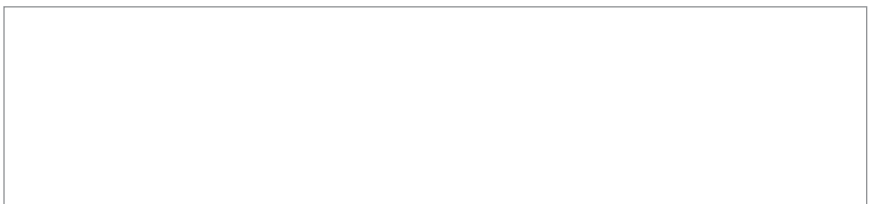


# TRIAL TALK

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## Reflections IV

By Joseph Epstein Esq. with Andy Silverman, Esq.

### Introduction

This is the fourth article in our series of points to consider in relation to mediation. These points cover alphabetically both those frequently mentioned by commentators as well as some that are not often noted either by participants in mediation or by mediators. However, all of the points we have selected cover issues that we see repetitively in our mediation practice. Some points are readily noticed while others are subtle and often escape recognition. It is our hope that both “partners in conflict” and their advocates will find our reflections helpful in their pursuit of conflict resolution.

### I. Flexibility

*One should always be as flexible as a reed; and not be rigid as a cedar. ~ Rabbi Dov Peretz Elkins<sup>1</sup>*

Flexibility at mediation requires experience, preparation, analysis of the case, an appreciation of the emotional case dynamics, and an understanding of the motivations, interests and goals of the participants. The ability to be flexible at mediation is lost if there is a last minute rush to submit materials needed for thoughtful analysis to the opposing side and to the mediator. When clients are not carefully prepared for the tone, the ambience, the interplay and the action of mediation, it is difficult for them to be flexible at mediation. Surprises at mediation do not engender the flexibility and creativity often needed to resolve a bitter conflict. This last dash of preparation and lack of preparation would not occur with trial, yet in 90%

of civil cases mediation is the “trial.” Such a lack of preparation can cause parties to come to mediation rigid and defensive because they have not honored themselves and the other side with advanced and complete preparation. With the aide and guidance of a mediator, the preparation discussed is possible and can be the norm. With such a foundation, parties can come to mediation ready to learn and listen with the flexibility and creativity necessary to find a way to understand the motivations, needs and interests that can be either the obstacles, or the bridge, to dispute resolution.

Mediation often requires the wisdom and flexibility to listen and to learn. It requires the flexibility to view the mediation landscape with reduced partisan perception.

### II. Forgiveness

*Forgiveness isn't something nice I do for someone who is 'guilty'. Forgiveness is something I do for my own mind. Do I want a mind that tortures me, or one that is a friend to me? ~ Hugh Prather<sup>2</sup>*

Blinding rage at a perceived or very real life changing injustice can be just that - blinding. Such blindness can prevent the enraged party from dealing with the changes that an injustice - the loss of a business, a business opportunity, a reputation, a leg, an arm, a child, a husband and a wife - has wrought. The ability to meet such a life altering challenge must begin from within. Viewed in this light, it is easier to understand why forgiveness is more for the forgiver than for the party forgiven. This does not mean

that the forgiving party should abandon a legitimate claim. It means the forgiving party should not be blind to all of his or her motivations, needs and interests. It also means that the forgiven party may look to his or her need to offer meaningful atonement, apology or acknowledgement, **which these authors suggest should not necessarily occur just at the conclusion of a mediation, when we have found that such offerings are typically made by the forgiven party, if at all.** Forgiveness allows the forgiving party to move forward rather than staying mired in the past.

### III. Golden Bridge

*Twenty-five hundred years ago, the Chinese strategist Sun Tzu counseled leaders to “build a golden bridge for your opponent to retreat across” . . .*

*I would reform it more positively: Build a golden bridge for the other to advance across – toward a positive solution.*

~ William Ury<sup>3</sup>

Sun Tzu is reported to have said that backing a foe up to a place where he has no ability to retreat causes your foe to fight like a tiger; after all, what other choice does he have? Ury has given the war-like Golden Bridge analysis a positive spin. In mediation, a party should allow his opponent a positive and face saving manner of retreat or bridge building that will allow for a peaceful solution to the dispute that has brought parties to the mediation table. Time after time, we have found the merit in this approach to conflict resolution in civil disputes. Parties should be encouraged to make a realistic appraisal of their situation and the opportunity to do so with advance notice. This way, the mediator can help guide the non-

dominant party to a peaceful resolution that he is able to embrace. Bridges built together lead to a sense of fairness and mutual acceptance of the forged resolution. Waiting until mediation to make such an appraisal may ensure that this does not happen due, in part or entirely, to emotions that the mediation process may evoke. Common emotions experienced by parties to mediation such as anger and frustration can significantly distract an ill-prepared party and thereby prevent an otherwise successful resolution from being reached.

### IV. Grief

*Your work of grieving entails mourning not only the actual person you’ve lost but also the hopes, dreams, wishes, fantasies, unfulfilled expectations, feelings, and needs you had for and with that person.*

~ Theresa A. Rando, Ph.D.<sup>4</sup>

Grief is a profound multi-dimensional reaction to change that accompanies a significant loss, loss of a relationship, way of life, and/or sense of security. Often it is an abrupt social or personal change accompanied by feelings of sadness, remorse, regret, bewilderment, uncertainty, emptiness and/or fright. Grief is one of three intertwined strands of emotion (the others are anger and fear) that often tightly binds up a party’s capacity to deal with conflict. Sometimes there is simply no getting around the fact that a party has been unjustly asked to accept a life altering change. Grief clouds judgment and fuels the thought process. Grief can cause a party to become paralyzed or to react irrationally.

How then can a participant, frozen by grief, find a way to analyze and accommodate this emotion, so rational

resolution of legal conflicts becomes possible? It is generally a mistake not to attend to a party still grieving a profound loss. There are four main ingredients for successfully dealing with a participant’s grief. The first is to utilize attentive silence and active listening in order to allow a party to voice his grief safely. The second ingredient is to forge a connection, if possible, with the grieving party. Third, it is important to provide acknowledgment of a person’s grief. Finally, it is extremely helpful if in the process of dispute resolution a grieving party can be given hope and purpose for his or her life journey.

### V. Healing

*The paradox of healing is that it is both holding on and letting go. We hold on to the memories; and we let them go; we hold onto the feelings, and we let them go. We hold onto an old way of being, because the self we are still resides there, and we let go to a new way of being, so that the self can live on.* ~ Molly Fumia<sup>5</sup>

Native American healers listen to patients by silencing their own thoughts to gain a more direct perception of the patient’s physical, mental and spiritual health. They form a kind of intuitive and spiritual first impression against which the relevance of knowledge and clinical experience can later be weighed. Their inner silence creates an outer state of “active listening” in which the Native American healer can pick up messages hidden in the patient’s words, tone of voice, and body language.<sup>6</sup>

During mediations, perceived victims of professional and business dissolutions, family firm disputes, negligence, medical malpractice,

and/or securities fraud will express the feeling of “why me?” With this feeling, it is often hard for some to accept that “bad things happen to good people.” It is our opinion that defendants, defense attorneys, and mediators can help with the healing process in a wide spectrum of cases. Empathy, sympathy and compassion (sincerely and appropriately expressed) can often move the mediation along the way to resolution.

We once mediated a case for a young man with a wife and young children. He was admitted into the hospital for a relatively routine surgery. Disastrously, he left the surgical suite blind. Between the date of the surgery and the end of the mediation, this young man learned to work with a seeing-eye dog. He went to school and fathered another child. At the close of the mediation, he thanked the adjuster and the defense attorneys for helping to provide for his family’s future. Clearly, he did not stay focused on his grief and despair. Instead, he was able to look within his soul for the inner peace and faith necessary for him to arrive at a resolution to the underlying legal dispute, which felt right to him. It is in cases like this one that healing can be part of the mediation process.

In appropriate cases, a mediator may assist with healing by encouraging those who feel unjustly victimized to view the unfortunate occurrence as an opportunity. In some instances, this certainly is hard, but as Victor Frankl, a Holocaust survivor and psychiatrist, teaches that courage and a positive attitude can take us a very long way in very difficult life journeys.<sup>7</sup> Victims can be encouraged to avoid the negative spiral of victimization. Victims who look at



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tragedy as a “gift in disguise” with a new sense of purpose and hope can use it as an opportunity for healing, growth and for inner strength will be better for it, and so will their case.

#### VI. Honesty

*Do not speak one thing with the mouth and another with the heart.*

~ Rabbi Kerry M. Olinsky and Rabbi Lori Forman<sup>8</sup>

*There is a vague popular belief that lawyers are necessarily dishonest...Let no young man yield to the popular belief-resolve to be honest at all events.*

~ Louise Bachelder<sup>9</sup>

Honesty is an important ingredient at mediation. As new information is shared and developed at mediation, participants have to decide if that can give credit to assertions their opponent and the mediator are making. Trust,

character and honesty determine when there is “credit” in the “trust” account that can be drawn upon. In mediation, transparency may be another slice of the honest pie, and it is generally relished and almost always helps lead to conflict resolution

In *Mediating Dangerously*,<sup>10</sup> Kenneth Cloke, a famed trainer of mediators, addresses the honesty factor from another angle. He connects honesty with empathy. He speaks about getting past the masks parties put on during the midst of conflict. Honesty, based upon active listening, self-revelation, empathy and connection are the ways we mediators are able to get past the protective mask of participants to the underlying issues and concerns. One task during mediation is to encourage a dialogue between the parties and the mediator, if not the parties themselves, that is based on candid and transparent communication. This, Cloke would say, requires that parties and mediators mediate honestly and dangerously. Modeling honesty can help the parties to do the same and together all reach a place of satisfying conflict resolution.

Honestly then is to be encouraged if we are to find both process and substantive fairness in conflict resolution.

## VII. Humility

*One major difference between our people and those of the dominant society today is humility. Among our people, no matter how far or how high a person goes, they know they are small in the presence of God and universe. ~ Lincoln Tritt<sup>11</sup>*

People can take over a negotiation and a mediation by not taking over, by stepping back, and allowing another to step up. Negotiators and particularly mediators must learn how much “space” to occupy. Mediators who occupy too much “space” have forgotten that most folks like the sense of fairness that comes when they have actively worked at finding their own “resolution,” while mediators who occupy too little “space” fail to move the process forward. So, let us be clear that “humility” **does not** mean meekness. Often mediators need to be able to pass on the credit for an idea to one of the negotiators, and sometimes the reverse is true. One way or another, mediators need to create buy-in and humility is frequently a key ingredient. It is critical to note that ALL parties to a mediation (including the mediator and, as the case may be, counsel) will dramatically increase the prospect of resolution if they **all** approach the process with humility. Recognizing that this trait does not necessarily occur naturally for some people, working toward such a course of conduct should be a guiding principle at mediation.

Taking a somewhat different slant on humility from that reflected in the above quotation, Alan Morinis<sup>12</sup> states that we should “[o]ccupy the rightful space, neither too much nor too little. Focus neither on your own virtues nor the faults of other.” His message then would be to do what you have to do during mediation to drop the partisan perspective awhile, listen at least a bit, chew on what you have learned and felt and then be willing to give expression to that and to your perspective, as it may have been influenced by your process of listening, learning and experiencing.

In caucusing and even in general session, mediators should facilitate a style of dialogue and a tone of speaking that encourages calm, open, flexible, and honest communication. This ties in nicely with the utilization of the traditional Native American Talking Stick. The Talking Stick is passed around the entire tribe, people can speak or pass, others listen with respect. Humility is a soul-trait that requires us to speak honestly and listen receptively. Kenneth Cloke might consider this mediating dangerously and it may be. Others might simply feel this is a call to mediate spiritually.

## IX. Humor

*Be honest in dealing with people and let them see the humorous side of you as well as the serious side. The two go hand-in-hand, and if you make them laugh, they'll forget their trouble for a little while.*

~ Bear Heart<sup>13</sup>

We all know that mediations can become intense and everyone can have bouts of impatience, frustration and pessimism. Humor is often an excellent way to burst the bubble of tension. It allows a moment of relaxation and enables perspective to creep back into the mediation process. This break in the pattern often leads to a flurry of increased creativity and renewed optimism with the mediation process. Humor, of course, must be used at an appropriate time and in an appropriate manner if it is to have the desired effect. We have found that often humor will open the door to a telling metaphor, parable and/or story. All help lead the way to allowing the principles to find their way.

**X. Intuition**

*You must train your intuition - you must trust the small voice inside you, which tells you exactly what to say, what to decide.*

~ Ingrid Bergman

*Intuition is the clear conception of the whole at once.*

~ Johann Kaspar Lavater

Intuition at mediation is honed by experience, by self-actualization, confidence, calmness, preparation and mindfulness. At mediation, quiet listening and active listening are two key strategies that allow a mediator to hear his internal voice, which we call intuition or extrasensory perception. Experienced and confident mediators learn to listen to this voice and quietly share this insight with the participants knowing that the choice to accept this intuition or insight is the parties' decision.

Often overlooked or unaddressed, the parties' intuition should play an important role during any mediation. This point cannot be overemphasized as again; mediation is the parties' process. Of equal importance is the fact that it is the parties themselves who know more about any given dispute than any other participant does and whether a mediated resolution feels right to them. Their intuition should be tested against the influence of their emotion. In a business setting, employment setting and even a family dispute, the parties' intuition may be the best marker. In other settings and even these settings, the neutral's intuition may be the most balanced.

**Conclusion**

Through a series of reflections ranging from flexibility to intuition, we have tried to provide you with

additional tools for your mediation toolbox. Like our earlier segments in this series, we are offering you concepts to consider as you prepare for and participate in mediations. We hope that these reflections enhance the mediation process for both advocates and parties. ▲▲▲

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**Endnotes**

- <sup>1</sup> Dov Peretz Elkins, *The Wisdom of Judaism: An Introduction to the Values of the Talmud* 74 (2007), *citing* Taanit 20.
- <sup>2</sup> Hugh Prather, *Spiritual Notes to Myself* 19 (1998).
- <sup>3</sup> William Ury, *The Power of a Positive No* 216 (2007).
- <sup>4</sup> Theresa A. Rando, Ph. D., *How To Go On Living When Someone You Love Dies* 17 (1991).
- <sup>5</sup> Molly Fumia, *Safe Passage* 167 (2003).


- <sup>6</sup> *See*, Kenneth Cohen, *Honoring the Medicine* 43 (2003).
- <sup>7</sup> Victor Frankl, *Man's Search for Meaning* (2006).
- <sup>8</sup> Kerry M. Olinsky & Lori Forman, *Sacred Intensions: Daily Inspiration to Strengthen the Spirit, Based on Jewish Wisdom* 66 (1999) *citing* the Talmud.
- <sup>9</sup> Abraham Lincoln: *Wisdom & Wit* 48 (Louise Bachelder, ed. 1965, 1998).
- <sup>10</sup> Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* 25-45 (2001).
- <sup>11</sup> Joseph Bruchac, *Native Wisdom* 86 (1995) *quoting* Lincoln Tritt, *Gwicken Athabaskan* (1988).
- <sup>12</sup> Alan Morinis, *Everyday Holiness: The Jewish Spiritual Path of Mussar* 45 (2007).
- <sup>13</sup> Bear Heart, *The Wind Is My Mother: The Life and Teachings of a Native American Shaman* 49 (1996).

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