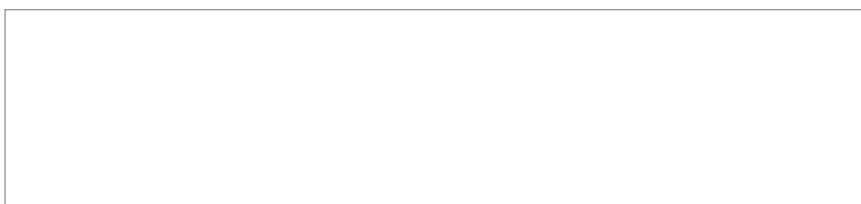


TRIAL TALK

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Reflections V

By Joseph Epstein Esq. with Andy Silverman, Esq.

Introduction

This is the fifth article in our series of points to consider in relation to mediation. We try to address both points frequently mentioned by commentators as well as some that are not often noted either by participants in mediation or by many mediators- some that just seemingly slide by. However, all of the points we have selected cover issues that we see repetitively in our mediation practice. Some points are readily noticeable while others are subtle and regularly 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. While conflict may be healthy, closure is even healthier.

I. Judgmental Over-Confidence

*Psychologists have documented that people often place unwarranted confidence in their own predictions about future events.*¹ ~ Robert H. Mnookin

Conflict within our justice system involves three components – the law, the facts and the emotions. Often advocates take the position that they can predict the outcome of the development of the pertinent facts of the case. For example, some suggest that un-deposed witnesses will testify in a certain unimpeachable manner and that deposed opposing witnesses will be subject to cross-examination that will make them appear to be whimpering biased fools due no account or respect. When it comes to the law, many attorneys

similarly adeptly distinguish all opposing case law and calmly note that this conservative or liberal judge, as the case may be, always rules in their favor. These rose-colored lenses probably have the same positive odds of accuracy as betting against the house in Las Vegas – you can win, but you do not typically hit the jackpot. These authors suggest that advocates and their clients, both in negotiation and at mediation, should suspend their overblown sense of predictive accuracy. The mediator’s role is to use reflective dialogue and evaluative tools in providing an unbiased reality check. The issue is whether advocates and their clients are willing to modify their rose-colored predictive perspectives.

II. Leverage

*Psychologically, we have only so much leverage to use in a negotiation. It is far wiser to use that leverage when it counts, and not deplete it only for purely symbolic victories.*² ~ Brian Muldoon

Leverage is a politically correct synonym for power. In negotiations, leverage is obtained by superior knowledge; advanced preparation; comprehensive risk analysis and risk tolerance; superior understanding of underlying interests, goals and objectives; and a greater sensitivity to emotional and social factors. Simply put, leverage in negotiations and mediations is obtained by participants reducing their fears, which increases the fears of others.

Thus, obtain leverage by 1) a better understanding of the facts based upon a better investigation of them via lay and expert witnesses; 2) comfort with a thorough risk assessment; 3) a higher tolerance of risk; and, finally, 4) a deep understanding of client interests after an advocate and mediator listen with their eyes. Listening with one's eyes is a concept of stillness that allows the listener to hear all that another is saying with his or her words and non-verbal communication. This style of communication is best if it starts before mediation with clients and opponents alike. At mediation, this tool often discloses unanticipated leverage.

III. Listening

All too often, people fail to listen because they want their turn to speak and express themselves.

*Listening is not passive, but active. It takes concentration.*³

~ Roger Fisher & Daniel Shapiro

The listening that resolves conflict is not the casual listening done while texting, taking notes, or otherwise multi-tasking. Deep listening requires a willingness to connect, to put aside partisan perception, and to allow the flow of emotion as well as intellect. This deep listening has been called "listening with your eyes." If your eyes are the windows to your heart, and your heart the window to your soul, such depth of listening allows for greater understanding and appreciation of difficult and different perspectives. Such listening allows for adjustment and modification of goals, which, in turn, allows for a resolution of civil disputes without a costly, risky, and often an all or nothing litigated outcome.

In addition to focused attentiveness, "listening with your eyes" requires practitioners of this heart felt art to be prepared to use active listening tech-

niques such as reframing, para-phrasing and summarizing. This creates reflective dialogue between the parties, allows for the development of mutual respect and advances the ball of resolution.

Listening is not passive; it requires focus and patience. Listening helps thoughtful advocates and mediators, who have armed themselves with the information and the connection, find a way to conflict resolution.

IV. Love

Love cures people - both the ones who give it and the ones who receive it. ~ Dr. Karl Menninger

The conclusion is always the same: love is the most powerful and still the most unknown energy in the world.

~ Pierre Teilhard de Chardin

A loving heart is the truest wisdom. ~ Charles Dickens

Not very long ago, one of the co-authors wrote an article about grief, anger and fear. In that article, there was the suggestion that love was not often present in mediation. On reflection - and this is an article about reflections - we believe that love is an emotion that often appears in mediation. We can think about many instances where love has been lost, strained or changed. Instances where love frequently comes into play include domestic relations disputes, family firm disputes, professional dissolutions, probate disputes, employment disputes and wrongful death cases. Thoughtful consideration of this emotion often allows advocates to identify underlying interests, goals and objectives. These may include acknowledgment, apology, recognition, prestige and closure. Love is one of four emotional quadrants - along with grief, anger and fear - the parties should examine in the course of mediation.

In our experience, love is a powerful element in cases where parties have had long-term relationships and where those relationships, even if altered, will continue in the future. At mediation, it is key to address how this powerful emotion is influencing the negotiations. In some instances, a small sub-caucus between the affected parties may be appropriate.

In wrongful death cases, the plaintiff is often dealing with a sudden, unanticipated death that shatters the world as he or she has known it. A love has been lost or at least unalterably changed forever. Like less vivid examples, acknowledgement of this loss generally must be part of the mediation process if it is to be successful. Put another way, sensitive tapping into this emotion can often help resolve a lawsuit.

V. Mindfulness

*Mindfulness...has everything to do with waking up and living in harmony with one's self and with the world...and with cultivating some appreciation for the fullness of each moment we are alive. Most of all, it has to do with being in touch.*⁴

~ Jon Kabat-Zinn

We generally think of mindfulness as the practice of finding a calm centering core within. Having reached this place, one can model and exercise the soul-traits of humility, patience and equanimity. In mediation, the expression or the exercise of these soul-traits and over-reaching mindfulness generally sets a tone that is calming and creates a sense of respect and dignity. At least one author speaks of external mindfulness. In personal conversation, he saw the sameness of external mindfulness and the Buddhist concept of loving kindness. He was caught short, however, when asked

about the correlation of external mindfulness with the Jewish concept of loving kindness. These authors believe that the concepts of external mindfulness and loving kindness are similar. Both require a connection with and an appreciation of another. Thus, mindfulness that is both internal and external is a powerful tool for the mediation participants' toolbox.

VI. Non-Verbal Communication

*One rule of thumb used in communications research is that 90% or more of an emotional message is non-verbal. And such messages – anxiety in someone's tone of voice, irritation in the quickness of a gesture – are almost always taken in unconsciously. . . .*⁵

~ Daniel Goleman

Many years and thousands of mediations have taught us much about non-verbal communication skills that advocates and mediators can utilize during negotiations. Our experience tells us that it is best to observe facial expressions, body posture, and movements, in addition to verbal communication and voices of other mediation participants, in order to draw opinions about the emotions of fear, anger, grief, love, and the feelings of sadness, happiness, surprise, contempt and disgust. We believe that observation and processing of such non-verbal communication better allows a mediator to assist other mediation participants in working with and through those emotions and feelings on a path to resolution. As noted previously, one can best accomplish this more subtle observation with both internal and external mindfulness and by "listening with your eyes."

Who speaks to the mediator at mediation? Is it the advocate ("go-between") or the decision-maker?

Sometimes, a go-between acts as the primary communicator with a mediator (more often than not, this serves to disguise the non-verbal communication of the decision-maker and filter's the verbal dialogue), which can deliberately result in a decision-maker's thoughts and feelings not being communicated at mediation. The lack of non-verbal communication is one of the disadvantages of having parties participate in mediation by telephone. While technology such as Skype can help address this particular problem, these authors suggest that parties who are truly serious about resolution be present at mediation.

In reflecting on non-verbal communication, we have found the following "rules of thumb" effective: When listening, listen for tone, as well

as context. When watching, look for posture as well as facial expressions. When listening to the speaker, consider the "tells" of the non-speakers. When gathering information, listen and observe more than speak.

VII. Partisan Perception

*One of the ways we sustain the culture of thinking alone is that we form conclusions and then do not test them, treating our initial references as facts. We wall ourselves off, in other words, from the roots of our own thinking. And when we are invested in an opinion, we tend to seek evidence that we are right and avoid evidence that we are wrong.*⁶

~ William Isaacs

Participated in
drug trial, 38.
Must catheterize
self for rest of life.

(A case referred to us.)



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Dan Reilly - dreilly@rplaw.com
Joe Zonies - jzonies@rplaw.com
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Partisan perception is similar to judgmental over-confidence (discussed above), but in our view it is a broader concept. Partisan perception is the filter through which parties perceive and interpret relevant facts and the law. People naturally interpret this data in a manner that is most favorable to them. This is where mediators can be most helpful. By listening carefully, analyzing the law objectively, and seeking to surface underlying interests, goals and objectives, mediators can assist parties to see more clearly, help remove blinders, and reconstruct their filters. This peeling of the onion, addressing the pitfalls of self-delusion, and reconfiguring of analysis, are strategies mediators must utilize in order to assist parties in making adjustments in their analyses that allow for settlement. Many advocates come to mediation having first submitted their clients' cases to focus groups, the composition of which often consist of members of the advocates' firms, friends, family and/or outsiders. Ideally, those focus group participants are from varying backgrounds and perspectives, the idea being to test the advocates' and parties' thinking. At mediation, a tool often used by thoughtful mediators is reflective listening, which similarly allows parties and advocates to reconsider their interpretation of "facts."

VIII. Patience

*"It is important to sort out what is actually within our power and what is not. And the remarkable thing is that in both cases, we are better off to be patient – patient with the things within our control to change, and patient with those that aren't."*⁷ ~ Alan Morinis

Patience is one of the most important ingredients for successful negotiations and mediation. But,

having said that, it is best flavored with respect and pace. Patience itself allows for the evolution of storytelling, which can be critical to the exchange of information and to the perception of fairness. It also allows for reflection and self-analysis. Patience mixed with respect enhances the feeling of fairness and the sense that there has been a legitimate exchange of "stories" before a neutral, which helps parties with "moving on," if not with "closure" itself. We call this the "journey impact." Over the years, we have learned that one must mix pace with patience, as the purpose of mediation is closure, agreement and settlement. Do not, however, confuse patience with permitting the mediation process to lose critical momentum or, as the case may be, stay stuck in neutral. The effective mediator knows when to slow down the mediation process and when to speed the pace of settlement negotiations, which takes inner peace and confidence along with an acute sense of timing. So let us be clear, patience does not mean staying stuck, but it does mean having respect for the importance of the process and the feeling of fairness.

IX. Persuasion

*To the wise person, a hint.
To the fool, a fist.*⁸

~ Rabbi Kerry M. Oletzky &
Rabbi Lori Foreman

Despite reports of some to the contrary, mediation is not a non-contact sport. In many mediations, particularly those involving zero sum negotiations, persuasion is a key element. It is essential for advocates to understand that to be effective, persuasion must start beforehand. Persuasion begins with the Complaint and Answer; continues through deposition and other discovery; and adds steam with pre-mediation motions. The power of

persuasion can build with pre-mediation focus group analysis and the creation of charts, graphs and other illustrative exhibits. The timing of the delivery of data and discovery that will influence the opposing party and mediators is critical. Frankly, too many advocates wait too long to "help" or persuade both the opposing party and the mediator. We believe that generally it is best for attorneys to exchange mediation statements well prior to mediation as surprises at mediation generally lose their power to persuade because they deliver a "punch" too late in the fight. In many mediations, there is an "audience at home," which cannot be influenced by material produced at the last moment. To persuade those people, as many persuasive tools as possible should be used in advance of mediation. Even mediators and parties at the mediation table are slow to respond to the utilization of last minute material. In summary consideration of the persuasion factor may influence whether you use a hint or a fist, when to push your persuasive tools, and with what audience.

X. Prejudice

*Prejudices are a kind of emotional learning that occurs early in life, making reactions especially hard to eradicate...The power of the stereotypes that buttress prejudice comes in part from more neutral dynamic in the mind that makes stereotypes of all types self-confirming. People remember more readily instances that support the stereotype while tending to discount instances that challenge it.*⁹ ~ Daniel Goleman

Prejudice is a pernicious factor that at times poisons the course of mediation. As we reflect upon it, prejudice in its broadest application may include judgmental over-

confidence and partisan perception. In its most blinding and poisoning aspect, it includes ethnic, social, gender, and/or sexual preference stereotyping and intolerance. These narrow-minded and unbalanced perspectives create filters that tend to persist despite information to the contrary. Experience reflects the sad truth that negative perspectives of this sort are highly resistant to new and contrary information. However, we are pleased to note that we see less of this sort of prejudice than we did five, ten or fifteen years ago. What does continue is the reactive devaluation of information from, and opinions of, opposing counsel when confronted with prejudice or partisan perspective. This, however, is typically overt and subject to address by mediators. In some instances, it is better for a mediator to test the prejudice or partisan perception than the opposing party.

Conclusion

Through a series of reflections ranging from Judgmental Over-Confidence to Prejudice, 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. Hopefully these reflections enhance the mediation process for both advocates and parties alike. ▲▲▲

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Joe Epstein, President of Conflict Resolution Services, Inc. (CRS), is a Fellow and former Vice President of the International Academy of Mediators, has mediated over 3500 cases. He regularly mediates bad faith, business, catastrophic injury, employment, medical malpractice, nursing home, probate, products liability, professional liability,

railroad and trucking cases throughout the Rocky Mountain and Southwest regions. Contact him at 303-355-2314, joe@crs-adr.com.

Andrew Silverman is a CRS panelist who focuses his mediation practice on commercial disputes, construction and real estate, family law, family-owned business disputes, homeowners and homeowners' association disputes and probate. Contact him at 303-355-2314, andy@crs-adr.com.

Endnotes

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