaluation is or is not proper has distracted us from a wider examination of the effects of evaluation in mediation practice. To "evaluate," dictionaries tell us, is to assess, analyze, consider, value, weigh, judge, size up or form an opinion,[ii] and applying this definition we believe that most mediators evaluate constantly, from their first contact with a dispute. They assess parties, lawyers, issues, options, and potential avenues for agreement throughout the process, forming opinions not only about legal issues and likely case outcomes, but also about personalities, bargaining tactics, and the conflict's impact on peoples' lives and businesses.

Evaluation, in this broad sense, is essential to a mediator's role. Parties and lawyers don't hire mediators to be "potted plants"; they expect them to use wisdom, judgment, and experience to facilitate settlement. And mediators act on their opinions, whether expressed or not. Every question or comment by a good neutral reflects his assessment of the best next step in the process. Thus, to us, whether mediators should evaluate is not the question. The question for mediators is how to evaluate – what to do with their views – and how what they do will affect participants and the process.

We think mediators handle evaluations in three general ways: expressing them directly, suggesting them implicitly or "leakily," or keeping them silent and hidden. Perhaps because the "e-word" has been anathema, and abstinence a widely-adopted prescription, we are unaware of courses, trainings, or much writing that focus on different ways mediators evaluate and their effects. In our view, the potency and prevalence of evaluation, combined with the lack of training and discussion of the topic, has left many mediators ill-prepared to evaluate in ways that protect the integrity of the process and enhance the likelihood of success. Our discussion here is intended to raise the topic of mediator evaluation anew and more broadly, in the hope that our colleagues will join in the discussion.

Direct Evaluation

Given that it has been the subject of most attention and controversy, our analysis starts with and focuses substantially on direct evaluation—a clearly and explicitly communicated analysis or prediction—that focuses on legal issues, as opposed to other topics. As

explained below, we strongly believe there is such a thing as good direct evaluation, even as we acknowledge that it can be risky.

First, however, we want to make clear that good evaluation does *not* include a mediator voicing a personal opinion about what is "right" or "fair," or a "just" outcome, in a dispute. This is for two reasons: relevance and impartiality. A mediator's view of fairness or justice is irrelevant because she will not be the one deciding the case if it does not settle. More importantly, once a mediator suggests to a disputant that a claim or defense is less than just, the listener may well see her as biased. Even if a mediator can put her feelings aside, like a doctor treating a hardened criminal, disputants are unlikely to believe that. We understand that some mediators convey their personal views of fairness or justice, but we do not defend the practice.

We think evaluation, when done well, should be an assessment and prediction about *someone else's* viewpoint: how a judge, jury, or arbitrator is likely to decide a specific issue or the entire case if it does not settle. Good evaluation, then, is akin to a weather prediction, except that the mediator is predicting the atmosphere in a future courtroom or arbitration.

Such predictions are relevant because parties almost always see adjudication as their alternative to settlement.

We fail to see how such predictions inevitably compromise a mediator's impartiality. A weather forecaster's prediction of rain on a day chosen for an outing does not make the listener think he wants her to get soaked. Quite the opposite, and the listener understands that. In the same way, a mediator's prediction that a jury may not respond well to a certain fact or argument does not render him partial to the other side. If the prediction is thoughtful and skillfully communicated, as suggested below, the disputants can understand that too.

We also don't believe that an evaluation diminishes parties' self-determination. Our weather forecaster's prediction of the likelihood of rain doesn't impinge on the listener's ability to decide whether to rent a tent for a wedding reception—it simply provides useful information to consider. Similarly, a doctor's pessimistic diagnosis doesn't constrain a patient from declining treatment or seeking a second opinion. If anything, a mediator's offering a neutral view of the litigation BATNA may enhance disputants' ability to exercise self-determination.[2]

Benefits. Assuming a legal evaluation is done competently, what are its benefits? Simply put, a mediator's explicit evaluation can help parties overcome impasses caused by divergent views of the likely adjudication outcome of a particular legal issue or the entire case.

Evaluation is not magic, however. Disputants have usually lived with cases for months or years before entering mediation. The idea that they will reverse strong opinions based on one mediator's counter-view (though retired judges may have special credibility) strikes us as bordering on hubris. But even if a mediator's evaluation doesn't persuade someone to entirely change his assessment, it can infuse uncertainty or reduce confidence

[2] We do, however, recognize that evaluation in any form when parties do not have access to legal advice raises difficult issues; thus our comments are limited to parties represented by counsel.

that the decisionmaker will see it his way. If a lawyer had previously dismissed his own doubts about a legal argument, a mediator's opinion that echoes those doubts may prompt him to rethink. It's akin to someone noticing a clothing stain that you had hoped wouldn't show. Now you know it does. Time to reassess the value of the outfit?

A mediator's evaluation can also influence parties' views. Often, lawyers admit to us, their efforts to convey realistic evaluations to clients have fallen on deaf or resistant ears. When the mediator's evaluation matches the lawyer's, a client may finally see the writing on the wall. If a lawyer had avoided raising any doubts to a client for fear of being perceived as disloyal or insufficiently zealous, he may use a mediator's evaluation as "cover," without having to own it himself. A lawyer may talk only about best-case outcomes while using the mediator as a foil or scapegoat who raises less pleasant possibilities. Later, after the mediator has left, the lawyer may suggest taking her evaluation into account, even while claiming that it's overly pessimistic.

Evaluation can have other useful effects. A nonbinding opinion from a respected person who has listened carefully to arguments can give a disputant the feeling of a "day in court." Given the small proportion of cases that ever reach a decision, this is as close as most litigants will ever get to traditional justice, and much safer. A neutral opinion can also help a party save face before a spouse or get approval from a corporate supervisor.

Risks. No doubt, evaluation is risky. We see it as the "surgery" of mediation, a tool to use carefully and sparingly, to the minimum extent needed. If the barrier blocking agreement does not involve views about legal issues, then offering an evaluation, especially a "global" opinion ("I believe the plaintiff is likely to obtain a verdict of $150,000 to $250,000") is the mediative equivalent of removing an appendix to deal with stomach pains—unlikely to help, unnecessarily intrusive, and involving possible serious side effects.

The largest, most obvious risk is that a disputant receiving an unfavorable evaluation will then perceive the mediator as aligned with the other side, no longer as neutral, and may withhold confidential information and mistrust the mediator's actions from that point on. Such an the "operation" is successful in that the neutral's evaluation is thoughtful and thorough, but the mediation process is now on life support. Not surprisingly then, when we teach and train about evaluation we focus on whether to use evaluation at all and how to do it to minimize the risk of losing the perception of neutrality.[iii]

A closer look at evaluation reveals other, less-often-acknowledged risks. One is that the mediator's prediction of the likelihood of success may not reflect the way the judge or jury would look at it. Unless a case is tried many times, it is impossible to know if a mediator's evaluation was right or wrong. We assume that non-partisan evaluations are less subject to cognitive distortion and thus more accurate. While research suggests this may be true to some degree,[iv] it doesn't mean all mediators will evaluate a case in a similar way. Indeed, when one of us asked lawyer-mediators to evaluate likely outcomes in a simulated case, their responses varied widely. No mediator should think their evaluation is the only reasonable one.

Evaluation can also be dangerous if the listener takes it as a signal that he cannot achieve his goals in a case. This triggers loss aversion, one of the strongest influences on human decision-making. Disputants do not always react to mediators' evaluations with respectful appreciation; often they express denial, disappointment, and even anger.

Disputants' reactions can trigger strong feelings in the mediator. Having put forward a thoughtful forecast, a mediator may react defensively to disagreement, placing her in opposition with the parties or lawyers — not where a mediator should ever be.

A final problem is that mediators may treat evaluation as an end, rather than what it should be: a useful, but limited, tool. Even the best evaluation, in other words, should not end or unduly narrow the process—it can help get the settlement "bus" out of a "ditch," but should not be used to drive it to any particular destination.

Implicit, or "Leaky," Evaluation

When parties have divergent views of the merits and less intrusive measures are insufficient, advocates of facilitative mediation recommend that mediators undertake "reality testing." As Professor Deborah Kolb observed, however, deciding to reality test implies that the mediator has developed an opinion about what reality is and that the disputant's view is different and would benefit from testing.

Reality testing is intended to encourage disputants to consider their own views more carefully and not to communicate the mediator's perspective, but we find it often does not work that way. Best practice may be to begin with questions posed in a scrupulously neutral manner. However tough litigators (which describes most lawyers we see in mediation) typically respond with highly optimistic assessments of their case. If the lawyer is exaggerating knowingly he may eventually moderate his arguments. Often, however, litigators remain obdurate, either to maintain a positional strategy, to please clients, or because they have "fallen in love" with their case.

At this point, training programs often suggest that mediators move to more pointed reality testing, perhaps characterizing their questions as a request for help responding to arguments made by the opposing camp. A mediator who does this is, in essence, applying her internal evaluation covertly. That's where the leaking may begin. One can imagine counsel saying to a client after the mediator leaves the caucus room: "Hmmm…. She was being really careful, but did you notice that she spent a lot of time asking about how we'd show mitigation? She said she 'just wanted to be sure' we'd thought about it, but she was damned persistent. I wonder if she was thinking we're wrong?" Eventually the divergence between the assumptions underlying a mediator's queries and those supporting the disputants' answers may be apparent.

Often, we think, a mediator unintentionally communicates his internal evaluation through tone, less-than-neutral phrasing and body language, and by the issues on which he focuses. We were struck that a request to our teaching colleagues for a specific example of a mediator using facilitative reality testing effectively with positional disputants yielded no results.

The "leakiness" of reality testing may be intentional, especially in other cultures. When we showed a video of explicit evaluation at a New Delhi conference, for example, an Indian panelist said he'd do it differently. Asked to demonstrate, he made a series of statements to a mock CEO: "I'm sure you've discussed the issue of lost profits with your lawyer…I would expect that you've given it careful consideration…." and so on. After a few comments no one in the room had any doubt about the mediator's opinion. A facilitative American mediator would probably have used questions ("Have you discussed lost profits with your lawyer?"), but we doubt that a sophisticated party would fail to get the drift, particularly if the mediator returned to the issue.

When disputants experience a mediator's "reality testing" as disagreement it carries the same risks as explicit evaluation. Unfortunately, however, when evaluation is leaked unintentionally the mediator is unlikely to focus on how to deliver the opinion in a way that reduces those risks.

Communicating an evaluation through comments or questions can also diminish its effectiveness. Research on how people are induced to change their mind has found that stating opinions explicitly is more effective than hinting through queries.[v] And if repeated reality-testing generates suspicion about a mediator's impartiality, the audience may have shut down and shut her out by the time she moves to direct evaluation.

Silent Evaluation

We haven't thought much collectively about the fact that mediators are continuously and unavoidably evaluating *internally and silently* as they do their work. In this context, standards and codes that tell mediators to maintain impartiality and honor party self-determination seem laudable but insufficient.

How a mediator works is inevitably influenced by the way he evaluates—considers, assesses, sizes up—the personalities, legal and factual issues, bargaining patterns and other aspects of a dispute. This is natural, but it is perhaps better done with eyes wide open. If a mediator internally discredits an argument or feels skepticism about one side's motivations, it is likely to impact how he conducts the mediation. All evaluation creates temptations to favor one side or another. If internal evaluation is inevitable, then it is worth thinking deeply and teaching thoughtfully about how mediators should deal with the feelings and perceptions it can generate.

In sum, accepting evaluation as a legitimate technique and understanding that it can be expressed explicitly, communicated indirectly or remain hidden allows us to examine concerns that abstinence policies ignore. These include how to evaluate effectively while maintaining the overall facilitative nature of the mediation process; how to teach good evaluative techniques to students, litigators and judges; and how to assess benefits, dangers and limitations, and use evaluative techniques as wisely and sparingly as possible.

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[i] See responses of lawyers concerning analytical techniques in the *Final Report of the ABA Task Force on Improving Mediation Quality* (2008).

[ii] https://en.oxforddictionaries.com/definition/evaluation

[iii] For advice about how conduct evaluation effectively, see Golann, *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* 145-77 (2009).

[iv] See Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (Springer Books 2010), summarizing studies on judge, jury and attorney decisionmaking.

[v] See Douglas Frenkel and James Stark, *"Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*," 28 Ohio St. J. on Disp. Resol. 263 (2013).

Let’s Get Evaluative…
How mediators give opinions indirectly, non-verbally, unconsciously

Professor Dwight Golann

Suffolk University Law School

2008 ABA Task Force on Improving Mediation Quality

Percentage of lawyers who believe specific actions would be **helpful in half or more of their cases**:

- 95%—ask **pointed questions** that raise issues;
- 95%—give **analysis of case**, including strengths and weaknesses;
- 60%—make **prediction** about likely **court results**;
- 100%—**suggest possible ways** to resolve issues;
- 84%—recommend a **specific settlement**; and
- 74%—**apply some pressure** to accept a specific solution.

Table C

"I assess and share my opinion regarding the legal strength of arguments made by parties and/or counsel."

Comparison of Responses by Regions of Practice

	Never (0)	Sometimes (1)	About 1/2 the Time (2)	Usually (3)	Always (4)	Weighted Average
All responding mediators	10.7% (13)	33.9% (41)	18.2% (22)	30.6% (37)	6.6% (8)	**1.88**
Mediators practicing in US	4.4% (4)	31.9% (29)	17.6% (16)	38.5% (35)	7.7% (7)	**2.13**
Mediators practicing in California	0% (0)	22.0% (9)	14.6% (6)	51.2% (21)	12.2% (5)	**2.54**
US mediators practicing in states outside California	6.6% (4)	37.7% (23)	16.4% (10)	34.4% (21)	4.9% (3)	**2.10**
Mediators practicing outside US	32.4% (11)	38.2% (13)	17.6% (6)	8.8% (3)	2.9% (1)	**1.12**

Observations

- Experienced mediators evaluate constantly
  - Their evaluations cover a range of topics
  - They keep most opinions confidential
- When mediators express an opinion, they often do so
  - Through phrasing or gestures rather than explicitly
  - Using words rather than numbers
  - Verbally rather than in writing
  - On a single issue, not “total case value”

What can a mediator evaluate?

- Bargaining:
  - Likely reaction of the other side to an offer
  - Likely impact of a tactic on the bargaining process
- Interests:
  - The impact of the conflict on a party's personal interests
  - On business or organizational interests
- Legal issues:
  - Gaps in information and methods to respond
  - Importance of specific issues
  - Costs of litigating
  - Outcome in adjudication of one issue – or the entire case

Discuss in small groups:

As a mediator, do you ever express opinions or make suggestions?

On what topics: Bargaining? Interests? Merits?

When and why?

Bagger Delishco Contract Case
Fed. Dist. Ct. Mediators May 2012

Mediator	SJ % likely	Plt Trial Win % likely
Mediator 1 (Def)	20	70
Mediator 2 (equal)	70	25
Mediator 3 (Def)	5	90
Mediator 4 (neutral)	80	0
Mediator 5 (Plntf)	40	70
Mediator 6 (Pltf)	33	66
Mediator 7 (Def)	25	65
Mediator 8 (equal)	10	50
AVERAGE	35.375	53.875

Levels of evaluation

- Non-verbal: Gestures, expressions, silence
- Indirect: Fail to respond positively, change the subject
- Verbal:
  - Questions: Focused, tough, leading
  - Indirect comments: Doubt, disagreement
  - Statements: Vague, direct
- Written: Memo pad, whiteboard, document
- Breadth: One issue (claim), one aspect (liability), entire case
- Precision: General, specific, numerical

Please discuss:

If you evaluate, how do you do it?

- Through gestures, words or in writing?
- Single issues or case value?
- How specific or general? Words or numbers? Ranges or specific?
- Anything you avoid?

Please discuss:

- Have you used “edgy” evaluative techniques?
- Have you seen anything you might like to do?
- Anything you would avoid?

What can an evaluation accomplish?

- It can
  - Persuade a party of risk of loss, or help a lawyer do so
  - Signal
    - A limit to what a party can get in the negotiation
    - The need for a concession or change of strategy
  - Provide “cover” for a difficult decision
- It does not end the process—it’s only a tactic to move it forward
- It provides one “push” – choose the moment and method carefully

Planning for evaluation

- Don’t do an evaluation simply because it “can’t hurt” – it can!

- How and when evaluation is done is key to its success

Some key questions

If I do evaluate

- On what issue or topic should I focus?
- When should I offer an opinion?
- To whom should I offer it?
- How should I structure and phrase my comments to:
  - Preserve the parties' and lawyers' confidence and trust
  - Move them toward resolution
  - Preserve other options?

Before evaluating

- Encourage and assist the parties to exchange information
- Ask questions: broad, narrow, leading, confrontative
- Lead analysis
- Indicate doubt, disagreement

Suggestions for evaluative feedback

- Evaluation is like surgery: “Less is more…”
  - Focus on the key issue blocking progress…
  - Give only to the person(s) who need it
  - Emphasize uncertainty and risk, and preserve some hope
- Start
  - With a single issue, not the entire case
  - Speak generally—you can always become more specific, never less so…and you may not need to
  - Orally first. May support with memo pad/whiteboard

What *kind* of opinion?

- Your *personal view* of a fair result? No! It's dangerous and irrelevant.
- Your *expert judgment* on an issue? No! Same reasons
- What will break the *bargaining* impasse? Yes – low risk
- Interests, personal and commercial? OK, if they are ready
- A *prediction* of the likely result at trial OK, *if necessary*

Present it as a *weather forecast:* Is it likely to rain in a future courtroom? You don't want anyone to get wet, but…would it be sensible to buy an umbrella?

Options after evaluating

- Ask questions: where do they differ? What about costs?
- Explore: What else might be important?
- Restart the bargaining: Confidential listener, what if?, brackets, sub-meetings
- Extend or tighten the evaluation…
- Final steps: Mediator proposal, adjourn and follow up

Section Three

Making the Most of Zoom: Screen Sharing and Other Tips

Robert M. Daisley
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Tampa, Florida

Section Three

Making the Most of Zoom:
Screen Sharing and Other Tips……. Robert M. Daisley

Discussion Outline

Reference Materials

MAKING THE MOST OF ZOOM: SCREEN SHARING and OTHER TIPS

- Embracing the differences of Zoom
- Setting up your Zoom office
- Example: Screen Share Feature
  - ❖ Mediation Agenda
  - ❖ Guiding Discussion
  - ❖ Spreadsheets

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DAISLEY MEDIATION

A. The Threshold Question: Is Zoom, Better, Worse or *Different* From Mediating At Your Office
   1. Thinking of Zoom as *different* will improve your Zoom mediation experience
   2. The importance of identifying and embracing the differences
   3. Screen share as an example of a tool that can be utilized only on Zoom

B. Setting Up Your Zoom Office (designing your own virtual mediation conference center)

   1. Lighting
   2. Background
   3. Sound (microphone and speaker)
   4. Where you sit

C. Configuring Zoom

   1. Mandatory Zoom Basics
      a) Enable breakout rooms
      b) "automatically move all assigned participants into breakout rooms"
      c) do NOT allow participants to choose room or return to main session at anytime
      d) Disable recording
      e) Enable screen sharing for all participants

   2. Zoom Options

      a) Waiting room protocol
      b) Starting in the main room or sending directly to breakout rooms
      c) the Johnny Carson-Robin Williams pressure v the "can I talk to you for just one minute" dilemma
      d) Break out rooms – how many do you want?
      e) Encouraging mute/stop video/ask for help

D. Making the Most of Zoom Example: Screen Share

   1. Agenda
   2. Guiding Discussion
   3. Spreadsheets

E. Questions and Answers

Reference Materials

Zoom on Breakout Rooms: https://support.zoom.us/hc/en-us/articles/206476093-Enabling-breakout-rooms

Zoom on Screen Sharing: https://support.zoom.us/hc/en-us/sections/201740106-Screen-Sharing

Zoom on Audio and Video: https://support.zoom.us/hc/en-us/articles/201362283-Testing-computer-or-device-audio

Zoom on Virtual Backgrounds: https://support.zoom.us/hc/en-us/articles/210707503-Virtual-Background#h_01ED77SXVP5NET5JX7TN099ZKH

How to Tailor Zoom to Mediation (by Don Philbin):
http://www.adrtoolbox.com/2020/03/tailoring-zoom-to-mediation-for-the-moment/

Zoom Hosting, Tech Support and Training: https://www.virtualmediationhosting.com

Air Pods:
https://www.amazon.com/gp/product/B07PXGQC1Q/ref=ppx_yo_dt_b_asin_title_o05_s00?ie=UTF8&psc=1

Zoom Ring Light and Stand:
https://www.amazon.com/gp/product/B07GDC39Y2/ref=ppx_yo_dt_b_asin_title_o05_s00?ie=UTF8&psc=1

Laptop Stand:
https://www.amazon.com/gp/product/B07PRVGN52/ref=ppx_yo_dt_b_asin_title_o05_s00?ie=UTF8&psc=1

Green Screen:
https://www.amazon.com/gp/product/B087NDF6CV/ref=ppx_yo_dt_b_asin_title_o01_s00?ie=UTF8&psc=1

Webcam:
https://www.amazon.com/gp/product/B08CL56SDS/ref=ppx_yo_dt_b_asin_title_o05_s00?ie=UTF8&psc=1

USB Hub:
https://www.amazon.com/gp/product/B083XTKV8V/ref=ppx_yo_dt_b_asin_title_o05_s00?ie=UTF8&psc=1

Section Four

Ethics in Mediation:
Real Case Scenarios

John C. Trimble
Lewis Wagner, LLP
Indianapolis, Indiana

Section Four

Ethics in Mediation:
Real Case Scenarios…….. John C. Trimble

Discussion Outline

PowerPoint Presentation

Ethics in Mediation: Real Case Scenarios
ICLEF Advanced Civil Mediation Practice: Adding Tools to Your Box
November 16, 2020-Indianapolis, IN

John Trimble, Lewis Wagner, LLP

1. What do you do if you learn that a party to the mediation has secretly videotaped or recorded the opening session or a private break-out session?

    - Can you report this activity to the Court?

2. What do you do when a party to an unsettled mediation shows up at your office the next day and tells you that they wanted to settle and their lawyer wouldn't let them?

3. What do you do when you are working with each party and they each tell you what they would agree to settle for, and the Plaintiff will take less than you know that the Defendant would pay? You also know that the Defendant will pay more than the Plaintiff's bottom line.

4. Is it *ever* appropriate to speak with a party alone even if their counsel consents?

5. Is it appropriate for the mediator to meet with both (or all) parties without their lawyers present?

    - Even if it is okay to do it, should you?

6. Ethically, do you have to notify other Defendants if you are asked by the Plaintiff and another Defendant to help them reach a separate settlement?

7. Is it ethical to just cut out one party who is not "playing ball" and settle the case with everyone else without telling the one party?

8. When is it *ever* appropriate for a mediator to offer opinions on legal or valuation issues? How can you ethically address your own opinions without stating them?

9. What do you do if you *clearly* know that a party has a legal issue wrong? (e.g. A party doesn't know about a case or statute that would directly impact their liability position or valuation of the case.)

10. If a party tells you they will settle for $500,000, is it appropriate for you to go to the other party and ask them "What if" I could get the other party to take $500,000?

ICLEF ADVANCED CIVIL MEDIATION PRACTICE: ADDING TOOLS TO YOUR BOX

"Ethics in Mediation: Real Case Scenarios"

John C. Trimble
LEWIS WAGNER, LLP
Indianapolis, IN

LEWISWAGNER LLP
Attorneys at Law

TEN QUESTIONS:

Have any of these happened to you?

QUESTION ONE

What do you do if you learn that a party to the mediation has secretly videotaped or recorded the opening session or a private break-out session?

- Can you report this activity to the Court? Should you?

AAM Guidelines for Mediators

- 2. Mediator Conduct
- 6.(b). The Mediation Process
- 8.(a). Confidentiality
- 13. Termination of Mediation Session

ABA Model Standards of Conduct

- Standard V. Confidentiality
- Standard VI. Quality of the Process

IN ADR Rules

- Rule 2.1 Purpose
- Rule 2.7B(1) Mediation Conferences
- Rule 2.7D(3) Report to Court RE: Termination
- Rule 2.11(A) Confidentiality

LEWISWAGNER LLP
Attorneys at Law

QUESTION TWO

What do you do when a party to an unsettled mediation shows up at your office the next day and tells you that they wanted to settle and their lawyer wouldn't let them?

Model Rules of Professional Conduct

- 4.1-Truthfulness in Statements to Others
- 4.2-Communication with Person Represented by Counsel

AAM Guidelines for Mediators

1. Mediation Defined
2. Mediator Conduct
8. Confidentiality
   - Comment c
9. Impartiality
10. Disclosure and Exchange of Information
11. Professional Advice

IN ADR RULES

- 2.7 (A), (B), and (D)

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Attorneys at Law

QUESTION THREE

What do you do when you are working with each party and they each tell you what they would agree to settle for, and the Plaintiff will take less than you know that the Defendant would pay? You also know that the Defendant will pay more than the Plaintiff's bottom line.

AAM Guidelines for Mediators

2. Mediator Conduct
8. Confidentiality
9. Impartiality

ABA Model Standards

Standard I – Self-Determination
Standard II – Impartiality
Standard V - Confidentiality

IN ADR Rules

Rule 2.1 Purpose
Rule 2.11 Confidentiality

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QUESTION FOUR

Is it *ever* appropriate to speak with a party alone even if their counsel consents?

Model Mediation Rules

- 4.1
- 4.2
- 4.3

AAM Guidelines

- Sections 1, 2, 6, 8, 9, 10

Model Standards of Conduct for Mediators

- Standards II, III

IN ADR RULES

- 2.7 (A) (B)

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Attorneys at Law

QUESTION FIVE

Is it appropriate for the mediator to meet with both (or all) parties without their lawyers present?

Even if it is okay to do it, should you?

AAM Guidelines for Mediators

1. Mediation Defined
2. Mediator Conduct
9. Impartiality
10. Disclosure and Exchange of Information
11. Professional Advice

ABA Model Standards

Standard I – Self-Determination

Standard II – Impartiality

Standard VI – Quality of the Process

IN ADR Rules

Rule 2.1 Purpose

Rule 2.7(B) Mediation Conferences

QUESTION SIX

- Ethically, do you have to notify other Defendants if you are asked by the Plaintiff and another Defendant to help them reach a separate settlement?

Model Rules of Professional Conduct

- 2.4-Lawyer serving as third-party neutral
- 3.4-Fairness to opposing party and counsel

ABA Model Standards of Conduct for Mediators

- Preamble
- Standards:
  - II-Impartiality
  - III-Conflicts of Interest
  - V-Confidentiality
  - VI-Quality of the Process

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Attorneys at Law

QUESTION SEVEN

Is it ethical to just cut out one party who is not "playing ball" and settle the case with everyone else without telling the one party?

AAM Guidelines for Mediators

2. Mediator Conduct
9. Impartiality
10. Disclosure and Exchange of Information

ABA Model Standards of Conduct

Standard IA. 1 and 2 Self-Determination
Standard II – Impartiality
Standard V – Confidentiality
Standard VI – Quality of the Process

IN ADR Rules

Rule 2.1 Purpose
Rule 2.7(B)(5) Mediation Conferences

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QUESTION EIGHT

When is it *ever* appropriate for a mediator to offer opinions on legal or valuation issues? How can you ethically address your own opinions without stating them?

ABA Model Standards of Conduct for Mediators

- Preamble
- Sections:
  - I-Self-Determination
  - II-Impartiality

AAM Guidelines:

- 1-Mediation Defined
- 9-Impartiality
- 11-Professional Advice

IN ADR RULE

2.7 (B)(5)

QUESTION NINE

What do you do if you *clearly* know that a party has a legal issue wrong? (e.g. A party doesn't know about a case or statute that would directly impact their liability position or valuation of the case.)

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IN ADR Rules

- Rule 2.1 Purpose
- Rule 2.7 Mediation Procedure

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QUESTION TEN

If a party tells you they will settle for $500,000, is it appropriate for you to go to the other party and ask them "What if" I could get the other party to take $500,000?

- Model Rules of Professional Conduct
  - 2.3-Evaluation for Use by third persons
  - 2.4-Lawyer serving as third-party neutral
- ABA Model Standard of Conduct for Mediators
  - Preamble
  - I-Self Determination
  - V-Confidentiality
- AAM Guidelines
  - 2-Mediator Conduct
  - 8-Confidentiality
  - 9-Impartiality
- IN ADR RULE
  - 2.1

Section Five

Lessons I Have Learned

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Section Five

Lessons I Have Learned……Brian C. Hewitt

PowerPoint Presentation

Lessons I Have Learned

NOVEMBER 16, 2020

Advanced Civil Mediation Practice: Adding Tools to Your Box

Brian C. Hewitt, Esq. Hewitt Law & Mediation, LLC, 255 N. Alabama Street, Suite 300, Indianapolis, IN 46204 bhewitt@hewittlm.com

Give Credit When Credit is Due. Nuance When It is Not.

It is easy for a mediator to get hyper-focused on settlement and to push the process as quickly as possible, simply because we want the case to settle. Remember to slow down and acknowledge the productive effort of parties who are genuinely engaged in the process. Thank them for their efforts. Thank them along the way for specific considerations, concessions and well-reasoned proposals.

On the other hand, when parties are not being helpful, take the time to nuance your comments with those parties. Try to win them over with nuance instead of hitting them on the head with a sledgehammer.

The Settlement is the Parties' Settlement, not the Mediator's. The Parties Have to Take Ownership of the Settlement.

If we are mediating with the passion we should be, it is easy to become discouraged when we feel a mediation slipping away. It is even easier to feel responsible for the failure of the parties to reach an accord. Remember, our job is to do our best, not give up, and provide measured, well-reasoned input. If we have done that and dispute resolution does not occur, don't be too hard on yourself. Sometimes the parties need reminded this is their settlement and they have to take ownership of it.

Charities Can Be Less Than Charitable

With all due respect to the many charities and not-for-profits that do wonderful things, I have had the opportunity to work with charities in many business, will and trust mediations. Almost without exception, the representatives of the charities, be they board members assigned to a settlement committee, or in-house counsel for large national charities, are particularly difficult and inflexible.

Charities tend to be driven by two misimpressions. First, they confuse legality with morality. Because their missions tend to be driven by a socially accepted form of morality, they believe that being named as a party to a suit is immoral as well as illegal. Of course, neither is true. Morality lies in the eyes of the beholder. Different "ethically moral" positions can be taken, but be adverse. As we know, parties often conflate morality, ethics and legality. Morality rarely overlaps with legality. Charities need reminded of this early and often.

Second, charities believe their reputation will be harmed and their donor base will be compromised if they settle a dispute. Their justification for this position is that if donors become aware their gifts may not be fully realized because a charity buckles in the face of litigation, it could dampen donor trust. What charities don't realize is the vast majority of their donors are unaware of a single piece of litigation involving a charitable gift. They give too much credit to donors and whether they would even know the litigation exists.

Third, charities need to be asked how donors would feel if they don't compromise and engage in litigation and lose an entire gift. At the end of the day, while many charities do good work, they can only do that work if they make prudent business decisions. The representatives of the charity need to be reminded they ultimately have to make a sound business decision in order to maximize the net benefit of a litigated gift.

Know Your Audience and Work the Crowd

- I have spoken often about specific personality traits that drive behavior in mediation. I would be happy to provide that paper to anyone. Feel free to email me.
- In short, you need to engage what I call a personality driven approach ("PDA") to mediation. Identify key personality characteristics that drive behavior in mediation, understand the audience, take them as they are, and use their central personality traits to motivate productive behavior. It may seem disingenuous for us to be different people to different parties. There is nothing disingenuous about changing how you interact with parties to make them feel more comfortable. The more comfortable they feel, the less threatened they will feel by the process, and by you, and the more able they will be to participate productively and objectively.
- The four steps to PDA to mediation are:
  - Step One: Spend the first session or two identifying the specific personality trait of every participant (stay tuned);
  - Step Two: Build rapport by tailoring your interaction with each participant to a specific personality trait. This rapport building is personality trait specific;
  - Step Three: Identify what that participant needs, psychologically, not financially. The personality trait drives the dollar amount a participant will settle for, not the other way around;
  - Step Four: Acquire an offer that gives each participant what he or she needs, psychologically.

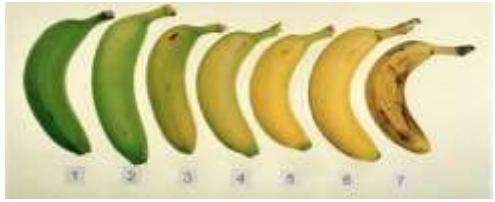
A Little Drama Can Go a Long Way

- The Time Out:
  - Sometimes despite our best efforts and exercise of herculean effort, a party just won't listen, will continue to interrupt, and refuses to participate in any helpful way. If all less drastic approaches have failed, sometimes a party has to be put in "time out" to get their attention. That requires the mediator to be firm and to ask a party and their counsel to take a break to discuss whether they have a goal to settle and to invite the mediator back into the process when they have evaluated and revised their approach to the process. In a similar vane, some parties tend to make repeated ridiculous and inflammatory offers. We all know that ridiculous offers open almost every mediation. Despite the fact we would all like to avoid that, it is part of the process. However, when some progress has been made and a party wants to go significantly backwards or make an absurd offer late in the day, don't be afraid to say "I am not going to take that offer in there, because if I do we are going to lose all the momentum we have and I don't want to do that to you". Sometimes this comment needs to be made to counsel who may be driving the party to make unreasonable offers.

Push Pause for Success

- Let's face it, we have mediated a lot of cases and those cases tend to fall into patterns, as do the participants. It is easy for us to identify a game plan and know what has to be done to settle a case. Sometimes, however, we, as mediators, need to push pause for success. We need to step out of the caucus rooms, take five or 10 minutes, review where the case has come and where it is going and consider different approaches. Don't get locked into your own game plan.

If the Case Doesn't Seem Ripe for Mediation, it isn't Ripe for Mediation



As neutrals, we want parties to take advantage of mediations and resolve disputes as soon and as inexpensively as possible. There's nothing wrong with that goal. Some cases that have few facts and little history can be mediated very early, with little to no discovery. Most cases, however, need some discovery and exchange of evidence so the parties feel educated enough to make meaningful concessions. Without a sufficient amount of education, the parties simply won't feel compelled to make concessions.

If you have a feeling a pre-suit or early-suit mediation is premature, schedule a conference call with counsel to discuss what information should be exchanged before a pre-suit or early litigation mediation. If early into mediation you realize the parties simply don't have a sufficient amount of information and are attempting to conduct discovery at an early mediation, discovery they will then have to review, suggest the mediation be continued and agree on a schedule for the exchange of discovery.

Phrases to Live (and act) by:

- **"I like to give a little as I take a little".** When a party is struggling to make another offer and has run out of energy, they may be experiencing analysis paralysis. They may also get fussy and claim they have given up far more than their opponent. Such parties are usually overcomplicating the process. Telling them "Don't think about what your opponent is getting, think about what you're keeping. Right now, you're simply making an offer to get an offer and every time you get another offer, you get closer to settlement."
- **"Work on structure first".** Every settlement requires two things. First, the parties have to agree on the structure of the settlement. What are the components, the building blocks, that are essential to settlement? Many mediations offer different options for settlement. This is particularly true in large dollar mediations that involved structured settlements, complicated business mediations, complicated tax mediations and will and trust mediations that involve numerous parties and various forms of assets. It is critical to discuss and agree on the structure of settlement first. Don't focus on the dollar values or asset values until you can agree on a structure. If you try to focus on dollars and assets first, you will end up wasting half the day and, ultimately, end up working on the structure before any meaningful progress will be made.
- **I explain it like this: Get on the same interstate; then get off at the same exit.** Until we agree on a structure for the settlement (the building blocks that are necessary to settle), you will be speaking Italian and they will be speaking French. We first have to start talking the same language and then we can roll up our sleeves and really get to work. Another way to put this phrase is that "until we agree on the same structure, the same building blocks for settlement, we are on parallel interstates that will never intercept". We first have to be driving on the same interstate in the same direction; that is the structure. We then need to get off at the same exit; that is the settlement.

When Do I Use my Negotiating Capital?

- Every party has a limited amount of negotiating capital to spend. Parties and, with shocking frequency, their counsel, don't understand the pace at which negotiating capital should be spent. That capital is finite. In more mediations than not, I find that neither a party, nor her counsel, have an effective appreciation for when to push the accelerator and when to hit the brake. Parties and counsel often spend negotiating capital too fast or too slow. They also suffer from the misbelief that that capital should be spent at a level pace over the course of a mediation period. I am convinced, and I am sure you are too from raw experience, that making larger moves can result in a better result several moves later if the timing of a larger move is carefully considered. A good mediator will take that move and make the most of it in the opposing caucus room. By the same token, there are times when a "get their attention" small move is appropriate. That timing should also be carefully considered.

Believe it or not, some Parties Lie – What do I do?

- One thing we have become very good at as mediators is judging character. It doesn't take us long to know when a party is lying to us. There is no profit in calling a party out when you know they are lying. Obviously, to do so would destroy your credibility. That does not mean, however, that lies should be ignored. In many cases, there are documents that prove whether a statement is true. When you hear something you believe to be a lie, don't state it as such in any room. Simply share the comment with opposing parties and ask them if they have any documents to respond to that comment. If they have documents proving the lie, innocently return to the declarant's caucus room and simply inform them the opposing party has asked you to share that document with them. I have found an exposed lie often redirects the dialogue between a party and the mediator. If you simply let the lie stand, there will be more to follow and the parties will think they have beaten the mediator at his own game. That is not helpful.

Be Smart, Be Patient When It Matters Most; Boil the Frog Slowly

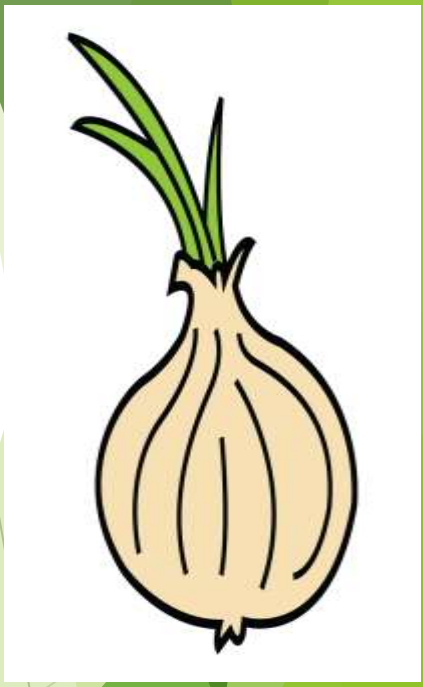
- If you are like me, you are more patient in your capacity as mediator than you are in most other things you do. That said, no mediator has an endless amount of patience. When you feel yourself becoming frustrated, take a minute by yourself, think about something else for 5 minutes or so, get a beverage (unfortunately, I don't mean an adult beverage), and realize your patience at that moment is critical. If a party detects your impatience, their impatience will grow exponentially. Tell them the mediation process is like boiling a frog. If you throw a frog into hot water, the frog will jump out. If you throw the frog into cold water and slowly increase the heat, it will be too late before the frog realizes its dilemma. That boiled frog is settlement.

Trust Me, Adding Significant Legal Provisions to the Settlement List Late in a Mediation is a Bad Idea.

- I can't tell you how many times I think I have mediated a settlement and I do a final laundry list of items that have been discussed for hours only to hear from counsel, "Oh, by the way, we need to include . . . ". That is when the additional and significant provisions that somebody wants to include in a settlement start to be expressed, for the first time. It is a horrible idea. It can derail a settlement or, at a minimum, delay it by several hours. The other room feels betrayed because items are being inserted at the last minute. It makes the mediator look bad because a party might assume the mediator forgot to mention these items. The solution is to try and anticipate items that might come up at the last minute. Ask the parties about them and tell them they need to be included early in the dialogue when the structure of the mediation is being discussed. Examples of such last minute catastrophes include indemnifications, releasing non-parties, releasing attorneys from potential malpractice claims that are separate from the mediation, mortgages and other security interests, and lists of tangible personal property that have disappeared or need to change hands.

Don’t Fixate on Arguing Over Who is in Charge. Fixate on Why it Matters.

- In various kinds of mediations, we will often encounter arguments over who has authority to do what and who is to have such authority going forward. Arguments over trustees, powers of attorney, officers and directors of entities, and guardians abound. It is easy to get into a tug of war over polarized candidates for positions of authority. Sometimes, if you peel back a couple more layers of the onion, the issue isn’t so much who is in charge, it is what they are in charge of. For example, I recently spent two days arguing about who an individual trustee had to be to serve with a corporate trustee on which the parties had agreed. We appeared to be at a dead end and then I asked what I should have asked on day one, “Why does it matter who the individual trustee is?” It turned out that it mattered because one side of the family wanted to make sure the individual trustee would not sell certain parcels of real estate that had sentimental and recreational significance to some of the family members. When I discussed that issue with all the parties, everyone agreed those parcels would not be sold and the need to have an individual trustee disappeared altogether.



Don’t Fixate on Where We Were or Where We Are, Fixate on Where We Are Going.

- Particularly after several hours of mediation, parties often get stuck. They can’t seem to find their way forward. They get stuck as they are fixated on prior offers and paralyzed in making additional offers. Every offer should have a purpose and every offer should be part of a plan. Getting parties to focus on the purpose and the plan equips them to look ahead and not dwell on the past.

Sometimes When You Ask Which Side Someone is on, it Depends on Which Day (or hour) it is.

- In multi-room mediations, parties often will align. Don't let those initial alignments fool you. Sometimes those allies are short-lived. Look for opportunities to leverage different groups of people against other groups of people in order to break log jams and make progress. Sometimes when somebody realizes the weakness of a perceived ally, it will motivate them to make more concessions in order to reinforce an alliance.

Use Math, Not Argument, Whenever Possible

- Whenever you can explain a suggested strategy or proposal through simple mathematics, the need to engage in needless debate decreases dramatically. Math is more objective. Be aware, however, that parties and their counsel often make mathematical mistakes. Mediators argue about whether it is the mediator's job to correct math errors. Sometimes, merely saying "Are you sure about that math?" "Do you want to check those numbers again just to be sure?" avoids a party making an offer and later figuring out the offer was based on false math. That scenario usually sets the dialogue back.

You are Wasting Your Time and Money if You Don't Come to Mediation with Appraisals and Valuations.

- So many business and family disputes are based on valuation disagreements. Parties come up with outlandish positions about what assets are worth and then insist on negotiating on the basis of those outlandish positions. When the facts suggest that objective valuation and appraisal information is critical, urge the parties to come equipped with professional valuations and appraisals or, at a minimum, some third party resource to support their valuation positions. I consult with a trusted CPA valuation expert who also holds investment advisor credentials as a sounding board during mediations to challenge the validity of valuation and appraisal positions. Being able to refer to a third party resource whose only purpose is to provide input to the mediator can only lend credibility to the dialogue.