ASSOCIATION OF ATTORNEY- MEDIATORS

Advanced Attorney-Mediator Training and CLE Seminar "Mediators On the Front Line: Tools to Disrupt Disruption"

Friday, November 12, 2021
Live Online Webinar

ATTENDEE PACKET

Association of Attorney-Mediators
Advanced Attorney-Mediator Training
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ASSOCIATION OF ATTORNEY- MEDIATORS

Presents its
Advanced Attorney-Mediator Training and CLE Seminar

"Mediators On the Front Line: Tools to Disrupt Disruption"

Friday, November 12, 2021
Live Online Seminar

Program Agenda

8:50 am Welcome! The meeting will open early for anyone wanting to get settled prior to the 9:00 am CT start. Grab a cup of coffee and say hello to colleagues before the meeting begins.

Please ensure you are logged into the Zoom Meeting at 9:00 am CT start. To comply with state CLE requirements, attendance will be tracked accordingly.

9:00 – 9:15 am **Welcoming Remarks**
Allison Ellis, *AAM Executive Director, Dallas, TX*
Danielle L. Hargrove, *AAM National President-Elect, San Antonio, TX,* ***Moderator***
Frank Neuner, *AAM National President, St. Louis, MO*

9:15 - 10:15 am **How To Say No Without Creating A Dispute And Damaging Your Relationship With The Other Person**
Bud Silverberg, *Dallas, TX*

There will be numerous occasions during a person's lifetime when he or she will have to say NO. In this session Bud Silverberg presents a technique that will give a person the courage to say NO (if that person is hesitant) and to do so without damaging the relationship with the other person. This is another tool that the Mediator can put into his or her tool box and use when appropriate. This technique was gleaned from William Uri's book, "The Power of a Positive No." (1.0 hour)

10:15 - 11:15 am **The Four C's to Managing Conflict in the Workplace Remotely**
Damali Peterman*, New York, NY*

Did you know that the rise of remote work in the past year has led to an escalation of conflicts between team members and conflicts between businesses and their clients? Join this interactive and engaging program to learn how to address this kind of conflict remotely using the 4 Cs - commitment, communication, conflict resolution, and camaraderie. ***Please note this session will not be recorded for on-demand viewing after the live presentation*****
(1.00 hour)

11:15 - 11:30 am ***Break***

11:30 - 12:30 **Holding the Calm: The Secret to Resolving Conflict and Diffusing Tension (in Really Tough Situations)**
Hesha Abrams, *Dallas, TX*

There are seven billion people on the planet, each with their own unique fingerprint. Yet we are taught to treat everyone the same. Doesn't that sound ridiculous? Treating everyone the same ignores our unique humanity. Personalized medicine is the new trend in healing our bodies. We need a personalized approach to heal human conflict as well. The trick is how to know what people want, what they will resonate with, and the right approach to take. You Hold the Calm.
(1.00 hour, including .50 ethics)

12:30 - 1:30 pm ***Lunch Break***

Zoom Meeting will be muted/no video feed will be shown during the lunch break. **If you log out of the meeting during the lunch break, please be sure and log back on for the 1:30pm CT start.** To comply with state CLE requirements, afternoon attendance will be tracked via the platform's attendance reporting and the record of attendance form which must be completed by each attendee to receive CLE/CME credit.

1:30 – 2:30 pm **Claims Against Mediators: A Survey**
Robert Badgley, *Chicago, IL*

Mr. Badgley will recount a number of claims made or lawsuits filed against mediators in recent years which he has seen in his capacity as claims and coverage counsel for Lloyd's of London. This survey of claims should provide some insight into the types of pitfalls a mediator may face and the types of liability exposure a mediator may face. This survey should also underscore the need for professional liability insurance.
(1.0 hour)

2:30 – 3:30 pm **Covid Protocol Considerations in Mediation:**
The Return to In-Person Mediations - Pivoting in light of the Delta Variant
Aric Garza, *San Antonio, TX*

Aric J. Garza will facilitate a discussion concerning the diverse perspectives and protocols of mediators and arbitrators concerning the development and implementation of protocols for mediations. This session is for those interested in considering whether a "COVID protocol" is beneficial or detrimental to their practice. When and how do you broach the subject to counsel? These protocols include the use of masks among participants, inquiries regarding vaccination status, howl to deal with objections to proposed COVID protocols, conventions and mandates, and a brief discussion of laws pertaining to such matters. Mr. Garza will provide a template outline of protocols for potential use by participants.
(1.0 hour)

3:30 – 3:45 pm ***Break***

3:45 – 5:00 pm **Closing Techniques: Avoiding and Breaking Impasse, Bracketing, and Mediator Proposals**

Lee Jay Berman*, Marina Del Rey, CA*
Danielle L. Hargrove, *San Antonio, TX,* ***Moderator***
Laura Kass-Moreno, *San Diego, CA*
A. Martin Wickliff, Jr., *Houston, TX*

Join our rock star panelists for an interactive discussion on best practices for mediation closing techniques. Are you actively including these techniques in your tool chest? If not, what reservations do you have in utilizing these and other closing techniques?
(1.25 hours)

5:00 – 5:15 pm **Closing Remarks**

Danielle L. Hargrove, *AAM National President-Elect, San Antonio, TX*

5:15 - 6:00 pm **Virtual Happy Hour** *(Optional)*
Please join us for networking and recapping the day with colleagues.

Certificates of Attendance will be sent via email to each attendee after the seminar ends, and where applicable, your attendance will be reported by AAM (course provider) to your state bar/ CME Boards.

Please complete an **online evaluation form** to provide an understanding of the benefit of today's seminar and help us continue to meet the needs of our Members. A link to the evaluation form will be emailed to you in a post-event email.

MCLE Information:
For the most up-to-date MCLE information, please visit the AAM website by clicking here:
MCLE Information

ASSOCIATION OF ATTORNEY-MEDIATORS
***Advanced* Attorney-Mediator Training**
November 12, 2021
Speakers and Panelists

Hesha Abrams, Esq., author of: *Holding the Calm, The Secret to Resolving Conflict and Diffusing Tension* is a nationally acclaimed attorney mediator who is known for crafting highly creative settlements and resolutions in very difficult matters. She has the unique talent to work with big egos and strong personalities with the keen ability to create synergy amongst the most diverse personality types driving to agreement. She has created settlements worth billions of dollars and has saved companies billions more using her innovative approaches to deal making. She specializes in crafting innovative solutions for complex or difficult matters in Intellectual Property, Commercial, Pharmaceuticals, Securities and "Deal Mediation", which is driving a complex business deal to a successful signing. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted landmark ADR laws. She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally with 30 years of in the trenches experience. She has worked in London, Hong Kong, Mexico, Germany, Thailand and India and with parties from all over the globe in complex commercial, business and patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators. She is AV rated by Martindale Hubbell. For further information, see www.HeshaAbramsMediation.com.

Robert A. Badgley graduated from the University of Chicago Law School in 1991 and is a member of Karbal Cohen Economou Silk Dunne LLC in Chicago. Among other things, he represents Underwriters at Lloyd's, London in insurance coverage matters involving professional malpractice claims (including claims against ADR providers). He has also served as counsel in more than a hundred arbitrations and mediations, and, under the auspices of the World Intellectual Property Organization, has served as arbitrator in nearly 500 disputes between trademark owners and Internet domain name owners.

Lee Jay Berman began as a full-time mediator 27 years ago, and has successfully mediated over 2,600 matters, many of which were high profile cases. He is an American Arbitration Association Master Mediator for employment matters, a national panelist on their commercial and construction panels, and a select mediator on their International Center for Dispute Resolution mediation panel. He is a Distinguished Fellow with the International Academy of Mediators, a Charter Diplomat with the National Academy of Distinguished Neutrals (NADN), certified by the International Mediation Institute (one of the first 5 mediators in the U.S.), and a Dispute Resolution Expert with the United Nations Development Programme. NADN named him their inaugural "Distinguished Neutral of the Year" in 2017. California's Daily Journal twice named him "Top

Neutral", he has been voted by his colleagues into the Who's Who of International Commercial Mediation from 2012-2021, and ranked by Chambers USA as one of the top 40 commercial mediators in the U.S. from 2018-2021. Also a respected trainer, Mr. Berman founded the American Institute of Mediation after seven years as Director of Pepperdine Law School's Mediating the Litigated Case program (ranked #1 nationally). The Southern California Mediation Association gave him their Randolph Lowry Award for his success in educating others. He has trained mediators, judges, attorneys, and business leaders across the U.S., Canada, and Mexico, and Europe, as well as in India, Dubai, Uzbekistan, Australia, and New Zealand. Lee Jay has been interviewed on dozens of podcasts, published numerous articles on mediation, and the American Bar Association will be publishing two of his books in 2021 and 2022.

Since 2002, **Aric J. Garza** has represented hundreds of individuals, businesses and non-profits in commercial law, consumer law, probate/estate law and real property law (both litigation and transactional matters). Aric has been a credentialed mediator in Texas since 1999. He is also an arbitrator serving on the American Arbitration Association's Commercial, Consumer and Employment Panels. Aric is an active member of the American Bar Association - DR Section, the State Bar of Texas ADR Section Council and the San Antonio Bar Association - ADR section. In his spare time, he plays and sings guitar and is known locally as The Blues Lawyer (@theblueslawyer on Twitter and Facebook).

Danielle L. Hargrove is a USAF veteran with 30 years of experience as an attorney advising in all aspects of labor and employment law, corporate compliance, and business disputes. She has a full-time neutral practice as a mediator and arbitrator. She is also retained to facilitate workplace investigations and provide professional coaching and consultation, particularly involving matters of diversity, leadership and matters of public policy. She is on the neutral rosters of the American Arbitration Association ("AAA"), Federal Mediation and Conciliation Service ("FMCS"), FINRA (securities matters), and the National Mediation Board ("NMB"). She serves on several Regular and Expedited USPS and APWU panels; on the Regional Texas and Oklahoma Arbitration panels for the Internal Revenue Service and the NTEU; and between the NTEU and US Customs and Border Protection. Ms. Hargrove also serves on the Dallas Area Rapid Transit Trial Board as a Hearing Examiner. She is also adjunct faculty with the Texas A&M School of Law. Danielle most recently served as AAM Board Secretary. She received her B.S. in Engineering Mechanics from the US Air Force Academy and J.D. from the University of Texas School of Law.

Laura Kass-Moreno has been practicing law since 1982. Her vast experience includes civil litigation, representing both plaintiffs and defendants in complex business, employment and real estate matters, as well as handling a variety of insurance matters and claims. Laura was also in-house counsel for interactive, entertainment companies including negotiating contracts with the National Football League, Major League Baseball, Home Box Office, vendors and hospitality venues. Laura has been a credentialed mediator since 1999 with expertise in contract disputes, employment/workplace issues, personal injury/insurance claims, real estate and homeowner's association matters and has conducted numerous, multi-party facilitations involving a wide range of challenging issues. Laura has facilitated conflicts across diverse industries, including the City and

County of San Diego, many colleges and universities and the military. She is also a mediation/conflict management and diversity and equity trainer for the National Conflict Resolution Center (NCRC) and the mentor for NCRC's Credential Program. She has trained and/or provided customized workshops for many reputable mediators currently practicing in San Diego. Laura's years of experience provide her with the creative, strategic bandwidth to successfully mediate cases to resolution.
Laura believes that, as long as the parties are talking, there is hope for resolution and she has built a reputation for being persevering yet patient, insightful and creative. Clients appreciate the fact that she uses every effort to settle a dispute.

N. Damali Peterman, Esq. is the CEO and founder of the prominent global conflict resolution firm, Breakthrough ADR. Breakthrough specializes in innovative and engaging ways to help individuals, companies, government agencies and educational institutions prevent, manage and resolve conflict in the workplace and beyond. As an attorney, mediator and educator, with over 20+ years experience, Ms. Peterman saw a need to teach people how to listen, negotiate and resolve everyday situations. She has traveled the globe servicing companies with tailored workshops aimed at increasing overall company efficiency and talent retention. Ms. Peterman is an adjunct professor at Howard University School of Law teaching Basic Mediation Training. Ms. Peterman also serves as mediator, arbitrator and ombudsman for the prestigious global ADR firm, JAMS, Inc. Prior to Breakthrough ADR, Ms. Peterman founded a law firm focusing on corporate and other business transactions. Previously, she was an assistant general counsel at Deloitte LLP and an associate at the global law firm Weil, Gotshal & Manges LLP. At both of these institutions, Ms. Peterman focused on corporate transactions, including deal structuring and contract negotiations. Ms. Peterman believes that, in addition to enabling positive business changes, ADR is critical to empowering positive social change. To this end, through Breakthrough ADR and community organizations, she has been privileged to train hundreds of law enforcement officers in New York City and elsewhere in ADR-based techniques for de-escalation and resolving conflict without the use of force. Ms. Peterman relishes seeing the breakthrough moments that these officers routinely have as they progress through training and learn new techniques to help navigate conflict. Ms. Peterman travels globally to teach workshops in negotiation and mediation and to judge mediation competitions. She also virtually teaches students, educators and other professionals across the world. Ms. Peterman is a highly sought after speaker, and she has been featured on various television networks and in many magazines and newspapers. Ms. Peterman podcast, Breakthrough Barriers with Damali is popular on 6 continents and listened to in over 50 countries. Ms. Peterman obtained her J.D. from Howard University School of Law, her M.A. in international policy studies/conflict resolution from Middlebury Institute of International Studies and her B.A. from Spelman College. Ms. Peterman is fluent in Spanish; is conversational in Japanese and has limited language skills in Mandarin Chinese, Russian, Portuguese and Dutch. She has traveled extensively throughout five continents.

Bud Silverberg is an attorney, full-time mediator and arbitrator with a BBA degree from the University of Texas at Austin, a JD from the University of Texas School of Law, and an MBA (Accounting and Finance) from Southern Methodist University. He was a senior attorney with the United States Treasury Department; Vice President-Tax Counsel of TCO Industries (formerly the parent company of Trailways, Delta Steamship Lines and other domestic and foreign corporations); and in the private practice of law. He is a past President of the Association of Attorney-Mediators; an Adjunct Professor at Southern

Methodist University's Dedman School of Law, teaching Dispute Resolution, and has mediated more than 4,000 cases. Bud is the Recipient of the American Arbitration Association's "Steve Brutsche Award" for professional excellence in dispute resolution. He was a joint recipient with his wife, Rena, of the "Justice Frank G. Evans Award" presented by the Alternative Dispute Resolution Section of the State Bar of Texas. He was named by *Texas Monthly* as one of the Texas Super Lawyers for every year since 2003; selected by *Best Lawyers in America* as a best lawyer for every year since 2008; and selected by *Best Lawyers in America* as 2021 Lawyer of the Year in Mediation in Dallas and Fort Worth.

A. Martin Wickliff, Jr. is a full-time arbitrator and mediator neutral; he specializes in Employment Law, and also handles investigations. Marty is a member of AAM, and has been trained by the American Arbitration Association ("AAA"). He is also listed on the Panel of Neutral Employment Arbitrators with AAA and the panel of mediators with Mediation.org. Marty is a member of the Panel of Distinguished Neutrals of CPR (International Institute for Conflict Prevention and Resolution). Marty, who is board certified in Labor and Employment Law by the Texas Board of Legal Specialization, and is also a veteran trial lawyer. In 2021, Best Lawyers named Marty "Lawyer of the Year" for the Houston area in Labor and Employment Law; and was named one of "The 25 Greatest Texas Lawyers of the Past Quarter-Century" by Texas Lawyer, 2010. Marty is a Fellow, College of Labor and Employment Lawyers (ABA); and former Chair of the Board of Regents, Texas Southern University. Prior to joining Cozen O'Connor, Marty had been a partner with Fulbright & Jaworski, Mayor Day & Caldwell, Wickliff & Hall, and Epstein Becker & Green.

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HOUSEKEEPING ITEMS

ATTENDANCE TRACKING AND INTERACTIVITY METHODS

To comply with state CLE/CME requirements, attendance will be tracked based on webinar attendance timestamps. Interactivity methods such as breakout sessions, polling, Q&A and chat will be implemented to ensure audience engagement and comply with live online CLE/CME course requirements.

Verification Prompts will be given throughout the day. **Please write down prompts as you see them appear on-screen or hear them spoken.** If verification prompts are required in your state, please report all prompts on the Record of Attendance Sign-In Form to receive attendance credit.

You may use this space to write down the codes and reference as you complete the Record of Attendance Sign-In Form after the seminar ends.

Code #1 _____ Code #2 _____ Code #3 _____

A few of the Speakers will utilize polling to engage with the audience during their presentations. Polling may be within the Zoom platform or using the Poll Everywhere technology. Please participate so that the session may be interactive. There are two ways you can participate in Poll Everywhere:

1) Web: You can respond by clicking the link to open a web browser and participate online: https://pollev.com/associationo195

2) Text: You can respond by phone. Text ASSOCIATIONO195 to 37607 to join the session

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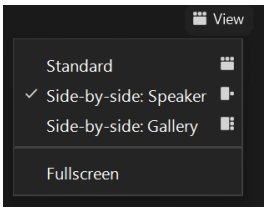
HOUSEKEEPING ITEMS CONTINUED



During the Zoom Meeting, please select **"Side by Side: Speaker View"** for the best viewing experience during the session. This allows you to see the keynote speakers on the main screen.

RECORD OF ATTENDANCE

You will need to complete a Record of Attendance Sign-In Form in order to receive credit for attending. You may access the form here: Record of Attendance Sign-In Form. A link to the form will also be included in the email sent before the seminar, and also shared via chat during the webinar. In case you have difficulty completing the form online, a copy of the form is included in this packet. You are welcome to print, fill out the form and scan/email back to AAM at aam@attorney-mediators.org.

EVALUATION FORM

Please complete an online evaluation form to provide an understanding of the benefit of today's seminar and help us continue to meet the needs of our Members. A link to the evaluation form will be emailed to you in a post-event email. You may also click here to access the online evaluation form: Fall 2021 CLE Evaluation Form

CERTIFICATES OF ATTENDANCE

Certificates of Attendance will be sent via email to each attendee after the seminar ends, and where applicable, your attendance will be reported by AAM (course provider) to your state bar/CME Boards. For CLE/CME self-reporting documentation not provided in the course materials, please email aam@attorney-mediators.org with your specific request.

QUESTIONS?

Email Allison Ellis, Executive Director, at aam@attorney-mediators.org or call the AAM Office at 972-669-8101 or 1-800-280-1368.

Thank you for attending our *Advanced* Attorney-Mediator Training and CLE Seminar!

PRESENTATION HANDOUT:

How To Say No Without Creating A Dispute And Damaging Your Relationship With The Other Person

Bud Silverberg, *Dallas, TX*

ASSOCIATION OF ATTORNEY-MEDIATORS

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The Power of a Positive No
or
How To Say No And Still Preserve Your Relationship With The Other Person

As many of you may remember, last year in Minneapolis, George Floyd died while in police custody. He died when one of the arresting officers held his knee on Floyd's neck for more than 8 minutes. Floyd was handcuffed at the time. During the entire 8 plus minutes, there were three other police officers who stood by watching, and not one of them spoke up and said, "Stop It" or "No" to the officer who had his knee on Floyd's neck.

That incident made me wonder why so many of us fail to speak up and say "No" when we know we should; and what, if anything, can be done to solve that problem of silence. In searching for the answers to these questions, I discovered the book, *The Power of a Positive No*, by William Ury, who was a co-author with Roger Fisher of the best selling book, *Getting to Yes*.

My talk today considers the reasons why many of us do not say No when we know we should, and Ury's process for giving us both the courage to say No and the procedure for doing so constructively. Ury's process also gives us the ability to withstand any push-back from those who resist our No.

I feel that this topic is very important to all of us, because there will be so many times during our lifetime when we will have to say No.

Hopefully, Ury's book gives us the tools to do so without damaging our relationships with other persons.

Bud Silverberg

I WILL TRY TO COVER AS MANY OF THE FOLLOWING TOPICS AS POSSIBLE WITHIN THE TIME PERMITTED. SPACE IS PROVIDED FOR THOSE WHO WOULD LIKE TO TAKE NOTES.

Every day we find ourselves in situations in which we need to say No to people on whom we depend. For instance,

1. Your boss asks you to work through the weekend to complete an important project.

or

2. You are in a meeting when your boss turns angrily to your co-worker, attacks her work unmercifully, insults her personally, and humiliates her before the entire group.

or

3. You receive a phone call from a friend asking you to serve on the Board of a Charity.

or

4. Your mother has reached an advanced age where it is no longer safe for her to remain in her home alone.

At the heart of the difficulty of saying No is the tension between Exercising your Power to say No vs. Protecting your Relationship with the Other Person.

In other words, if you exercise your power by saying No, you may strain your relationship; whereas if you protect your relationship, you may weaken your power to say No. There are three common approaches to this Power vs Relationship dilemma:

1. **Accommodate. By this approach, we stress the Relationship even if it means sacrificing our key interests**.

2. **Attack. We say No without any concern for the relationship**.

3. **Avoid. We say Nothing at all**. **We avoid out of fear**.

Accommodation, attack, and avoidance are not just three separate approaches

The way out of this dilemma is to use both your power to say No **and** to do it in a way that will preserve your relationship. How do we do that? By using the following 3 step process:

Step 1. Determine your interests, then express them. Step 2. Assert your No, and finally, Step 3. Invite the other party to reach an agreement that satisfies both your interests and the other party's interest.

Step 1. Discover your interests that lie behind your No.

No is a position. It is a statement of what you do not want. Interests are needs, desires, aspirations and concerns and are the reasons for the No.

Ask yourself:

1. What am I seeking to accomplish by saying No?

2. What am I seeking to protect by saying No?

3. What am I seeking to change by saying No?

Needs (interests) are the basic drives that motivate human behavior. The five most common basic needs are:

1. Physical security;
2. Financial security;
3. Belonging and love;
4. Respect; and
5. Control over one's life.

To uncover your interests, listen to your emotions.

Uncover your values also.

Needs and values are where you come from. Intention is where you want to go.

Once you have clarified your intention to say No, give it energy.

Uncovering your core interests and values:

1. Instead of your No rejecting the other person, your No is simply your standing up for what matters most to you.

2. You now know where you are going with your No.

3. It gives you energy. You now have the fuel to deliver your No and keep from backing down in the face of resistance.

Sustaining Your No. Saying No is not easy.

Once you have determined your interests and values and focused them into a clear and strong intention, it is now necessary to come up with a practical strategy (a Plan B) that will address your core interests or values in case the other person refuses to accept your No. Plan B is the power to protect and advance your interests and needs.

Plan B is not to punish anyone. It is to protect your interests behind the No.

Your Plan B is your backup plan. Note that Plan B is not a compromise or a less preferred agreement.

Your Plan B can also be a valuable benchmark that you can use to evaluate any proposal you make as part of your positive No or any possible agreement the other person might suggest.

Brainstorming to determine a Plan B. The Golden Rule of **Brainstorming is** to generate as many ideas as you can while suspending all criticism of those ideas for a certain period of time. Welcome wild ideas –

Consider:

1. **Doing it yourself.** A Plan that you can do on your own to satisfy your needs and interests.

2. **Exiting.** What would it mean for you to leave the situation or relationship with the other person.

3. **Third parties**. Are there potential third parties you can turn to for help if you cannot reach an initial agreement with the other person?

Intermediate and ultimate plans.

Building a coalition

As you develop your Plan B, consider what the other person might do to compel you to back down.

Consider the worst case scenario

Reassess Your Decision to Say No. Now that you have uncovered your interests and your values, and developed a strong Plan B, you are in a position to ask yourself, "Should I still say No?" The presumption may be Yes, but it is always wise to reassess your decision.

Now, **your next challenge is to prepare the other person to accept your No.**

The secret to preparing the other person to accept your No is to respect him.

It is important to understand that respect comes from strength and confidence.

Although we may not feel any respect toward the other person at the moment, we should act like we do respect the other person, because it works.

There are two ways to demonstrate respect: listening and acknowledgement.

1. **Listen attentively.**

   You may not always be able to satisfy his interests and needs, but

2. **Acknowledge the other person** means treating the other person as a somebody – not as a nobody.

   a. **Acknowledge the other person's point of view** -- without agreeing with it.

   b. **Let the other person know you value him**.

   c. **Set a constructive tone**. Ask, "Is it convenient for me to talk with you now?"

Fear and guilt often stand in the way of your saying No.

Expressing your interests explains your reasons for saying No.

How do you express your interests in a concrete manner? There are three tools at your disposal:

1. **The-Statements that set out the facts**.

   Sometimes blunt candor is called for.

   Judgmental language.

   Categorical statements.

2. **I-Statements describe the effect on you of the other person's conduct**. Since I-Statements refer to your feelings and needs, they are more difficult for the other person to refute.

   I-Statements vs venting.

Explain your interests. Once you have described your feelings, you can then explain your interests.

The other person's reaction.

3. **We-Statements**.

Follow your intuition.

Summary of Step 1. Step 1 is to assert your own interests, needs, and values by using The-Statements (the facts), I-Statements, We- Statements, or a combination of them.

Step 2. Delivering a Positive No. Deliver your No in a very calm, matter-of-fact tone. Do not attack..

Don't be overly concerned with what the other person will think.

Here are some specific words or phrases that may be helpful in your saying No to the other person's demands:

No.

No thanks.

I have a policy.

I have plans or **I have another commitment at that time**.

Not now. One way to soften the blow of the No and to make it easier for you to say No, is to say "Not now." Not now does leave the door open for a future request, however. So if you are certain that the request will never be granted, it is better to let the other person know that now.

I prefer to decline the position than do a poor job.

Here are some useful phrases for saying No to inappropriate behavior:

Stop and No.

No can also be used to stop offensive behavior. Interestingly, No can attract more help than even the word Help.

Most attackers are looking for easy victims. They are not looking for a fight, not even a verbal one.

Hold on, Whoa, and Wait a minute are ways to interrupt behavior that are easier on the relationship than No and Stop.

That is not OK, That is not appropriate, and **That is not allowed**.

It's not ok with me, This doesn't work for me.

That's enough. You are not judging the other person for his past behavior. **You are simply saying that right now you've had enough**. **It's time to stop**. "That's enough" says the Mom to her two kids who are pillow fighting.

Step 3. **Perhaps the most common mistake in saying No is to stop right there**. Unfortunately, most people overlook the opportunity to propose a positive outcome**.**

Do not mistake your making a proposal as a softening of your No.

A positive proposal is a practical solution. It is specific, realistic, and constructive.

Offer a third option. Couple your No with a positive solution that addresses the other person's needs while still meeting your needs.

Example. Imagine that a key employee asks you for a raise. Since there is no room for a raise in the budget, your immediate answer would be No. So consider other options:

1. **Recognition.** What about giving her a new title that would give her more respect? Or travel to a conference to represent the Company?

2. More **responsibility**. How about letting her participate in a high visibility project that is vital to the organization's future?

3. **College tuition**. What about checking with human resources to see if a tuition loan for college courses might be arranged?

   If you are not personally able to help the other person, suggest someone who could.

4. **Later**. Sometimes your major constraint is timing. In that case, a third option might be to agree to the other person's request, but to have it take effect at a later definite date. BUT do not agree to do it later unless you really mean it.

5. **If . . . Then.** If you would like to say Yes, but circumstances are such that you can't say Yes now, you can make a conditional offer. In other words, state the conditions under which you could say Yes.

Suggest a Problem-Solving Process.

When you say No to the other person's behavior, be clear about the specific change you would like him to make.
A constructive Proposal has four characteristics: It is (1) clear, (2) feasible, (3) positively framed, and (4) respectful.

1. Make your request Clear.

2. Is your request <u>feasible</u>?

2. **<u>Frame your request positively</u>**.

3. **<u>Make your *request r*espectful</u>**.

<u>Sometimes the only solution available or appropriate is a plain No</u>. In effect, you are asking the other person to accept your No and respect your needs.

<u>End a Positive No on a positive note</u>.

The structure of a Positive No is as follows:

1. **<u>Express your interest or need</u>:** "It really embarrasses me when you ask such a personal question."

2. **<u>Assert your No</u>:** "Would you please not do it?'

3. **<u>Propose a positive outcome</u>**: "And when I'm ready to talk about it, I'll be sure to let you know."

Restrain the Other Party's Push-Back. How can you contain the other person's strong reaction to your No and transform it into acceptance of your No?

1. The first step is to understand that the other person may need time to process your No. In effect, you are delivering bad news. Understanding that there are a series of emotional stages people naturally go through when hearing bad news can help you learn how to handle the other person's reaction.

The emotional stages people go trough when they hear bad news are (a) avoidance, (b) denial, (c) anxiety, (d) anger, (e) bargaining, (f) sadness, and (g) acceptance. Human beings have emotional reactions, and those reactions take time to process.

2. **Don't yield and don't attack**. The moment after we deliver our No is when we may be most vulnerable to wavering.

3. **The key is not to overreact, but to stay on track**.

4. **Pause before responding**. If the other person is in a rage or a panic, you need to be calm enough for both of you. Pause before responding.

5. **If you can think of the other person's provocation as a game, you will be less likely to take it personally. Nor will you fall for their tricks.**

6. **If you know it will be hard for you not to react to the other person's provocation, consider asking a friend or colleague to accompany you.**

   The power of not reacting.

7. **Listening respectfully will help the other person move from resistance to acceptance**.

   Paraphrase.

   Some common phrases to begin the process of paraphrasing are:

   "Let me make sure I understand what you are saying."

"If I hear you right, you are saying that . . ."

"Help me to understand. If I hear you correctly, you are saying . . ."

8 **<u>Acknowledge the other person's point without conceding yours</u>**

9. **<u>Replace "But" with "Yes , . . and</u>."** The word "But" is an eraser. It erases everything right before it. So replace "But" with "Yes . . . and."

<u>If you do not react, you allow the other person's anxiety and anger to subside</u>.

If, however, the other person still refuses to accept your No, you will need to emphasize patiently and persistently that No in fact means No.

1. **<u>To do this, the first step is to repeat your No as often as necessary</u>**.

<u>Repeat your No</u>.

<u>Sometimes, the other person does not give up so easily</u>. In that case, it may be uncomfortable to keep repeating No. So craft a simple phrase that you can say repeatedly as a way of anchoring your No**.** Some possible anchor phrases are:

"Your demand isn't going to happen."

"This doesn't work for me."

"No thanks."

"I am not comfortable doing that."

"I'm sorry, but I'm not interested."

"I would prefer not to."

<u>Use intentional repetition</u>.

2. **<u>If that does not work, educate the other person</u> <u>about the consequences of not respecting your No.</u>**

<u>Let Reality be the Teacher</u>.

<u>Ask reality-testing questions</u>. Here are a few examples:

a. What will happen if we cannot reach an agreement? What are the costs to both of us if we go to court or if we go on strike?

b. How will this affect our relationship (partnership, etc.) if we cannot agree to respect each other's needs in this situation?

3. **Warn, don't threaten**.

A warning is different from a threat.

4. If that does not work, then display your Plan B.

Walk Out of the Relationship.

The more power you use, the more respect you need to show.

Do not confuse respect with weakness.

Negotiate an agreement for a positive outcome. Once the other person does accept your No, it is time to negotiate an

agreement and move forward to a healthier relationship. The goal is one that protects your core interest**s.** It may take several forms:

1. One that satisfies your interests and addresses the other person's interests.

2. One that provides a positive relationship that allows you to be true to yourself and allows the other persons to be true to themselves.

3. One that provides for an amicable separation.

Three principal obstacles stand in the way of the other person's agreeing to your proposal:

1. They may have some unmet interest or concern;

2. Even if the other person might be willing to agree, he might be worried about the opinion of key constituents, whose approval he may need or want; and

3. Even if he does agree to your proposal , it may not be long-lasting, because the process of saying No may have strained the relationship too much. Therefore, it may have been irrevocably damaged, unless you are able to repair it.

Address both parties' interests.

If the other person rejects your proposal, find out why.

Given what you are asking the other person to do, **he may not see it as a win at all for himself. <u>The key is for the other person not to see it as a loss, but rather as an agreement he can live with on an ongoing basis</u>. <u>It needs to be an agreement that takes into account the other person's most basic interests better than his alternative could.</u>**

<u>While an Agreement is good, it is not the end of the negotiation process</u>.

Now visualize the constituents asking the other person tough questions about the agreement, such as:

"Why did you give up?"

"What did you give up?"

"Did you really need to make that concession?"

"What about our needs – did you forget about us?"

"Why weren't we consulted?" And so on.

Think about the best answers the other person could give, and help him to prepare his speech. Help him save face

<u>The tendency after saying No is for the parties to drift further apart when in fact the opposite is called for</u>.

Reach out to the other person.

Rebuild confidence. **If your relationship has undergone strain or been damaged during the process of saying No, think about what you could do to repair the relationship. A sincere acknowledgement, apology, or expression of regret can go a long way**.

Replenish your goodwill account.

Immediately after saying No, look for opportunities to nourish the relationship.

End on a positive note. Last impressions count too.

<u>The other person often prefers a clear answer even if it is No</u>, rather than continued indecision and waffling.

PRESENTATION HANDOUT:

The Four C's to Managing Conflict in the Workplace Remotely

Damali Peterman, *New York, NY*

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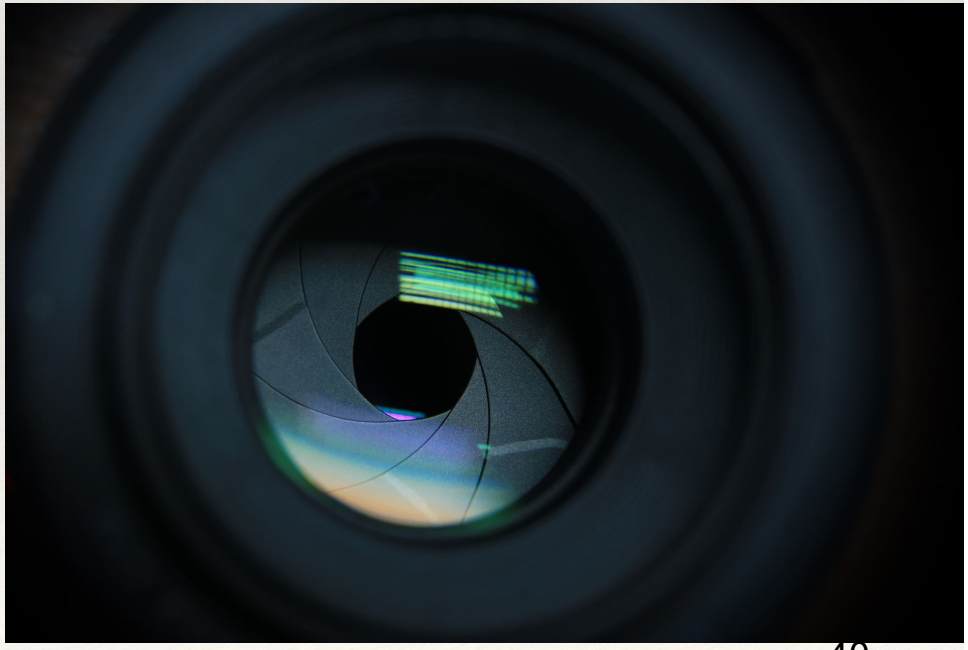
The 4 Cs of Managing Conflict Remotely

October 20, 2021

BREAKTHROUGH ADR

Today's Objectives

- Participants will learn tips designed to manage conflict remotely by exploring the 4Cs:
  - Commitment
  - Communication
  - Conflict Resolution
  - Comradery



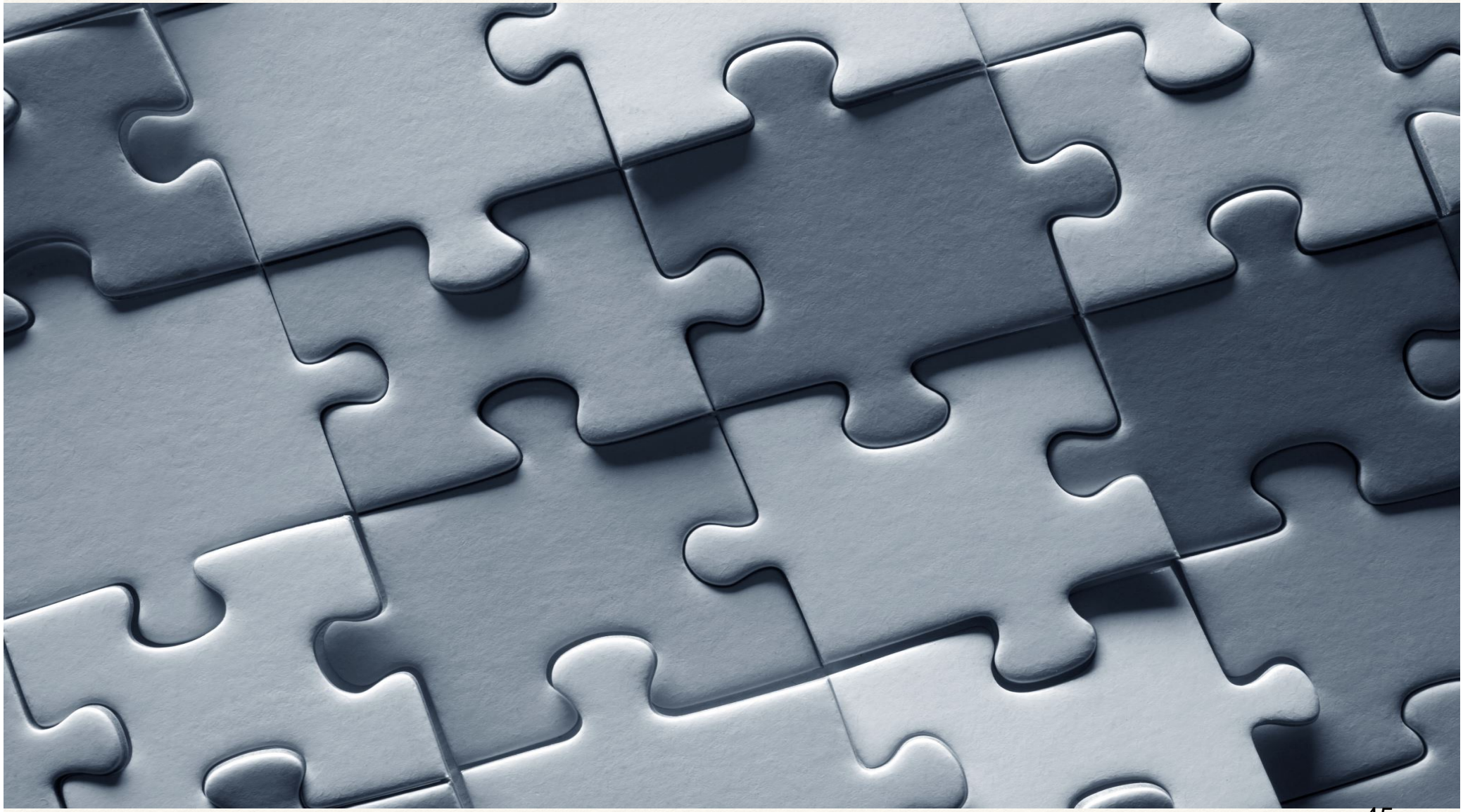
COMMITMENT


com•mit•ment
To pledge or obligat
mittere : com-, com-
committing, esp.: a
mittee. b. Official
authorizing


engaged
commitment
or share in an
partnership: the
activities to further
engagement
joining together
common goal or

HOW TO INCREASE COMMITMENT

HOW TO INCREASE ENGAGEMENT

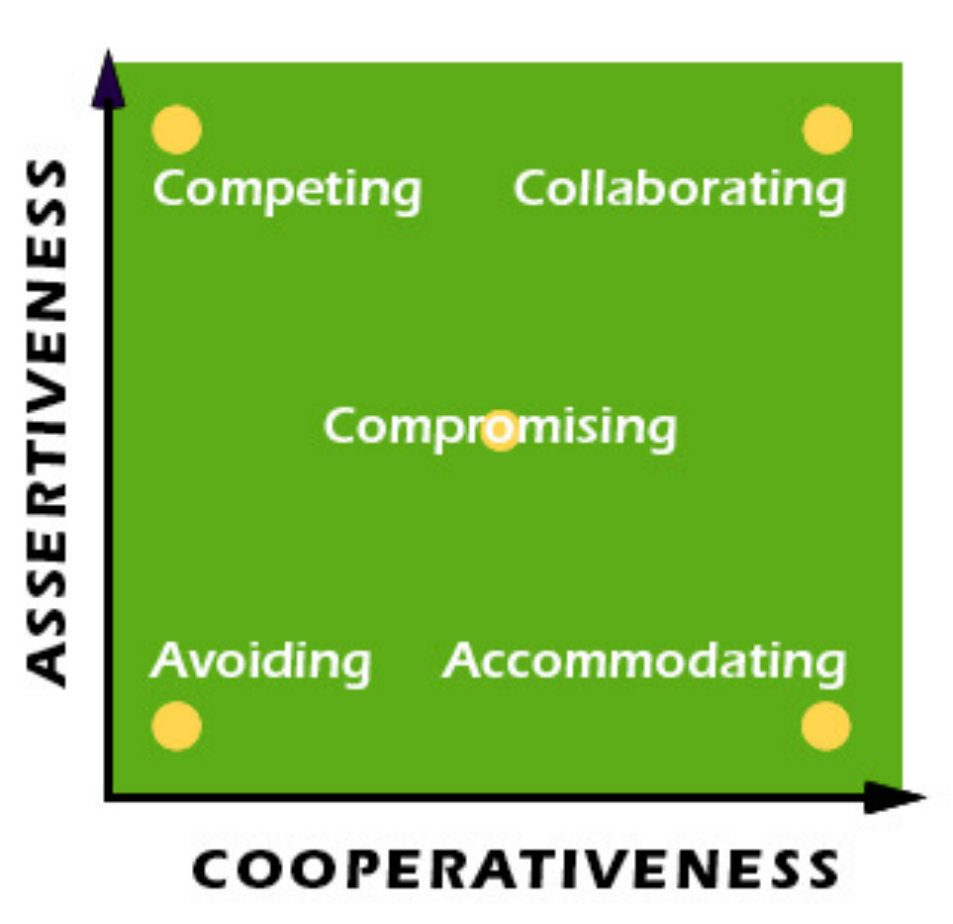


COMMUNICATION

5 Conflict Communication Styles

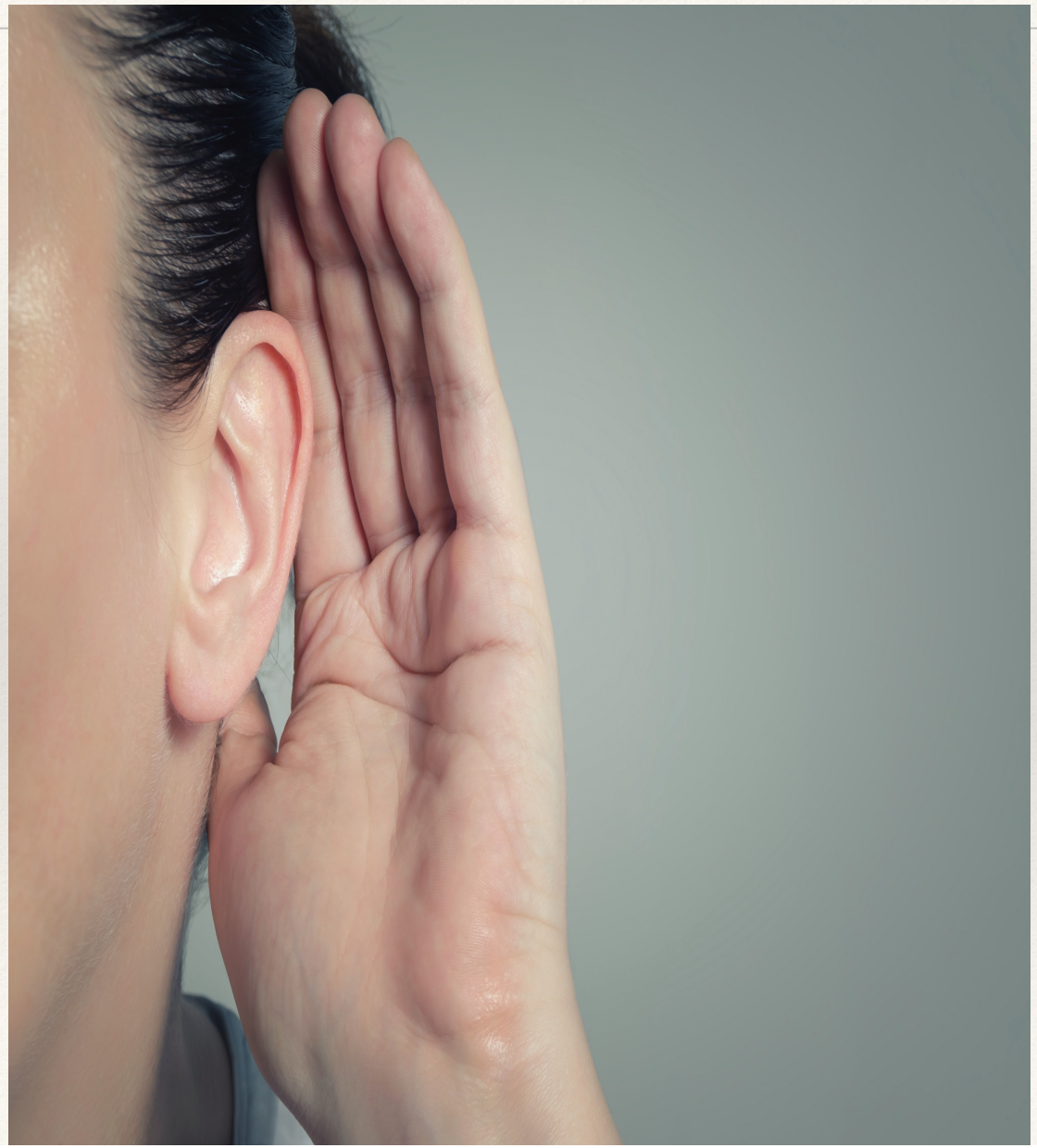
What are you doing?

1. Competing
2. Avoiding
3. Accommodating
4. Compromising
5. Collaborating



Source: Thomas and Killman

Can You Hear Me Now?



CONFLICT RESOLUTION

Recurring Issues in Conflict Resolution

Breakthrough ADR's SMART Tips

- **Separate the person from the problem.**
- **Make a point to understand the underlying interests, and not just the stated positions of the people in conflict.**
- **Accept reality with a "Yes, and…".**
- **Resolve with everyone at the table.**
- **Trust the process.**

Breakthrough ADR's THINK Tips

- **T**est yourself
- **H**ave plan
- **I**ntent v. Impact
- **N**ever take bait
- **K**now when to fold

COMRADERY

COMRADERY

- What does comradery mean?
- What is the impact of no or low comradery in the remote workplace?
- How do you recreate the watercooler experience virtually?

How to Build Virtual Comradery

Q&A

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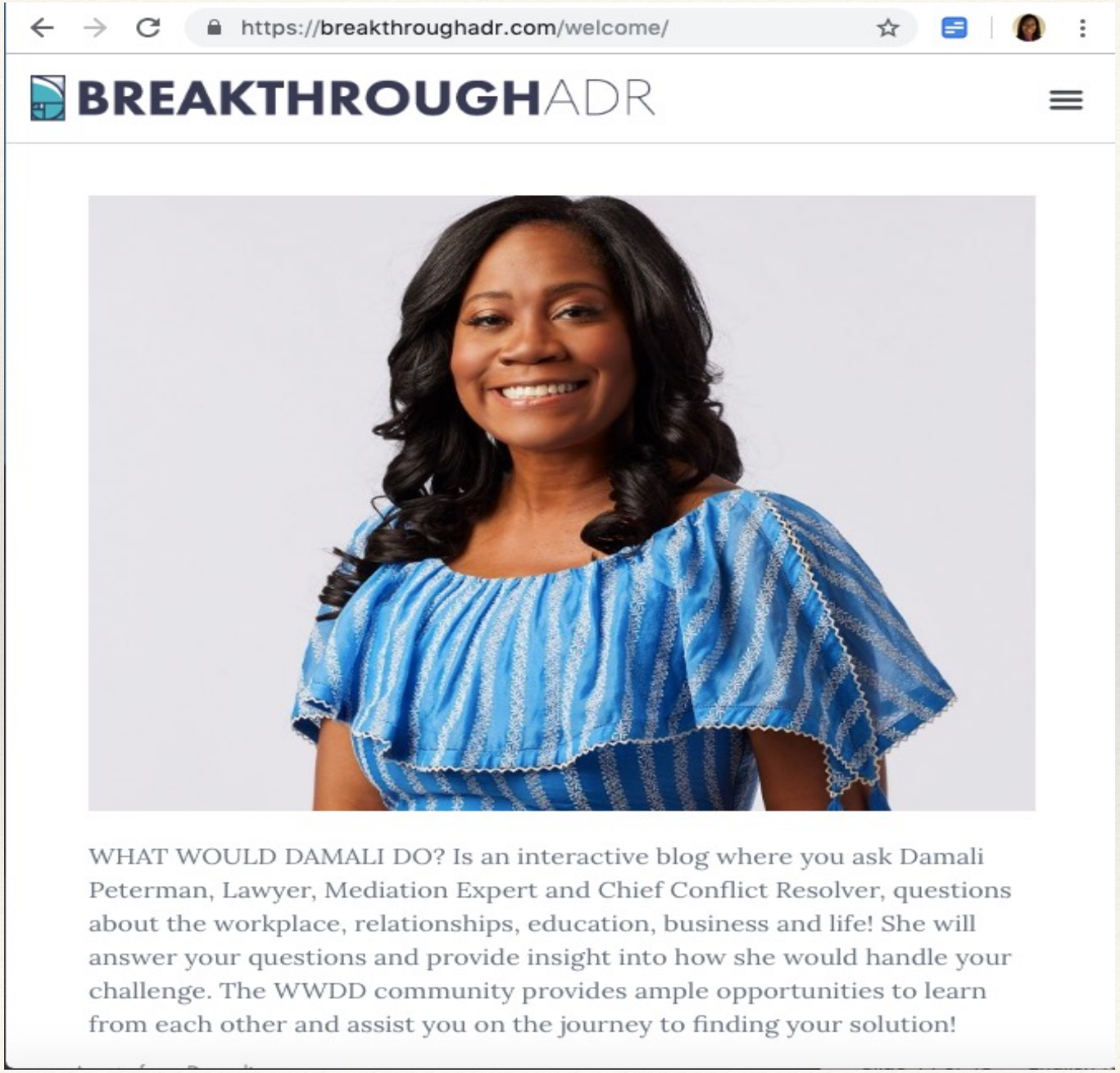

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Take More Trainings!

- Art of Negotiation
- Art of Conflict Resolution
- Introduction to the Mediation Process
- Basic Mediation Training
- Advanced Mediation Training
- Train the Trainer
- The Great Facilitator
- Conflict Resolution for Workplace Titans
- Additional customized trainings are available upon request!

THANK YOU!

PRESENTATION HANDOUT:

Holding the Calm: The Secret to Resolving Conflict and Diffusing Tension (in Really Tough Situations)

Hesha Abrams, *Dallas, TX*

ASSOCIATION OF ATTORNEY-MEDIATORS

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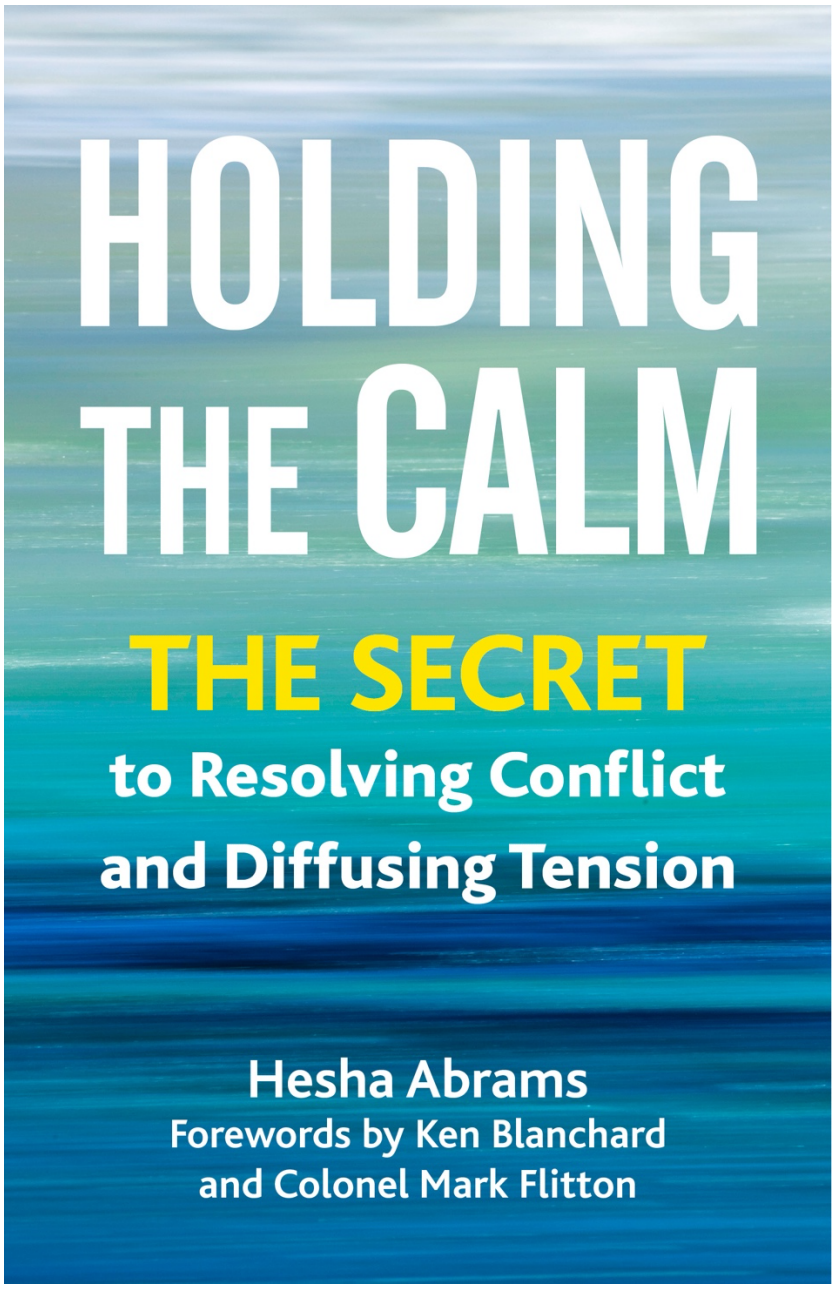

HOLDING
THE CALM
THE SECRET
to Resolving Conflict
and Diffusing Tension
Hesha Abrams
Forewords by Ken Blanchard
and Colonel Mark Flitton

Dedication

To The Triumph Of The Human Spirit

We Are All Bigger
Than We Think We Are

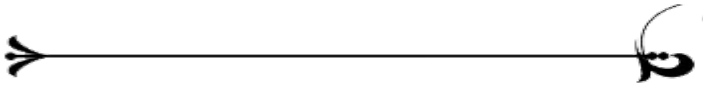
Table of Contents

18 Create Small Winnable Victories
19. Don't Take No for an Answer
20. Going Postal-Not

Conclusion -- Your Turn

Preface: Why I'm Sharing these Secrets with You

"Michael, if you can't pass, you can't play."
Coach Dean Smith to Michael Jordan
in his freshman year at UNC



"Somewhere, Something incredible
is waiting to be known."
Carl Sagan, Astronomer and Astrophysicist

That fear permeates our society. One hundred million lawsuits are filed each year in the US alone. Throughout the world litigation often takes the place of problem solving. Senseless shootings occur with such frequency that we are numb to it. The chapters in Holding the Calm are designed to be a tool box for you. Something you can grab and use as you need it or plan an entire project around it. We've all used a shoe to hammer a nail into the wall when the hammer wasn't available. But what if it was a bolt and needed a wrench? What if the tool box was full of kitchen tools? You needed a knife but all you had were spatulas?

Just like you need the correct tool for the job. You need the correct approach for that particular person or that particular conflict. There are seven billion people on the planet, each with their own unique fingerprint. Yet we are taught to treat all people in conflict in the same way. To use the same formula or approach with everybody. Doesn't that sound ridiculous? People are not the same, They don't argue the same way. They don't fight the same way. They don't resolve the same way. They don't eat the same foods. They don't like the same movies. They don't laugh at the same jokes.

Treating everyone the same ignores the unique humanity in each of us. Personalized medicine is the new trend in healing our bodies. We need a personalized approach to heal human conflict as well. The trick is how to know what people want, what they will resonate with, and the right approach to take in diffusing conflict, finding solutions and solving problems. And…it's not hard if you have a good tool box to pull from.

What Holding the Calm lays out are rich, deep, yet attainable and fun tools to help people with drastically opposing viewpoints have civilized discussions and resolve disputes, lawsuits, divorces, and fights from many different vantage points. It is incredibly meaningful to bring peace where there was discord, to stop fighting, and to find solutions. It is so valuable to others and society in general but also so beneficial for you to be a person that knows how to stop a fight, resolve a conflict, or harmonize differences. This is work worth doing. As Teddy Roosevelt, former President of the United States said, "Far and away the best prize that life offers is the chance to work hard at work worth doing."

There's a great story about Teddy Roosevelt's campaign for U.S. president when he was running on a third party ticket in 1912. The campaign was short on cash. The campaign manager told a staff member to get some brochures ready for a big publicity whistle stop tour. The staffer found a great picture of Mr. Roosevelt when he was president and,

desiring to please his boss, rushed and printed three million brochures. When the campaign manager, George Perkins came back he immediately said, "where is the license to use this photograph?" Dumfounded, the staffer had no answer and no understanding of intellectual property laws which required a license from the photographer to use his work.

The risk that the campaign would be sued or bankrupted by the fees was great. The wise campaign manager thought a moment and said, " I have an idea." He sent a telegram to the photographer and said, "We are planning to distribute millions of pamphlets with Roosevelt's picture on the cover. It will be great publicity for the studio whose photograph we choose. How much will you pay us to use yours? Respond immediately." The photographer telegraphed back "The most I can offer is $250." "Done" said the campaign manager. Crisis averted.

How magnificent would it be to win the argument without fighting? Win the case without filing a lawsuit. Win the battle without actually going to war. Holding the Calm makes that possible. The campaign manager could have lied. He could have threatened or coerced. He could have bribed or just stolen the picture. But he did not. He did his own form of Holding the Calm. He spoke into the ears that were hearing him, avoided a fight, and created a solution that made everyone happy. Now some may feel that he wasn't honest or that he wasn't transparent. If the relationship is important then this approach would not be the correct choice. If, however, you are avoiding catastrophe, then avoiding the battle may be the greater goal. I like the quote from William Arthur Ward, " The pessimist complains about the wind, the optimist expects the wind to change, the realist adjusts the sails".

Holding the Calm is about seeing possibilities all around you like stardust but it's also pragmatic. We can't have our minds so open that our brains fall out. There are alligator pits in life and we need to avoid them. Life can be a jungle either literally or figuratively. We need to see opportunities but also need to protect ourselves. Holding the Calm is pragmatic. What works. What does not work. How to really resolve conflict, problems, and diffuse tension.

In Israel, when there was an outbreak in assaults against women at night, a minister in the Israeli cabinet suggested a curfew to keep women in after dark. "But, said Golda Meir, former Prime Minister of Israel, "it's the men who are attacking the women. If there's to be a curfew, let the men stay at home, not the women." By framing the solution this way Golda Meir, also reframed the problem which prevented a quick but poorly designed solution from being implemented.

When you are Holding the Calm, you can do this too. You speak into the ears that are hearing you. The trick is how to do that effectively. I wrote this book with short chapters in an easy to absorb fashion, designed to inspire, with rich morsels that reveal tools, skills, stories, anecdotes, lessons, and inspiration for everyday humans and professionals embroiled in fighting or arguments and see no way out. Things you can do right now to make any tense situation better.

This book is set up as hors d'oeuvres, tapas, dim sum, or a great breakfast buffet.
The gentle power of Holding the Calm is now available to you. Use my stories. Use my anecdotes and examples. Use these tools to make your life easier when faced with conflict. They are a get out of jail card. They are battle tested. They are calmative. They are universal whether you live in Beijing, Brooklyn or Bagdad.

Let's Go!

Holding the Calm

It is the most important ingredient in solving any problem. It is Step #1 before you do anything else. Holding the Calm is the oxygen which makes everything else possible.

Even when there are explosions.
Even when there are limited possibilities.
Even when there is rage, fear, stubbornness, or deceit.

Holding the Calm is an active yet simple way to create space for possibilities, drain the swamp of toxic emotions, fully let someone be seen and heard and diffuse tension so solutions can be found.

The Breakthrough Step Is Holding The Calm.

You create and sustain the space for Calm by first asking yourself:

"What does this person need."

Finding a solution, resolving a conflict, settling a lawsuit, negotiating a deal, all begin with Holding The Calm. The better you can do it, the more you can hold, the faster you can create and sustain The Calm, the better every situation is and the more possibilities there can be.

Holding The Calm works even in really bad situations.

I mediated a case where a postal truck hit a young boy who then became brain damaged. Postal regulations forbid drivers from passing out candy to kids. They don't want kids trained to run out into the road to see the postal driver to get a treat. Well, in a small rural county a kind driver, who had the same route every day, thought, "Why can't I give out a little candy, a little happiness to the kids on my route?" So, every day she brought a bag of penny candy and the kids ran to her truck when she came down the road for a sweet treat.

Of course, you know where this story is headed. One day she was out sick, and a replacement driver took the route who had no idea kids would run out in front of the truck. She struck a little boy who suffered brain damage and was now in a coma.

Bad situation.

The family hired a lawyer and sued the postal service. The father was a truck driver and mom was a waitress. Mom was nervous about her upcoming deposition the next day, so she took a few extra sleeping pills to help with the fear. The husband woke up in the morning to find a dead wife.

Really bad situation.

I had no idea what I would say to this guy or how to deal with this situation. I began by Holding The Calm. I walked into the room and looked at him. He was chewing tobacco, had a John Deere hat pulled low over his eyes, and was slumped in a chair. I just looked at him and said, "How in the world are you dealing with this?" He growled, "I read the Bible."

I made my voice low and growled back. "What part?" He snarled "Job". I got quiet and said, "Oh my gosh, you are Job." He slid down off the chair onto the floor and I quietly sat down on the floor next to him. I didn't touch him. I didn't speak. After a long time, I got up and said to his shell-shocked lawyer, let's go help this man be done with this. By the end of the day, we got to a financial number to settle the case and didn't have to put this man through any more pain.

By Holding The Calm, we created the space where he could be heard, understood, valued, and safe to make resolution possible even though he barely spoke.

Want a Business Story Where Holding The Calm Worked Completely Differently?

It was late at night negotiating a business deal between two high powered executives, and we locked in at Tom demanding 35 million dollars and Juan refusing to pay more than 30 million. Two big egos, a lot at stake, how to bridge this gap? By Holding The Calm, I saw that the need to win was potent and there was no solution. So, I shifted to the need to not lose. I told them that we were going to flip for the extra 5 million. They looked at me incredulously. I took a coin out of my pocket and said either we do this or arm wrestle for it. I then threw the coin in the air. Juan reached out and grabbed it midair and said, "Ok, we'll split it. I'm a public company and I can't have it out there that I flipped a 5 million dollar coin." I teased them and said, "Come on, it'll be the story of a lifetime". After joking around a little, the tension was released, and we did, in fact, split the difference. Egos were saved. Manhood's intact. No winners. No Losers. The case settled.

The need to win is also the need to not lose. By Holding The Calm, I was able to see that reframing a 30 million dollar dispute into a 5 million dollar dispute where one could lose

completely reframed the definition of a "win" enabling the egos to feel satisfied. All and only possible by Holding the Calm.

Would you like to see another example of Holding the Calm when people want revenge?

Assume you have an agreement but there is a small gap between what one will pay and the other will accept. Hold the Calm and suggest the difference be donated to charity. They will look at you shocked. Sometimes it works because a party is really committed to a charity, sometimes it takes an evil twist. In a particularly nasty business divorce case, I suggested that each former partner decide which charity the other partner had to give his one half of the gap amount to. The power struggle was immense, and they gleefully thought about ways to punish their former partner by making him donate money to something he hated. The self-interest to punish the other was satisfied and two international charities received nice donations.

The difference between the three scenarios? By Holding the Calm, I was able to see what each party needed then selected the correct tool for the job. You do this too.

Holding The Calm is the most important thing you can do for someone else when they are triggered and their amygdala is activated.

Your husband is fighting with the neighbor. It's getting loud and aggressive. You don't know what to say. You don't know what to do. You

Hold The Calm

Your boss is yelling at you and your partner. It is blaming and accusatory. You don't know how to stop it. You

Hold The Calm

Your daughter is fighting with her teacher. You don't want to intervene but you don't want to stay away. You

Hold The Calm

Your roommate is arguing with the landlord. You don't want to get evicted but you don't know how to stop it. You

Hold The Calm

You sue someone and they won't make it right, or you get sued and can't get out of it. You hire a mediator who can

Hold The Calm

Whether you have no formal schooling or attended a top-ranked school, whether you're highly skilled or not, we're all human beings. We all get triggered. We all have weak spots. We all have limitations. It's all about us, human beings, and our attempt to remain civilized in the face of conflict. Think of all the people you know. I bet you know really smart people that can get themselves all worked up over simple issues. Really foolish people that drive you crazy. People so different from you, you don't even know where to start a conversation.

Holding The Calm is the turning point that makes conversations that turn into resolutions possible.

Human Beings are quite different but underneath all the trappings and outer layers, we are really quite similar when triggered. Rage, Fear, Power, and Ego are universal human qualities. By deciding to Hold The Calm, you enable yourself to have power over your situation, power over your impulses, or power over a deteriorating problem so that solutions may be found.

So, what is NOT Holding The Calm?

Getting reactive
Being judgmental
Becoming arrogant or cocky
Eye rolling
Snide comments
Devaluing statements
Dismissive body language specifically, flippant hand gestures, turning away, crossing your arms
Pursing your lips or snarling
Letting your face show that you think what is being said is ridiculous

In these situations, all you're doing is feeding the other person's amygdala which prevents that other person from even hearing or seeing you much less being persuaded

by you. All they see is a rejection of themselves which makes them defensive, uncooperative, or unresponsive. They will certainly not be willing to listen to you.

Don't worry, we all do it. We're all human and we all get triggered. It's part of the human experience.

The first step is Holding The Calm. This sets the stage for diffusion of tension where resolution is possible.

It's easy. Be present. See what is happening. Hear what is not being said. Then use a story, an anecdote, an approach, a validating remark, a listening technique, a deflection tool, or simply a deep listening. The full tool box for Holding the Calm is laid out in the Conclusion.

Typically, if a person's first idea doesn't work, the attempt at peacemaking fails and the fighting escalates. Then the other guy is a "jerk", the situation is impossible, and they see no way out. Their money, time, resources, and relationships are all needlessly expended or destroyed.

It doesn't have to be this way. Relations with co-workers, bosses, family, friends, neighbors and businesses all are improved with a more civilized approach to disputes, problem solving and conflict resolution. Calm medicine can seep into all corners of our society.

This is what makes us civilized. Holding The Calm.

About the author.

For the last 30 years, Hesha Abrams has been fascinated by human conflict and real world ways to resolve it. She has discovered what actually works and what doesn't, skills honed from working with tens of thousands of real people, companies, industries, and communities to resolve disputes, even really horribly entrenched, muddy, difficult ones. And…she loves it. She loves the difficulty, the curiosity of learning a new case, new people, and new ideas. Just figuring it out. Dealing with different people, different cultures, or different countries can be exhilarating. She approaches each new situation asking herself, What will I learn today? How will we get this matter resolved? She has made a lifelong study of human decision-making.

Hesha is an internationally acclaimed attorney mediator known for crafting highly creative settlements and resolutions in very difficult matters. She has the unique talent to work with big egos and strong personalities with the keen ability to create synergy amongst the most diverse personality types driving to agreement. By Holding the Calm, she has created settlements worth billions of dollars and saved clients billions more using her innovative approaches to deal making. She now specializes in crafting innovative solutions for complex or difficult matters but has she cut her teeth doing thousands of cases large and small in every conceivable area. This is how she discovered people are really the same but very different. The trick is how to tell the difference. What tool to use? How to approach the situation? How to prevent an explosion? Holding the Calm is her contribution to make our world and our relationships a little more harmonious.

She has written and spoken widely to audiences around the globe who are seeking a better understanding of conflict and pragmatic ways to resolve it. Most people are so afraid of conflict. It raises their blood pressure, makes them nervous or afraid and aggressive when that's the only tool available. Diffusing this tension and helping create harmony where once there was discord is her life's work. She wrote this book as a way to share real tools that actually work so that other people can benefit from her experience and resolve conflict and diffuse tension in their corner of the world.

She has worked all over the world and with parties from all over the globe in complex commercial, business, and patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The

Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, and 2002, was elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators. She is AV rated by Martindale Hubbell.

She lives in Dallas, Texas and Sarasota, Florida with her magnificent pilot husband who must be an eagle because he is happiest in the sky. She has four wonderful adult kids who enrich her life and four adorable grandkids who are the joy of her life. Walking the beach looking for pirate treasure with them delights her heart. Sharing this book and its tools to make your life more harmonious makes her smile thinking that maybe, just maybe, we can make this world a better and more peaceful place.

You can see her work at HeshaAbramsMediation.com and HoldingtheCalm.com. She welcomes your insights and stories about your own journey of diffusing tension and resolving conflict and encourages you to spread this magic pixie dust around the world.

For more information about the author or to inquire about speaking engagements, contact:

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"What a great book! - My favorite part was: "So how BIG can we get? How Smart, How Wise, How Kind, How Skillful? I don't know, I'm not dead yet." LOVE IT!! "
Hilary Rapkin, Esq., Chief Legal Officer Wex, Inc.

PRESENTATION HANDOUT:

Claims Against Mediators: A Survey

Robert Badgley, *Chicago, IL*

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CLAIMS AGAINST MEDIATORS: A SURVEY

Robert A. Badgley, Esq.[1]
November 2021

Claims and lawsuits against mediators and other ADR professionals have become a commonplace. In most cases, the claims are baseless and they are ultimately defeated. Even so, defense costs can be considerable, and even staggering, and the distraction of defending a malpractice claim can work palpable wear on a mediator's business.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity – the kind of near-absolute immunity enjoyed by judges and arbitrators – as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, such as breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it must be repeated, even if mediator defendants ultimately escape liability they can nevertheless incur significant legal defense bills. Further, where mediators are faced with disciplinary proceedings, the imposition of disciplinary sanctions can be costly in other ways, such as the mediator's reputation. And, of course, it requires time and often money to respond to the disciplinary charges.

The following survey of fairly recent claims should underscore the fact that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong. In broad terms, the majority of claims against mediators result from a party not understanding the mediation process (many claimants allege that the mediator was biased against him or her for the simple reason that the mediator was doing what mediators often do – pointing out the potential weaknesses in the party's case to open the party's eyes to the prospect of losing the case if it proceeds to trial), or from a mediator not making it clear at the outset that he or she is not giving

[1] Robert A. Badgley has practiced law for 30 years since graduating from the University of Chicago Law School in 1991. He is a member of Karbal Cohen Economou Silk Dunne LLC in Chicago. Among other things, he represents Underwriters at Lloyd's, London in insurance coverage matters involving professional malpractice claims (including claims against ADR professionals). He has also served as counsel in more than a hundred arbitrations and mediations, and, under the auspices of the World Intellectual Property Organization in Geneva, has served as arbitrator in nearly 500 disputes between trademark owners and Internet domain name owners. Although many of the claims discussed herein are accessible as public records, the author has chosen not to provide specifics because many of these claims involve insureds of his clients and, as a courtesy to such insureds, the author would like to maintain a measure of discretion.

any legal advice to the parties, or from a mediator not disclosing his or her prior relationship with the parties or their counsel.

Family Law

One area where the use of mediation continues to proliferate is family law. The emotionally-charged context of a divorce or a child custody battle produces situations in which, even where a mediator has seemingly done everything right and has taken necessary precautions to protect both parties, he or she is still open to claims.

- **Post-Mediation Advice.** A mediator was sued in a Southern state for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an email, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by email that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save emails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

The wife sued the mediator for $15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested as a result of the order of protection set in motion by the mediator.

The court granted the mediator's motion for summary judgment and dismissed the entire lawsuit. The court reasoned that, if the mediator's statements to the husband had been made in her role as mediator, then immunity applied to bar the claim. If, on the other hand, the statements were made outside the ambit of her role as mediator, then she owed no legal duty to the plaintiff. Either way, the court concluded, the case should be dismissed. The plaintiff appealed, and the appeal was dismissed. The lawsuit cost the mediator's liability insurers (Lloyd's of London) more than $20,000 to defend.

- **Faulty Advice at Mediation.** A mediator (who is also a lawyer) was sued in a Western state in connection with a divorce mediation. The plaintiff husband and his wife jointly retained the mediator to mediate the dissolution of their marriage. After some negotiation, the parties reached an agreement for the division of their marital assets, payment of debts, and spousal maintenance that was memorialized into a Comprehensive Mediated Settlement Agreement & Consent Decree ("Marital Agreement") that was ultimately entered by the court, thereby finalizing their divorce.

In his malpractice lawsuit, the husband alleged that the mediator had advised him and his ex-wife that the latter's retirement benefits were less valuable than the ownership interest the husband then had in his company. The mediator allegedly advised that, in order to keep 100% ownership of his business, he would have to pay spousal maintenance payments to his ex-wife of $2,300 per month for the next 14 years.

The husband was concerned about the ongoing stability of his income, owing to market fluctuations. He claims to have expressed this concern to the mediator, who allegedly assured him that the Marital Agreement would include a provision allowing modification of the spousal maintenance payments should his income drop more than 25% for six consecutive months. The husband alleged that he asked the mediator about some apparently contrary language contained in the Marital Agreement, which stated that the "right to modification for change of economic circumstances… has been specifically withdrawn from the court" and that "the court shall never for any reason have the power to modify the amount or duration of the spousal maintenance award." According to the malpractice complaint, when the husband confronted him with this apparently contradictory provision, the mediator told him he could seek modification of the spousal maintenance provision despite this provision.

The husband alleged that sometime later, his income dropped significantly more than 25% for far longer than six months due to uncontrollable market conditions, and that his ex-wife decided to take early retirement from her job at nearly the same time. Due to this confluence of events, he sought court modification of the Marital Agreement. The court refused to modify his spousal maintenance obligations, citing the provision quoted above from the Marital Agreement, including that "the court shall never for any reason have the power to modify the amount or duration of the spousal maintenance award."

The malpractice lawsuit pleaded five counts: (1) Breach of Contract; (2) Legal Malpractice; (3) Mediator Malpractice; (4) Fraud; and (5) Negligent Misrepresentation. As described above, the husband's allegations centered upon his claims that the mediator miscalculated or misstated the value of his ex-wife's retirement account and the value of his own business. Thus, the husband argued, there was no need for him to make spousal maintenance payments to account for the nonexistent excess value of his business as compared to his ex-wife's retirement fund. Also, as described above, the husband's other main allegation was that the mediator misrepresented the extent of the husband's ability to modify the Marital Agreement's maintenance payment requirements in the future.

The lawsuit settled for $30,000, with the mediator's liability insurers (Lloyd's of London) paying that sum plus the defense fees and costs (roughly $29,000).

hold-harmless provision. Additionally, the divorcing couple agreed to split the cost of the mediator's services.

The parties engaged in mediation, and the mediator prepared a marital separation and property settlement agreement. In the settlement agreement, the parties waived all past, present, and future alimony rights. The husband did not retain his own counsel for the duration of mediation, and did not consult with an attorney before executing the agreement.

On behalf of the couple, the mediator filed a joint petition for divorce in the local family court. A few months later, the family court issued a judgment of divorce which incorporated the settlement agreement.

Years later, the ex-wife filed an action requesting the modification of the judgment of divorce and seeking alimony payments from the husband. In response, the husband retained counsel and entered into an agreement to modify the judgment of divorce, by which the husband agreed to provide his ex-wife with $557 for 379 weeks.

The husband then sued the mediator in state court, seeking more than $225,000, comprised of total future alimony payments totaling and attorney fees paid to counsel in connection with the alimony modification issues. The lawsuit alleged legal malpractice and negligence. In the suit, the husband alleged that the mediator had acted as his lawyer for the purpose of drafting the settlement agreement and filing the joint petition for divorce into which the settlement agreement was incorporated. The husband alleged that the settlement agreement contained contradictory terms regarding the waiver of alimony which actually protected his ex-wife's right to modify the alimony piece of the agreement in the future.

The mediator's liability insurers (Lloyd's) engaged defense counsel for him. A motion to dismiss is being prepared in this case. A number of seemingly viable defenses will be raised. Among other things, defense counsel will argue in a motion to dismiss that the husband's negligence claim relies on his allegations that, at some point during the mediation proceeding, the mediator acted as his attorney. The husband appears to face a serious obstacle of proving an attorney-client relationship here, especially because the mediator advised him repeatedly that he was entitled to confer with independent counsel. Further, the mediator never filed an appearance on behalf of the husband or performed any legal service for him other than mediation services, which included filing the settlement agreement in court as the divorce mediator.

Further, it is believed that the mediator has strong contractual defenses. The husband signed a consent to mediate, which included a provision encouraging the parties to consult with their own counsel. The settlement agreement also expressly states that the mediator did not act as an attorney for either party, and it confirmed that the mediator had advised each party that

they were entitled to consult with independent counsel. Finally, the consent to mediate agreement contained a hold-harmless clause wherein the parties agreed to hold the mediator harmless for any errors, omissions, or future negative consequences.

To date, nearly $15,000 in defense fees have been paid by the mediator's liability insurance policy, and this is before a motion to dismiss has been filed. This claim underscores the need to confirm – in writing and before the mediation – that the mediator is not acting as a lawyer at all, much less as a lawyer for either party, and that the parties should confer with their own counsel. It appears that the mediator in this case took these precautions, and still got sued. It remains to be seen whether these precautions will result in a relatively early dismissal of the lawsuit. If not, this case will require document discovery, depositions, the possible engagement of experts, summary judgment motion practice, and perhaps even a trial.

- **Misrepresented Mediator Identity.** In a Midwestern state, a mediator was engaged in a divorce case. The court later appointed the mediator as parenting coordinator in the case. According to the husband, who filed suit against the mediator, he discovered that the mediator was using a false name, because the true name would have revealed the mediator's prior criminal conviction for accepting bribes while working as a probate officer several years earlier. In his lawsuit, the husband alleged that the mediator had been siding with the ex-wife, and he demanded damages in the form of fees paid to his lawyer (for investigating the mediator's background) and a return of the fees he had paid to the mediator.

The court dismissed the initial complaint, but denied the mediator's motion to deny the amended complaint. Before the lawsuit moved too far into the discovery phase, the parties settled for $16,500 (funded by the mediator's insurers, Lloyd's).

- **Unauthorized Practice of Law.** In a Midwestern State, a mediator received a demand letter after a divorce case was settled. Counsel for the husband alleged in the letter that the mediator engaged in the unauthorized practice of law ("UPL") by negotiating and preparing a document purporting to be a Marital Settlement Agreement "Memorandum of Understanding," and by subsequently rendering of legal advice pertaining to the case. The husband's lawyer demanded a refund of mediation fees and claimed that a suit for damages and a possible referral to an unauthorized practice of law commission was looming.

Defense counsel was engaged under the mediator's insurance policy (Lloyd's). Although defense counsel concluded that the UPL allegations were baseless, the mediator wished to put the matter behind him and avoid possible UPL proceedings and/or a lawsuit. The mediator refunded the fees, amounting to $7,900, to the husband in exchange for a release and covenant not to sue. Lloyd's agreed to pay 50% of the refunded fees. The Lloyd's insurance policy does not cover a return or disgorgement of mediator fees, as they are not "damages," but an

accommodation was made here because the return of fees also had the effect of avoiding a future lawsuit or other legal proceeding.

Allegations of unauthorized practice of law are made against mediators from time to time, and what constitutes UPL varies from state to state. The vital point here is that a mediator must make it clear to the parties at the outset that the mediator is not rendering legal advice and is not acting as a lawyer in any manner. The mediator should also make it clear that any document drawn up to reflect the basic terms of a mediated settlement should be reviewed by each party's counsel.

Commercial Law and Other Contexts

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

- **Defamation.** In a Western State, a mediator was sued for alleged defamation arising from a multi-party construction defect dispute he mediated. The plaintiff in the defamation suit was one of the lawyers participating in the underlying construction defect mediation.

It was alleged that the mediator berated this lawyer, calling him a "horrible lawyer" and commenting, unflatteringly, on the size the lawyer's manhood. It was alleged that these comments were repeated by the mediator outside the confines of the mediation proceeding. At a social event shortly after the mediation, the wife of one of the other lawyers at the mediation said to the plaintiff: "Hey! You're the guy with the little ****!"

The plaintiff filed suit against the mediator, alleging defamation, false light, intentional infliction of emotional distress, and so forth. After discovery in the lawsuit, the mediator filed a motion for summary judgment, seeking dismissal of all counts by reason of quasi-judicial immunity, privilege, and the fact that the mediator's statements were opinions, not assertions of fact. The summary judgment motion was pending when the mediator and the plaintiff settled for $25,000. The mediator's liability insurers (Lloyd's of London) funded the settlement, as well as paying more than $88,000 in defense fees and costs.

- **Failure to Render Services.** In a Western State, a mediator was sued for allegedly failing to take any action to resolve a property dispute between the plaintiff and her former boyfriend. The lawsuit alleges that the mediator took fees from the parties, held a mediation session with them, and promised to provide them with his findings and recommendations on how to resolve the dispute. Months passed with no further action, during which time, it is alleged, the

plaintiff lost control over the subject property. The plaintiff sued the mediator for needless legal fees and lost income from the sale and/or use of the subject property.

While a summary judgment motion was pending, the mediator agreed to settle with the plaintiff for $3,500. The mediator's insurers (Lloyd's) also paid more than $13,000 in legal fees prior to funding the settlement.

● **Subpoena for Deposition.** In a Midwestern state, a plaintiff sued her former business partner, and the case was settlement by mediation. The mediation occurred in several sessions over a period of years. The plaintiff then filed a malpractice lawsuit against the firm who had represented her in the underlying business dispute. The defendant law firm subpoenaed the mediation records of the mediator, and sought to take the mediator's deposition.

By way of further background, it appears that the plaintiff had several discussions with the mediator throughout the lengthy mediation process, during which she expressed dissatisfaction with her lawyers. The plaintiff asked the mediator whether she had a viable malpractice claim against her lawyers, and whether the mediator could recommend another lawyer to replace her lawyers in the business dispute. The mediator apparently gave the plaintiff at least one name of a possible replacement counsel. Some of these discussions with the plaintiff occurred *after* the underlying business dispute was settled.

Through defense counsel appointed by the mediator's liability insurers (Lloyd's), the mediator invoked mediation privilege as a basis to resist the subpoena. After an exchange with defense counsel in the malpractice suit, the mediator agreed to sit for a very brief deposition in which a very limited scope of questions would be allowed.

This matter illustrates that mediators may gain so much trust and credibility that they become all-purpose sounding boards for the litigants who appear before them. This additional role comes with its own set of potential problems, and mediators should keep their roles straight when litigants confer with them outside the strict confines of the mediation setting. This matter also illustrates that mediators should ensure that their liability insurance policy protects them against a subpoena to produce files or give a deposition. Not all insurance policies will provide a defense to mere discovery demands, as opposed to lawsuits seeking damages.

● **Another Subpoena for Deposition.** In the Midwest, a sex abuse victim's claim against an archdiocese was settled several years earlier in mediation. The archdiocese later went into bankruptcy. The victim made a claim in the bankruptcy proceeding to reopen his claim against the archdiocese, arguing that the prior settlement had been procured through fraud and undue influence. The bankruptcy court initially ruled that the new claim could go forward. The

archdiocese then subpoenaed the mediator, presumably to give a deposition to confirm that the mediated settlement had proceeded in good faith and without fraud or undue influence.

The mediator, whose Lloyd's liability insurance provided coverage for discovery demands, hired defense counsel to resist the subpoena. Through counsel's efforts and those of the archdiocese's own counsel, the bankruptcy court reversed its prior decision and disallowed the new claim by the abuse victim, which had the effect of rendering the subpoena moot. Again, this matter illustrates the importance of having insurance coverage against more than just lawsuits seeking damages. It is not unusual for a party to seek the records or testimony of a mediator after a settlement comes apart. Even though mediators usually defeat such subpoenas and demands, the attorney fees required to do so can be substantial.

● **Failure to Recognize Impairment.** In a Southern state, a mediator successfully settled a civil lawsuit between a plaintiff and an automobile service company. After the settlement was concluded and the lawsuit dismissed, the plaintiff sent a letter to the mediator in early 2021, demanding his mediation file and threatening to file a bar complaint against the mediator. The plaintiff alleged that, during the mediation session, she was manipulated by her lawyer and was "suffering from post-concussion syndrome." She claimed that the mediator knew or should have known of her impaired condition and nonetheless allowed the mediation to proceed. (The mediator flatly deny being told about, or having any reason to suspect, the plaintiff's alleged impairment.) The mediator's liability insurers (Lloyd's) appointed a civil defense lawyer for the mediator, to advise him on whether and how to respond to the plaintiff. To date, the mediator has not responded to the plaintiff in the underlying lawsuit, and to date no bar complaint has been filed.

The outcome of this matter remains to be seen, and after the passage of nine months it would appear that this matter will come to naught. This matter illustrates how useful defense counsel can be in pre-lawsuit circumstances, both in terms of providing advice to the mediator and in terms of serving as a buffer between the aggrieved party and the mediator. Such consultations with counsel are generally covered under the Lloyd's insurance policies.

● **Conspiracy and Bias.** A commercial law mediation in a Western state involved a dispute among the plaintiff company, another company who asserted cross-claims against the plaintiff, and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The plaintiff left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute.

The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-

appointed mediator enjoys quasi-judicial (i.e., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and was again appealed. The dismissal of the suit was affirmed again, and the plaintiff filed a petition for *writ of certiorari* with the U.S. Supreme Court. The Supreme Court denied that cert petition. Despite the existence of immunity in this state for court-annexed mediators, this claim went on for years and was very costly to defend (more than *$560,000*). The mediator's insurers (Lloyd's) picked up the entire tab.

● **Nondisclosure and Bias.** A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed that the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The instant case settled at mediation for $200,000.

The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs, which were paid by Lloyd's of London.

CONCLUSION

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the widespread use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.

PRESENTATION HANDOUT:

Covid Protocol Considerations in Mediation: The Return to In-Person Mediations - Pivoting in light of the Delta Variant

Aric Garza, *San Antonio, TX*

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Association of Attorney-Mediators (AAM)
"Mediators on the Front Line: Tools to Disrupt Disruption"

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OVERVIEW:

- How do we view the implications of COVID for the mediation process?
- How do attorneys handle COVID protocols for clients?
- What are the perspectives of participants?
- For In-person or Zoom proceedings, how do we broach the subject in general? With attorneys? With participants?
- ***"Mediating the Mediation"***

OVERVIEW:

- **Key = Be Adaptable**
- ***Issue: how do we handle opposing views concerning in-person mediation versus Zoom mediations?***

"Process Planning"

- **"Process Planning"** is the development and agreement on ground rules for the mediation process itself, in addition to traditional pre-mediation activities;
- **"Process Planning" in Mediation is--**
  - Helpful in ensuring that the parties feel confident that they can safely engage in the process
  - Helpful in establishing an agreed safety protocols
  - Helpful in determining whether to restrict the number of attendees in accordance with the new occupancy limits for our conference rooms

"Process Planning"

- Strongly consider scheduling a pre-mediation conference call with both counsel ***and their clients***
- **Don't delegate** it to an administrative assistant
- Discuss In-Person and Zoom/Video Conferencing options
- **Purpose:** Build trust in the process overall
- **Safety is now a Major Factor in ADR**

Process Planning: Video Conferencing

- **If the mediation will be by videoconference, the mediator must ensure that--**
  - all participants have suitable computer equipment and adequate internet access,
  - that they are comfortable with the measures that have been taken to maintain the confidentiality of the process,
  - that they are sufficiently familiar with the videoconference experience so that they are not distracted from focusing on the substantive issues and engaging in a meaningful negotiation,
  - For persons who have a hearing disability, mediators may be required to provide Interpreters/Sign Language specialists

Process Planning: In-Person

- If an in-person mediation is planned, the mediator must confirm that all participants are comfortable with, and will agree to abide by, the safety protocols, including the requirement of face masks; and
- If those protocols are not acceptable to one or more of the parties, then the mediator must explore the possibility of other solutions, such as a hybrid process in which some participants attend in person and others participate by videoconference.

Polling Question 1:

- Poll Question: Since COVID, do you conduct pre-mediation conferences **routinely**?
  - Yes?
  - No?

Polling Question 2:

- **Do you currently offer in-person mediations?**
  - Yes, I'm back to my pre-COVID practice
  - Yes, but with certain protocols
  - No, I'm not doing in-person mediations until 2022
  - No, I've decided I will do online mediations moving forward

Polling Question 3:

- Do you utilize **written, published protocols** to conduct in-person mediations?
  - Yes
  - No

Sources of Draft Protocols

- JAMS (Process Planning)
  - https://www.jamsadr.com/blog/2020/process-planning-is-an-essential-prerequisite-to-successful-mediation-in-the-post-covid-19-era
- FINRA
  - https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation
- American Arbitration Association
- Local Rules of Courts
- Others

Protocol Development:

- Parties have agreed to location, but Mediator is concerned; how do you raise issue?
- Parties have agreed to location, but difference in protocols
- Parties have not agreed to location, and have differences in protocols
- How should mediators discuss their own concerns (family, elderly, young children, young grandchildren)
- Be prepared to accommodate ALL situations; don't be tone deaf

Aric J. Garza - Protocols

- **Schedule and conduct Pre-Mediation Conference with Attorneys personally**
- Emphasize procedural as well as substantive topics to cover in the Conference
- Outline Issues to Address via email:
  - Locale
  - Number of Participants
  - Special Accommodations
- Frank discussion about COVID concerns and how they play a part on the mediation process
- Maintain neutrality regardless of attorney and client perspectives
- Address my own concerns
- **Although I'm open to In-Person mediations, I emphasize Zoom mediations for practicality purposes**

In-Person Proceeding (Conference Rooms)

- Conference Room large enough to allow social distancing;
- Hand sanitizer provided in each room;
- Masks for all in-person participants and arrangements made to provide masks to participants who do not have them;
- Plexiglass dividers and face shields provided in the event that participants must remove their masks; and
- In-person participants provided with information on best practices when traveling to and attending the hearing.

In-Person Proceedings (Other)

- Lunches - Individually wrapped lunches
- Hand Sanitizers In all Rooms
- Cleaning be done prior to arrival and at end of the day
- Signs Politely Requesting that all Participants Practice Social Distancing

Zoom/Video Conferencing

- Schedule a “Walk-Through” with Counsel
- Microphone Check
- Connectivity Check
- Video Check
- “Share Screen”
  - PDF
  - Exhibits
- Ask to Scan Room, if appropriate
- Breakout Rooms (option to “automatically send”)

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PRESENTATION HANDOUT:

Closing Techniques: Avoiding and Breaking Impasse, Bracketing, and Mediator Proposals

Lee Jay Berman, *Marina Del Rey, CA*
Danielle L. Hargrove, *San Antonio, TX,* **Moderator**
Laura Kass-Moreno, *San Diego, CA*
A. Martin Wickliff, Jr., *Houston, TX*

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Closing Techniques:

Avoiding and Breaking Impasse, Brackets & Bracketing, and Mediator Proposals.

Presentation Speakers

By the time the parties come to mediation, they are already at an impasse.

Laura J. Kass-Moreno, Esq
Certified Mediator

Although I enjoy representing clients in litigation and in trial, I'd rather assist parties attempt a resolution of their disputes.

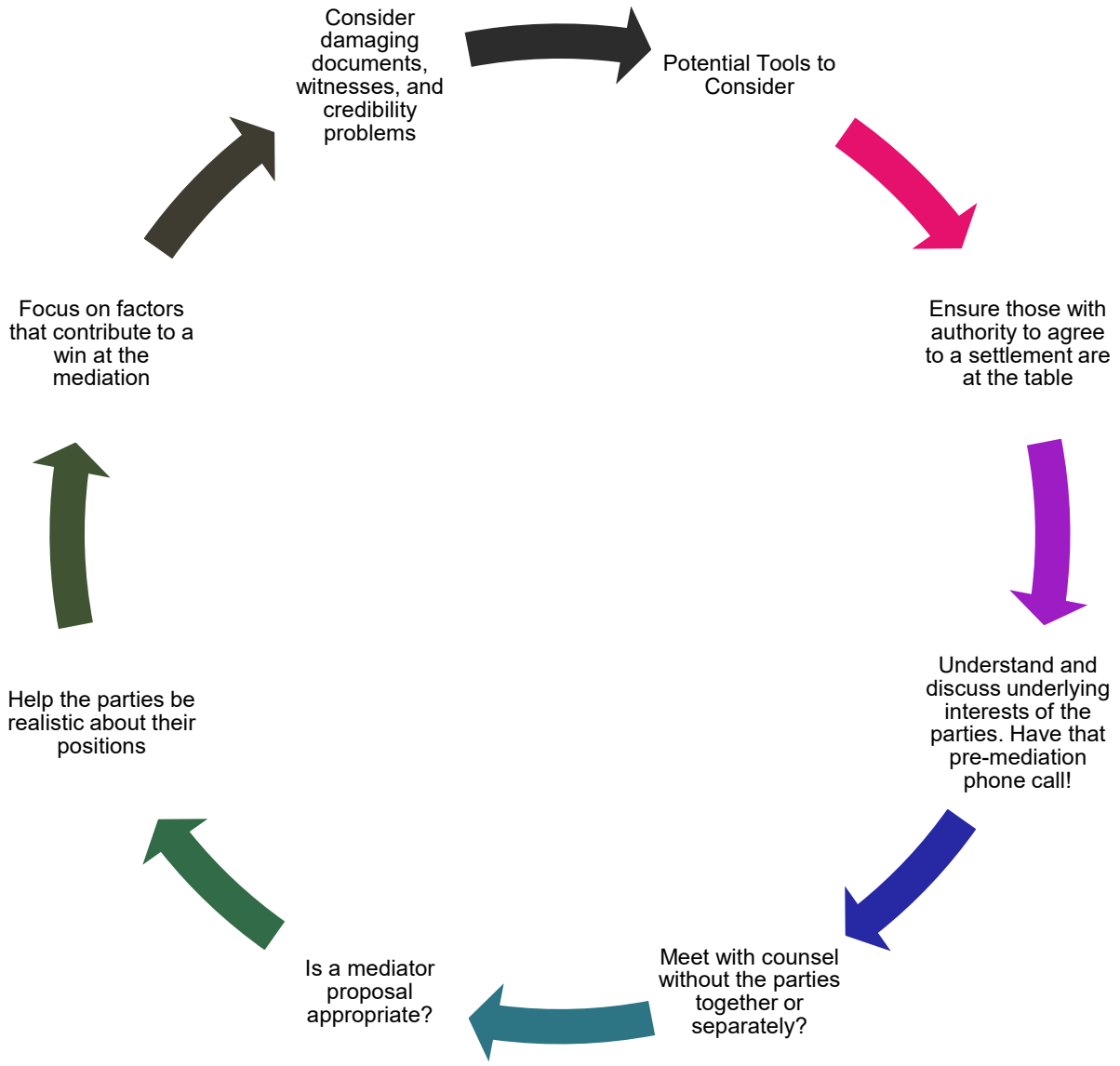
A. Martin Wickliff
Mediator and Arbitrator

"Impasse is a fallacy."
"Settlement Authority is temporary."
"Mediator Proposals are overused."

Lee Jay Berman
AAA Master Mediator and founder of the American Institute of Mediation

Avoiding and Breaking Impasse

Breaking and Avoiding Impasse



Final Take Away

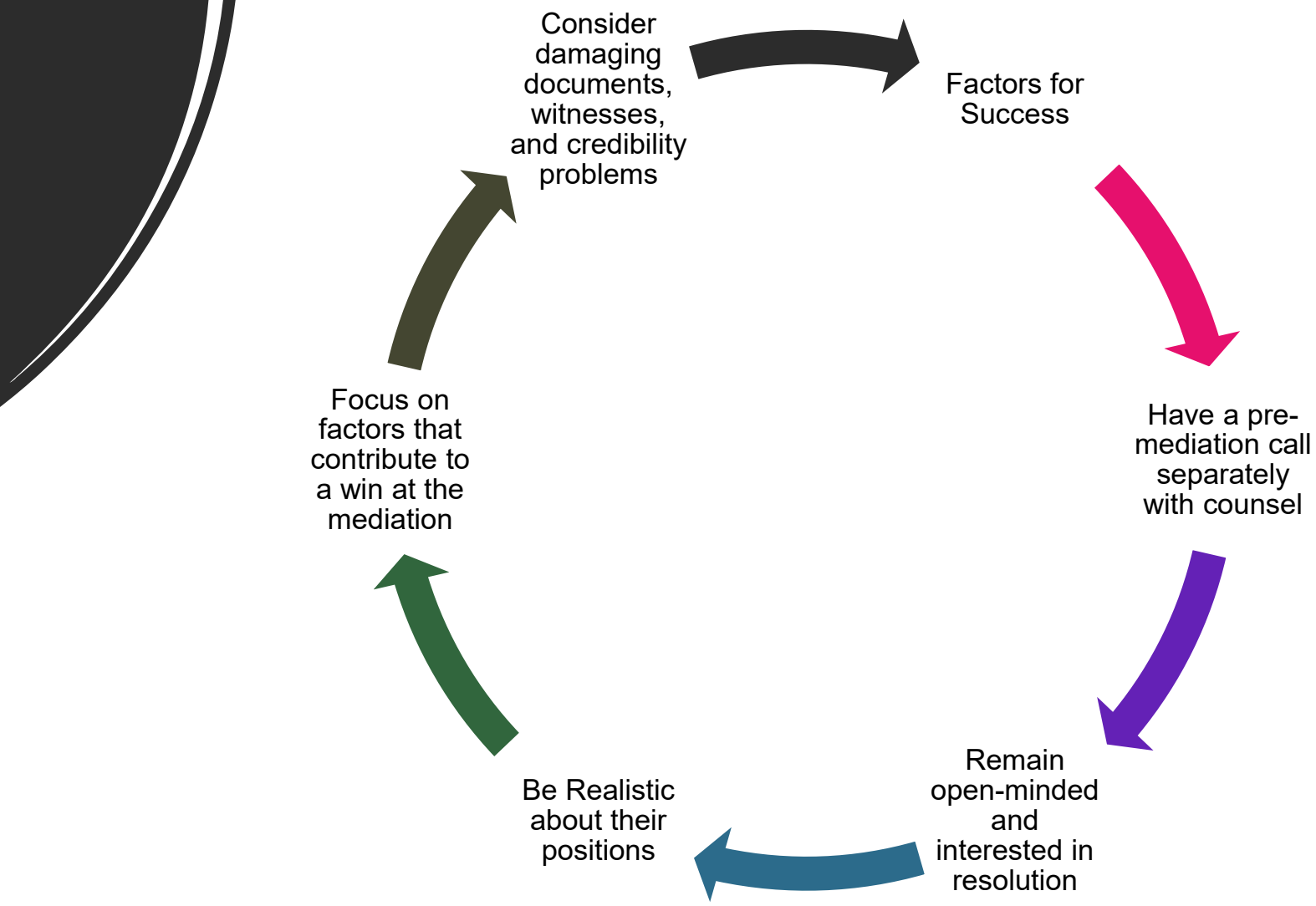
As long as the parties are talking, there is hope for resolution.

A pre-mediation phone call streamlines the process and alerts you to the reason for impasse.

If a case does not settle at mediation, follow up in a week or two thereafter and even monthly, if warranted.

The Mediator’s Proposal

Mediator Proposal



Final Take Away

Just giving a number for the mediator's proposal, as is commonly done, is not enough. Outline the reasoning in writing. It provides the attorneys for all parties the "cover" they need to back what the mediator is proposing and probably what the attorney thinks is a good settlement number.

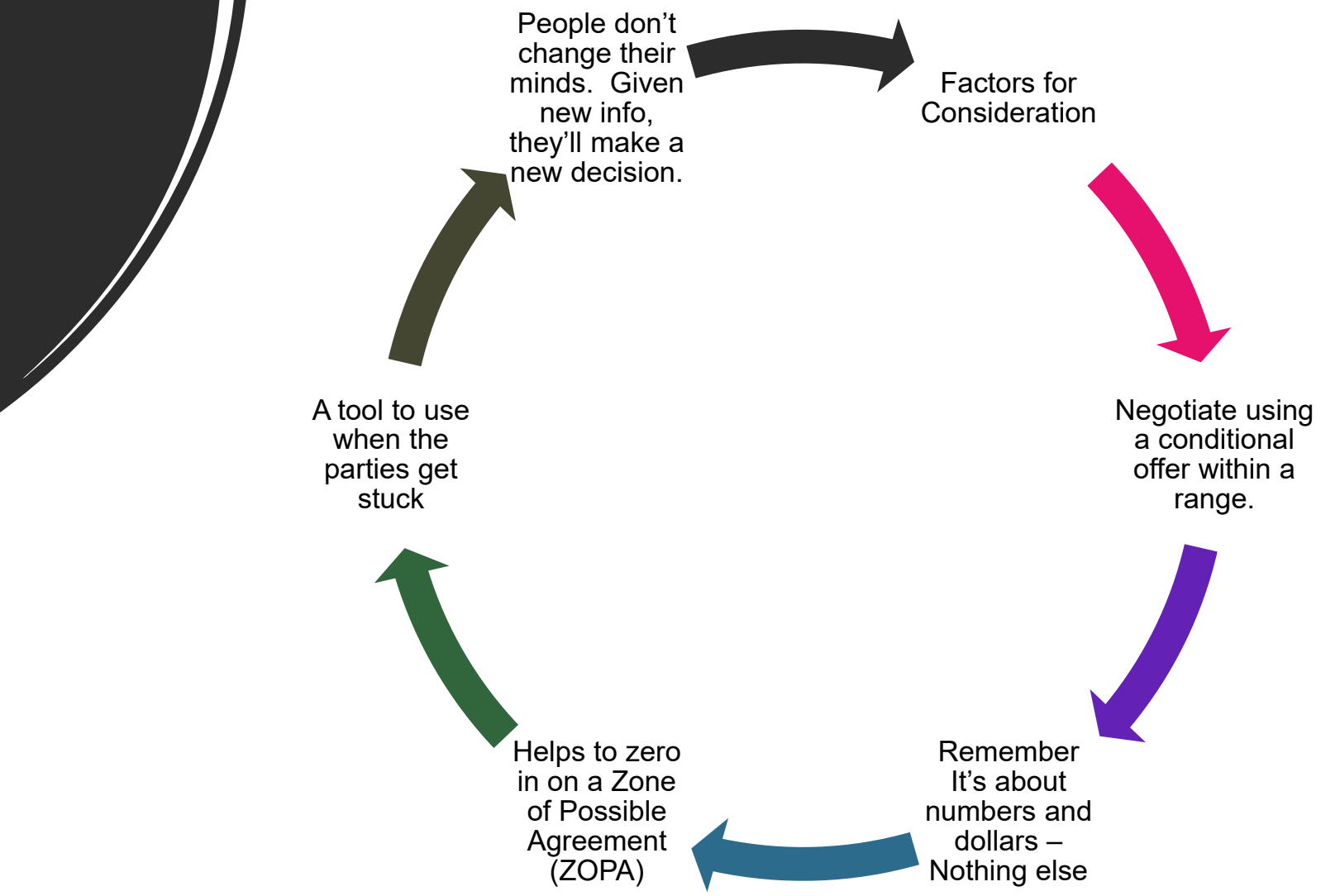
Corporate decision-makers who may have not been part of the mediation process need to review in writing the mediator's reasoning about why a matter should settle for a particular figure, including any non-financial terms.

My mediator's proposals have had a 90% success rate over the last three years – so they work. These proposals can be very valuable after the day of a mediation to resolve difficult disputes.

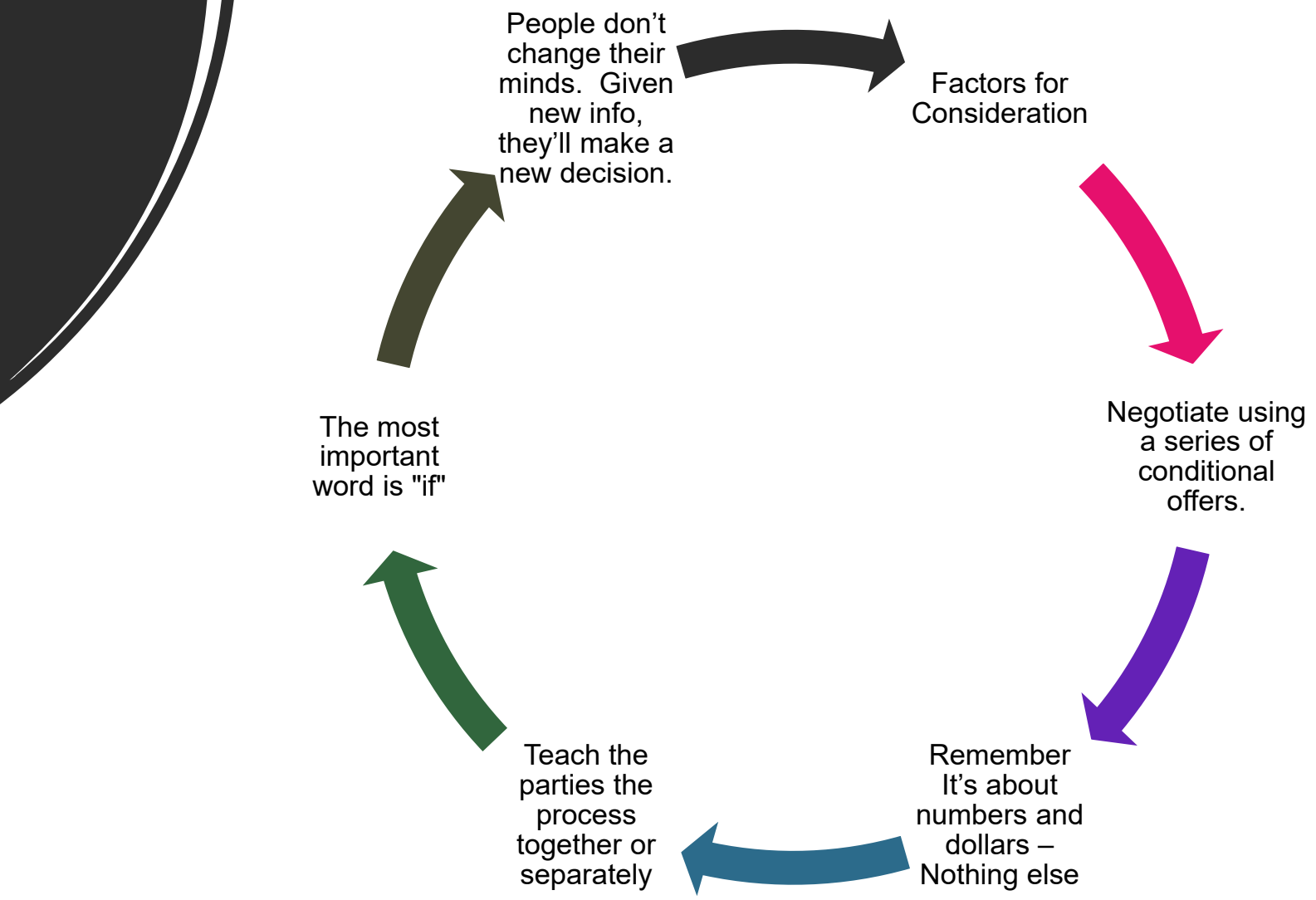
Bracketing the “Zone”: Bargaining Success in Mediation

> “Bracketing can be one of the most effective negotiation techniques in a mediator's toolbox, when it is used correctly.
>
> It can also be one of the most misunderstood methods, if not.
>
> The intent of any offer is always more important than the content of the offer.”

Bracketing


People don't change their minds. Given new info, they'll make a new decision.
Factors for Consideration
Negotiate using a conditional offer within a range.
Remember It's about numbers and dollars – Nothing else
Helps to zero in on a Zone of Possible Agreement (ZOPA)
A tool to use when the parties get stuck

Brackets


People don't change their minds. Given new info, they'll make a new decision.
Factors for Consideration
Negotiate using a series of conditional offers.
Remember It's about numbers and dollars – Nothing else
Teach the parties the process together or separately
The most important word is "if"

Brackets v Bracketing – “It’s Science and Math”

Bracketing

A conditional offer set in a range.

This case will settle between these two numbers:

“We’ll be between 750 and 850, if your’e between 100 and 150.

Softens the blow of the numbers (not hard numbers) without commitment.

Can be used to zero in on or message a Zone of Possible Agreement (ZOPA)

Not as effective bracketing unless both side’s brackets move toward the middle in a positive way on every round.
Its a momentum process.

A tool to use when the parties get ”stuck”, have begun to dig their heels in or need help to move or to save face.
It says, “I’ll jump in the pool with you.” If/Then phraseology is important here.

No “heming and hawing”,… keep the pace and keep the discussion going

Brackets – “All about the Benjamins”

Negotiating using a series of conditional offers. It’s about numbers and dollars and nothing else. (i.e., insurance, no underlying interests, not working to collaborate but compromise)

Can jumpstart things when it looks like things are beginning to stall. Used in the middle or the end.

Teach the parties the process together or separately.
“I’d be willing to go to “x” if you go to “x”.”

Keep people on board. Don’t let anyone off the train!

What number would you like to see that would tell you the other side is serious or would keep you here?

Where would you be willing to go if they do what you request?

The most important word is “if”.

Incent folks to move.

Final Take Away

When used properly, Bracketing can be a very effective closing technique when used appropriately.

Negotiating "With Brackets" is not the same as "Bracketing."

Bracketing can help people to make significant moves, and still save face in negotiations.

Thank You

What Makes Mediation Work and Why Everyone Benefits

by Laura J. Kass-Moreno
Editor: Kerry Hoxie

Conflict may be unavoidable, but it does not have to be unmanageable. From claims involving neighbors, homeowner's associations and property disputes to personal injury, employment issues, substantial business matters, family law and probate claims, mediation may provide the best opportunity to reach a resolution which addresses the interests of all concerned, in a timely manner, with the least amount of financial burden. As a lawyer and a mediator, I can truly say I have never participated in a mediation that has not had some benefit to the parties.

Mediation offers a safe environment in which the parties may speak in confidence to present their concerns and objectives. By engaging in a facilitated dialogue, with the guidance of a trained mediator, numerous options may be explored and, ultimately, agreements can be reached. Most significantly, the mediator does not render decisions, issue rulings or make definitive legal judgments. Unlike traditional forms of litigation in which the parties necessarily assume adversarial positions, the parties in a mediation have the unique opportunity to customize a resolution designed to meet their particular interests. The solutions agreed upon in a mediation can be quite creative and vastly different from decisions that would be reached in a litigation setting. Attorneys are welcome and are encouraged to participate in the process.

Mediation is a constructive method of dispute resolution that has widespread applicability. Contrary to popular belief, mediation is not limited to use only in connection with lawsuits, although it is certainly recognized for its effectiveness in litigation. At a minimum, mediation provides the parties with an opportunity to clarify their viewpoints and understand the different perspectives each brings to the matters at hand. That the opportunity to be heard and to listen to the various perspectives is the essential starting point must not be underestimated. Recently, even labor unions have embraced the concept of interest-based negotiations, which is the very philosophy that makes mediation so productive as a method of dispute resolution.

Skeptics may discount the likelihood of success with mediation, particularly in larger, more complex matters. Such distrust is entirely misplaced. Major companies have successfully resolved disputes in such divergent matters as those arising in connection with mergers and acquisitions, substantial employment claims alleging wage and hour violations, assertions of wrongful termination and discrimination. Heated disagreements regarding the purchase and sale of real estate, view rights, easements and alleged breaches of fiduciary obligations are other topics ripe for mediation, whether addressed before or after the filing of a lawsuit. Personal injury claims initiated by large groups of similarly affected plaintiffs, in addition to individual person injury claims, and even shareholder lawsuits, have been successfully resolved and concluded through mediation. Mediation has been uniquely effective in situations in which no remedy seemed possible or appropriate.

Our legal system is, by its very nature, limited to determinations of right and wrong, designed to punish and reward past actions and behaviors. Despite the expression that parties must have their "day in court," in litigation this does not actually occur. Rather, a trial is a lengthy procession of witnesses, experts and evidence orchestrated by legal minds in the execution of

Continued on page 26

Laura Kass-Moreno is a Certified Mediator with PMA Dispute Resolution (Professional Mediation Associates) as well as a mediator, trainer, instructor and facilitator in Mediation and Conflict Management with the National Conflict Resolution Center. Ms. Kass-Moreno has 28 years of experience working in highly reputable law firms, in addition to substantial litigation experience in many areas including personal injury, real estate/construction/HOA claims, professional liability, employment, intellectual property and corporate matters. She also has expertise in negotiating, drafting, implementing and enforcing complex and diverse contracts. She is a panel member of the San Diego Superior Court Civil Mediation Program.

a well-planned strategy. The testimony of parties may be interrupted by objections and, oftentimes, the information that parties most want to disclose is excluded due to lack of relevance. In the end, the results fall victim to the understanding, personal preference and even mood of the fact finder. Mediation, on the other hand, not only allows the parties to specifically address their current interests, but can also address the future and how the parties wish to communicate and handle conflicts thereafter. By putting such processes in place, it is entirely possible that tensions likely to arise between the same parties in the future may be addressed while they are still manageable, and before they escalate to a level that is disruptive and counter-productive.

Mediation offers benefits to all parties to a dispute. In every mediation in which I have been involved, the parties have left the mediation with more information and a greater understanding of the issues than they had prior to participating in the process. It has been statistically proven that when parties participate in the formation of an agreement, they have a much greater interest in the outcome and are far more likely to abide by the terms of such agreements. At the very least, mediation will help clarify the issues and assist the parties in arriving at a plan of action so that they can move forward to address the important, substantive issues. It would be difficult to imagine a situation in which the parties would not benefit from participating in mediation. As long as the parties are talking, there is hope for resolution. **TBN**

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namely DTG's time records. "DTG obviously has records of the hours the putative class members logged at their respective locations, and determining whether any one member logged overtime hours is a matter of basic computation." *Id.* at *33. The court found that determining the amount of overtime compensation owed, if any, to each class member went to damages and did not defeat class certification.

The court found that plaintiffs' inaccurate wage statement claims could be adjudicated on a class-wide basis for the same reasons that claims for overtime pay could be so adjudicated. However, the court noted that any claims regarding the actual number of hours that a putative class member worked were not suitable for class treatment because they required an individual inquiry into that person's work history.

As for plaintiffs' claims for waiting time penalties, the court determined that they were suitable for class treatment for the same reasons as the overtime claims. The court found that it would only require a basic computation to determine each class members' damages.

Also, the court found that plaintiffs' unfair business practices claims could be resolved on a class-wide basis because these claims were wholly derivative of plaintiffs' other claims, some of which the court found suitable for class treatment.

The court, however, found that plaintiffs' meal and rest break and reimbursement claims were not suitable for class certification because common questions did not predominate. The court found that because DTG did not have a uniform meal and rest break policy and because the putative class members were employed at various locations, common questions did not predominate. The court also stated its opinion that meal and rest breaks only need be *made available*, so time sheets were not probative.

As for the reimbursement claim, the court found that determining whether plaintiffs' expenses were necessary required a fact-intensive inquiry into the reasonableness of the expenses under the circumstances. Because plaintiffs sought reimbursement for multiple expenses, as opposed to a single expense or a set of discrete expenses, common issues predominated.

With regard to the superiority of class treatment of plaintiffs' claims, the court noted that it had "already determined that the threshold question whether DTG's healthcare professionals are employees or independent contractors is susceptible to common proof, and that specific claims can be adjudicated with minimal attention to individual issues." *Id.* at *44-45. Accordingly, in light of that conclusion as well as the court's finding that class treatment would be more efficient and conserve judicial resources, the court determined that certain of plaintiffs' claims would be best adjudicated on a class-wide basis.

CONCLUSION

In conjunction with *Dalton v. Lee Publications, Inc.* (S.D. Cal. July 27, 2010) 2010 U.S. Dist. LEXIS 75132, another independent contractor misclassification case, *Norris-Wilson* demonstrates that the Southern District is taking seriously the misclassification issue. The court engaged in a well-reasoned and thoughtful discussion and did not allow DTG's merits arguments to cloud the certification analysis. In fact, defendant employers should take heed of the court's multiple remarks regarding DTG's contradictory merits and certification arguments, as engaging in such a strategy may ultimately backfire and actually support class certification. **TBN**

negotiations is not just about numbers. A mediator *insurance law.*

AAM PRESENTATION

BY LAURA KASS-MORENO

To gain a better understanding of what has been an obstacle to resolution, I make it a practice to conduct pre-mediation calls with counsel and with parties, if not represented by counsel. This is extremely effective in being able to get a preview of not only the issues in dispute, but also of the relationship between counsel for both parties, the relationship between counsel and their clients, any obstacles to resolution and any concerns they may have about the mediation, settlement and/or issues with their client. This practice also assists with assuring that those with authority to enter into a settlement are at the table, virtually, or in person. Though it is nice to have the personal touch with everyone at the table, virtual mediations have made it easier and less expensive for parties and their attorneys to attend. The pre-mediation call is also an opportunity to remind the attorneys that at mediation, their role is as an advisor rather than an advocate. The process is collaborative, not competitive.

At least in theory, parties come to mediation with a desire to resolve their claims. Why do some cases NOT settle at mediation? By the time the parties come to mediation, they are already at an impasse. Each party believes that they are in the right and the other(s) are in the wrong. They have lived with this conflict for quite some time and have been encouraged and persuaded by their counsel as to the merits of their respective positions. When asked if I can tell whether a case will settle at mediation or not, I cannot give an answer because I sincerely believe that as long as the parties are talking, there is hope for resolution.

As a practical matter, it is challenging to resolve in four or eight hours, a conflict that has been brewing for years, in some cases. One reason that people cannot envision a resolution is that they focus on what they have to give up, instead of what they have to gain. In some cases, one or both of the parties believes that there is a better deal that has not been put on the table.

When the parties are at an impasse on the details of a settlement, if in a joint session, the mediator calls for a caucus. During this separate meeting, there are the traditional approaches that mediators have successfully implemented including Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) and a Negotiated Agreement Now (NAN). Additionally, is there something other than money that will satisfy them?

In a caucus, reality testing questions asking how this situation has impacted them, their work, their families, and their lives helps them to see the toll this conflict has taken. The usual questions include asking the parties if they are aware of the expense, amount of time and the emotional strain that litigation entails, coupled with the fact that a win is not guaranteed. This can assist the parties to move off their current position or demand.

When parties are in conflict, they cannot imagine what it would be like to NOT be in conflict. The questioning then turns to can they imagine what their lives would be like to have this conflict be over? What would the value to them be to have this matter behind them? These types of inquiries can assist with getting the parties to be more receptive to offers.

Another approach to impasse is to really understand and discuss their underlying interests and figure out the underlying interests of the other side. The question then becomes what are they willing to give up to get their own needs met? Ask how the other side is likely to respond to an

AAM PRESENTATION

BY LAURA KASS-MORENO

offer. As a mediator, you can use the answer to that question, if helpful, to ask for movement by that party. In addition, seek the assistance of counsel and ask them what they want you to say to the other side in support of their position.

Depending upon the nature of the impasse, it may be helpful to meet with both attorneys without their clients and/or meet with each attorney separately to dig deeper into the essence of what is getting in the way of settlement.

As a last resort, I will ask the parties if they would like me to make a mediator's proposal. I find this to be particularly helpful when the parties are close in dollar amounts.

Keeping in mind that this conflict has been part of the lives of the parties for some period of time, it is not easy for them to "give in" during the course of the mediation. Perhaps, they need to talk it over with someone else. In many cases, the parties need time to "marinate" over the conversations that occurred during the mediation. It is easier to "save face" for some to agree after the mediation has concluded.

Certainly, if a case does not settle at mediation, we will discuss any interim tasks that might be helpful to move the case along. I will definitely follow up in a couple of weeks and even months later to see if any progress has been made and/or if they would like to come back to mediation. Except in those cases where individuals will only be satisfied to have the decision made by a judge or a jury, I remain hopeful that resolution is possible.

3 TAKE AWAYS

1. As long as the parties are talking, there is hope for resolution.
2. A pre-mediation phone call streamlines the process and alerts you to the reason for impasse.
3. If a case does not settle at mediation, follow up in a week or two thereafter and even monthly, if warranted.

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