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STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcraziaw.com

from the chair

Jerome Allan Landau

Greetings Friends and Colleagues,

I recently had a discussion with a friend who was upset that his new attorney came across as very cold, sterile and uncaring. The natural question was "why is he your lawyer?" The response was that "he is reputed to be among the best in the state!" This begs the question, "why can't a professional be highly skilled and also still have a presence of sincere caring?"

STRESS!!!!!! Lawyers have rated Number 3 – in "suicides". This is one category we would pray to be at the very bottom of the list. After all, we are highly educated, we help others "solve their problems"… Notwithstanding that comment which attorneys hear too often "You're a lawyer, I hope I never need you!" We are the profession with whom almost everyone at some time consults – and although often for "happy moments" (I was offered a high paying position), as often our clients gift us with their *STRESS, as if we did not have enough in our professional and personal life*.

Our personal capacity for serving a client's actual legal needs varies. Our need to maintain our own "state of professional presence" when serving a distressed client is a given. However, does "professionalism" also concurrently urge us to be sort of an "anchor' for that distressed client? To what level of "concern" should we strive?

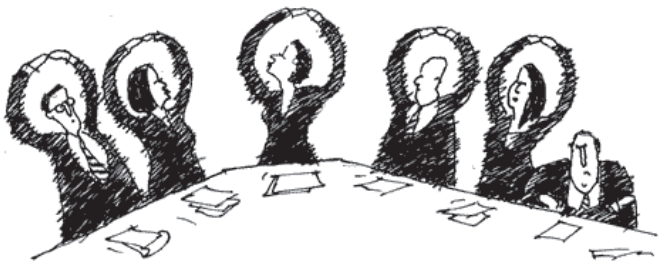
As Mediators we are even more confronted with this position – understandable and expected in family and employment matters. However, I have mediated business and corporate matters with high level corporate executives who are skilled at concealing deeply felt emotions; believe themselves personally "at risk" if they do not appear "successful" in the mediation hearing – if they do not "trounce" and "bloody" the other side (often the party advice of their colleagues). This often notwithstanding the amount at issue in the conflict. The results of a mediation must be reported to corporate Boards, to supervisors, to underlings and even spouses – "I must not appear weak".

>

from the chair

Although only infrequently expressed by counsel or a party, parties often look to the Mediator "for healing"; no matter how "simple" the conflict appears.

Imagine parties entering the hearing room – levels of nervousness because this is a new process; or because reputation can be threatened; or substantial funds (to them) are at stake; or because "if this does not work" litigating or arbitrating the dispute will be very costly in time, money and emotions – sometimes crippling a business.



The mediator led the group through ballet moves as a stress-relief exercise except for Bob whose firm had a rule against dancing at work.

What greets them as they appear before the "Mediator" – a professional emanating a sense of confidence (not to be confused with "ego") and caring? Or a person who personally gives the impression of being concerned about his/her "success" of achieving resolution?

I suggest that service as a Mediator might superficially appear quite easy – take some programs, learn some mediation tools and reprint your cards.

As many experienced Mediators have stated, there is a level of skill, or actually personal "presence" which moves the process beyond mere "tools". This is not about "woo-woo"; it is about being able to "connect" with a party (or counsel) on a level which engenders "trust". What I refer to as "presence" relates to how the Mediator first appears – the "first-impressions" which sets the initial foundation of the relationship – and the Mediator / party / counsel experience is a relationship.

Neuro-scientists and physicists remind us that as "electro-magnetic" beings we can "sense" each other – in ways that go beyond merely observing a person's physical mannerisms. Can you relate with the experiencing of observing someone entering a room and having a "feeling" of hope that they either come towards you, or walk the other way?

This underlies what parties and counsel experience when they first meet us; and importantly sets a foundation for the mediation hearing. With this awareness, and taking effort to reduce and manage our own stress levels, we are able to more skillfully prepare ourself for any of life's activities – including our professional service.

I suggest that this is an important feature of being a professional; and also enhances the opportunities for achieving a successful resolution of the conflict brought before us.

Equally applicable to our professional endeavors is the statement "Mediator, heal thyself!" ADR

— Jerome Allan Landau, ADR Section Chair

Amoebic**Mediation:**

a more conscious manner of assisting parties in mediation

by Jonathan Conant, Esq.

Most mediators and counsel employing their services are aware of the three main types of mediation: Evaluative, Facilitative and Transformative. Depending upon the nature of the dispute, counsel are quick to assert their chosen style. In observation, this is generally based upon their own needs and familiarity with that specific style. However, perhaps a moment of thought and consideration is in order for what is truly in the parties' best interests.

In reviewing the litany of material available on the subject, the moniker of "Facilitative Mediator" is credited to Jon Linden during the 1960's and 1970's. It was the most structured and most utilized style of mediation at the time (Linden). A "Facilitative Mediator" will generally ask questions of the parties and attempt to normalize their points of view in search of their more essential interests, supporting their positions and points of view. The Facilitative mediator will then attempt to assist the parties in finding options for a resolution of the dispute, reviewing each and comparing it to their desires and interests (Zumeta).

A facilitative mediator will not provide advice to a party, suggest an outcome or position that a party should take or assert one that the mediator believes is in that party's best interests. (Etcheson). This style of mediation is of a more classic style, with the mediator remaining completely neutral. Even in the face of Impasse a Facilitative Mediator will continue to ask questions in hopes of the parties finding their own way out of the forest of issues, arriving at their own resolution.

AmoebicMediation

In a paper offered to the Colorado Bar Association, Debbie Reinberg and John Rymers offer suggested "pro's and con's" for each style of mediation. With specific regard to the Facilitative Style, they would suggest the following advantages and disadvantages that have been adapted for the purpose of this article:

advantages:

1. Works well when the parties have a vested interest in maintaining a relationship.
2. Focuses on identifying a wide range of common interests between the parties and crafting solutions that meet all parties' interests. This leads to a broader and more complete resolution.
3. Works well to identify substantive, procedural and psychological interests.
4. Allows for greater creativity in problem solving.
5. Greater probability than evaluative mediation to promote trust and an on-going relationship between the parties.
6. Works well when there are complex interpersonal or family dynamics.
7. Allows for early resolution of disputes before parties become entrenched in their positions.
8. The very nature of the facilitative mediation process can be therapeutic because it allows the parties to say important things to one another in a safe environment.

disadvantages:

1. A facilitative process may take longer to resolve than other styles.
2. May be difficult if there is no interest (or perceived interest) in an ongoing relationship between the parties.
3. Can elicit strong emotions that may not be anticipated by the mediator or the parties.
4. Requires skillful planning by the mediator and substantial understanding of the parties' interests. This is one reason this process may take longer.
5. Sometimes difficult to get disputing parties to buy into a facilitative process, especially if the issues are not clearly defined.

During the 1980's, a new style emerged known as "Evaluative Mediation". Under this style of mediation technique, the mediator will make suggestions to the parties and even offer them an opinion regardless of whether or not it was requested. (Zumeta). It is hypothecated that this style arose as a result of the increase in the use of mediation in court ordered or court referred cases, and in response to the onslaught of cases mediators were pressured to move them along quicker, foregoing a more "interest based" technique such as a facilitative mediator would use. (Etcheson). The feeling is that a party cannot make a truly autonomous decision without knowledge of the relevant legal and social norms. (Waldman, citing as authority Stark).

Mediators frequently use this technique when the sole issue being mediated involves the payment of money damages, or single issues. An evaluative mediator will offer an opinion on the case based upon his or her own knowledge or expertise in the subject matter of the dispute. It may be to the value of the case, or simply the mediator's opinion as to the merits of the case. (Russell). The evaluative style has been stated as having the following advantages and disadvantages:

advantages:

1. Works well if there is not an interest in an on-going relationship between the parties.
2. Tends to lead to resolutions that are based upon points of law.
3. Works well when parties are on a litigation path.
4. It is a good way to evaluate the legal strength of a party's position.
5. Works well when there is a distributive issue.
6. Often can be completed in less time than other types of mediation.

disadvantages:

1. Does not promote an on-going relationship between the parties.
2. Often limits the focus to legal rights rather than overall needs and interests of the parties.
3. Outcomes tend to be more narrowly framed in legal terms.
4. Greater potential for misuse of mediator power due to the evaluative role of the mediator.
5. Because issues are more narrowly framed, there is less opportunity to address psychological interests.
6. There is often less opportunity for parties to feel listened to and acknowledged.

Recently, there has been a trend toward what has been called "Transformative" mediation. (Bush, Folger). The major difference between this style and the other two is that in the Transformative style the mediator will attempt to balance the negotiating power of the parties through a discussion and evaluation of the pother party's position in hopes of getting that party to recognize the other's position. Practitioners of this technique strive to "transform" the relationship between the parties through empowerment and recognition of the other party's position and interests. (Zumeta).

In the Transformative mediation, the mediator will seek to cause the parties to communicate directly with each other. (Linden). This author would suggest that through the mechanics of restating and rephrasing, a mediator would attempt to get the parties to acknowledge their feelings and interests in hopes of equalizing the imbalance of power often found in mediation. Many court programs are gravitating toward this style in their Justice programs, as well as in their family programs.

The adapted advantages and disadvantages of this style have been stated as being:

advantages:

1. Allows for the greatest amount of self-determination of the parties.
2. Allow the parties to learn about themselves and the other parties, assisting them in moving forward from where they were previously stuck.
3. Provides the parties with new tools to resolve their own disputes in the future.
4. Can be powerful in disputes involving strong emotional aspects as transformative mediation can help parties begin to heal and learn new skills to move forward.
5. Has all the advantages as facilitative mediation.

disadvantages:

1. Not everybody desires relationships to be transformed. Many people just want resolution.
2. May create conflict between the mediator and the parties if there is not a shared interest in the transformative approach.

The are other, more esoteric forms of mediation technique, but these are the three main forms that we often encounter and employ in mediation. Often, as has been stated previously in this article, counsel for one of the parties will suggest or request an Evaluative mediator, or a Facilitative one. Often, this is due to the nature of the conflict or perhaps issues that one attorney may have with his clients where an affirmation of his advice through the means of an evaluative mediator is what the attorney feels his or her client needs.

In a paper authored by Dorcas Quek, District Judge for the Subordinate Courts of Singapore, a different theory was presented. The basis of his position was that the basic tenet of mediation was self-determination. Another way to look at this is to say that disputants emerge from court proceedings often feeling dissatisfied with the process, while participants in a mediation emerge from their dispute feeling as if they have received exactly what they needed as opposed to a third party telling them or assessing what they needed. (Waldman) Evaluative mediation has a tendency to undermine that precept as an evaluative mediator loses his or her neutrality and infringes upon the parties sense and need for self-determination.

As part and parcel of this ability of parties to self determine is the need for the party to be able to make an accurate evaluation of their alternatives to consider. An argument for an evaluative style involves an assessment of the BATNA (Best Alternative To a Negotiated Agreement) and the WATNA (Worst Alternative To a Negotiated Agreement). An evaluative style helps the parties to do these calculations and make this consideration.

However, there are many techniques available to assist parties in making this determination exclusive of a mediator suggesting an outcome or providing his or her opinion. They could come by means of continued probing questions of parties and counsel in caucus to assist them in deriving their own peculiar BATNA and WATNA. Going hand in hand with this analysis is reality testing, again in that private caucus. Care must be taken that these not be conducted too early in a mediation session as they could have the outcome of causing a party to become more emboldened in their position, creating a more difficult series of negotiations. (Quek, at page 4).

This author would submit based upon experience that the parties themselves through their actions and comments will suggest the proper methodology to be employed. There are times where parties are sophisticated enough and have done their own evaluations to the point where a purely facilitative method works best. On the other hand, there are those cases where the parties are capable of making their own decisions but for whatever reason have been unable to accurately evaluate their own risks, or their own BATNA and WATNA. These cases need to have within them an evaluative approach, but then fall back on a Facilitative approach once the parties have become educated enough as to be able to make such a decision.

It is this mixed-method that I refer to as Amoebic Mediation. Just as the single celled protozoan will evolve and change its shape, so must the mediator. The mediator must take his or her clues from parties and counsel and then act accordingly. The best manner for doing this is through

Amoebic**Mediation**

the continued use of my favorite mediation tool – the one that I insist remain on the top shelf of the mediator's toolbox – the Question.

The first line of questioning must take place prior to mediation whenever possible. These initial questions are generally directed to counsel in an effort to determine how much discussion and evaluation has taken place. Have the parties discussed the BATNA and WATNA? Have they realistically evaluated the risks and potential rewards of their positions? Is the party unreasonable in their position or are they skeptical of the advice given by their counsel, and need a re-affirmation of the advice given by counsel? Does counsel simply have control issues with their client?

The second series of questions should occur subtly during the opening statements of the parties. During this phase of the process the mediator must be keenly aware of what the parties are saying both in terms of the spoken word as well as body language. The mediator must question and look for "tells", picking up on perceived weaknesses in that party's position or argument. This line of questioning is much more superficial so as not to subject them to embarrassment during opening statements or taking other action which would cause the party to become more ingrained in their position and less willing to compromise or discuss alternatives.

There has been great debate of late as to whether opening statements should be employed or whether the parties should proceed immediately toward caucus. Still others would debate the use of caucus, insisting on having the parties negotiate together and not in private. These topics require much more depth than this paper and it is presumed that a brief opening statement is given for step two. In the event that no opening statements are given the line of questioning employed should simply be added to the third and final step.

Finally, the last round of questioning must take place in caucus. Here, in private, is where the styles of evaluative, facilitative and even transformative can and should be employed as needed and as the parties indicate is needed. I have often used all three methods during mediation as needed to keep parties moving toward the goal of resolution. As I like to instruct parties when I begin a mediation, my goal is to assist them in making an informed decision – one that they can make based upon their own evaluation of the merits and risks after a reasoned discussion; balanced with my facilitating their conversation and negations with the other side, and; transforming the parties and their positions into a common goal where they have both maximized the result to their mutual benefits as best as possible.

Facilitative Mediation and Evaluative Mediation are divergent theories, at opposite ends of the mediation "spectrum". One would seek to have the parties make all the decisions while the other would educate and advise the parties of the merits of their position. The arguments for or against the other are similar with the therapeutic nature of the process being the fallback position of each.

As is stated in conclusion of the ***Waldman*** article:

> *As the mediation field wrestles with divergent visions of mediation's goal and method, it is important to attend to its own rhetoric of disputant autonomy and control. Only by listening to what disputants themselves have to say about mediator approach and technique can we fashion effective and sensible policies regarding the role of evaluation in mediation.*

Just as the Amoeba changes its shape, a mediator must change its style to accommodate the parties' needs in mediation. Once a style is employed the mediator must not be "married to it", but must always be flexible enough to fall back on a prior style if the parties, particular issue or point in mediation reached requires it. ADR

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about the author

Jonathan D. Conant provides Mediation and Arbitration services throughout Arizona from his base in Prescott, Arizona. He is a frequent contributer to ADR Publications, lectures and provides training on behalf of numerous ADR Organizations. He is currently Northern Arizona's only member of the National Academy of Distinguished Neutrals, and offers parties his experience of over 18 years and litterally thousands of mediations.

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MARICOPA COUNTY ASSOCIATION OF FAMILY MEDIATORS CELEBRATES ITS TWENTY-FIRST BIRTHDAY

The Maricopa County Association of Family Mediators (MCAFM) is the only non-profit organization in Arizona devoted exclusively to family mediation. MCAFM was founded in 1994 to assist family mediators in expanding their professional expertise, to educate the public about the benefits and use of mediation and to promote legislation and court policies that increase the use of mediation in family law matters. MCAFM members practice in a wide variety of areas, including dissolution and post dissolution matters, parenting and support issues, pre-nuptial agreements, elder care and probate matters, and communication enhancement for couples and other close family members.

Collaboration and support have been at the heart of MCAFM's mission for the past 21 years. Annually the group sponsors ten monthly meetings on the last Tuesday of the month which feature a one hour educational component in addition to opportunities for members to share information, practice tips and questions with other mediators and mediator friendly professionals. Recent programs have covered such topics as techniques for dealing with high conflict clients, tax tips and traps for divorcing couples, ethical concerns for mediators, the role of parenting coordinators, and family law and legislative updates. In addition to their commitment to professional development, MCAFM members have devoted numerous hours to the annual fall High School Peer Mediation Conference which is sponsored by AACR and they have served as facilitators for discussion forums sponsored by community groups, colleges and schools.

MCAFM has co-sponsored workshops featuring nationally known speakers with other non-profit groups as well as the Maricopa County Superior Court. Bill Eddy, LCSW, J. D., who is recognized as an expert in dealing with high conflict personalities, was the lead speaker at the January, 2009 conference co-sponsored by the Maricopa County Superior Court, the AZ Association of Family and Conciliation Courts and MCAFM. MCAFM also has brought other nationally regarded speakers, such as Jim Melamed, co-founder and CEO of Mediate.com, and Zena Zumeta, an expert in family, elder and probate mediation, to the Valley for workshops.

In February 2014 MCAFM and Collaborative Divorce Professionals of Arizona co-sponsored an advanced family mediation workshop with Forest "Woody" Mosten, who is an internationally recognized mediator, trainer and author. On March 13, 2015 MCAFM, along with the Arizona Association for Conflict Resolution, will bring Woody back to Phoenix to present a master class for advanced mediators from all practice areas.

MCAFM's upcoming luncheon program series features some very timely topics and speakers. On February 24th Francesca Schultz, MC, LPC, discussed the assessment and treatment of the Trauma response, particularly as it relates to issues of sexual infidelity and betrayal. On March 31st Judge Janet Barton, Presiding Family Court Judge and Cheri Clark, Family Court Administrator, provided the group with a family court update. On April 28th Claudia Work, attorney and expert on LBGT issues, shared her insights and strategies for dealing with family matters involving same sex couples. On May 26th Ken Mann, mediator, attorney and CPA, and Jim Magrogan, business appraiser, will discuss the ins-and-outs of family business negotiations, including dissolution and intergenerational transactions.

MCAFM welcomes guests to its monthly luncheons and encourages everyone to visit its website, **www.mcafm.org**, to learn more about the group, its members and meetings. We invite you to join us at an upcoming luncheon.

Judicial Settlement Conferences Contrasted With Private Mediation

by Hon. Ted B. Borek (Ret.)
Pima County Arizona Superior Court

After nearly fourteen years as a Superior Court Judge including over seven years on the civil bench, I have conducted over 100 settlement conferences on cases assigned to other judges. Now that I am focusing exclusively on mediations and arbitrations in the private sector, I have been asked to describe the differences between judicial settlement conferences and private mediations. Of course every judge and mediator has a unique style influenced by background, experience, and training. These are my observations about what I think can be said generally.

Ordered Settlement Conference or Voluntary Mediation

Pursuant to Rule 16.1, A.R.Civ.P., with the exception of compulsory arbitration and mandatory requirements in medical malpractice cases, a Superior Court may order the parties, counsel, and those with settlement authority to attend a conference to facilitate settlement. Such orders usually require that a settlement conference memorandum be furnished to the settlement judge at least five days before the conference. The memorandum is to address five subjects identified in Rule 16.1(c), that is a description of issues and evidence, status of settlement discussions, assessment of results if tried, and other helpful information. Settlement discussions are confidential, and more often than not these memorandum are not shared with the opposing party. While the court can order a settlement conference and impose sanctions for failure to comply with a scheduling order, the court cannot order the parties to settle. In contrast, for a private voluntary mediation my scheduling letter contains no enforcement authority, except perhaps for payment of any earned fee. Similarly, the letter includes a request for a settlement memorandum including the information identified in Rule 16.1(c). In some cases, I suggest that non-confidential information be shared with the opposing party. Interestingly, I recently learned that mandated settlement conferences settle at a rate from 17 to 40 per cent, whereas the settlement rate for voluntary mediations is over 80 per cent.

Scheduled Duration

Judicial Settlement Conferences in Pima County must fit into the Court's calendar and usually are scheduled for three hours

each. They sometimes last longer, but there is always pressure to end them on time for administrative efficiency. By contrast, the time scheduled for a private mediation is a matter for the parties to decide and usually is for more than three hours. Some mediators increase their fee upon reaching a certain time limit, and I am told many agreements are reached just before the limit is reached.

Pre-Mediation Preparation

The demands of the bench, especially when in trial, limit the time available to the judge for pre-mediation preparation, by example for reading voluminous material or speaking with counsel before the mediation begins. When I was on the bench I rarely contacted counsel before the mediation. By contrast, now I make every effort to speak with counsel before a conference to get a sense of what to expect procedurally. For example, if a lawyer is planning an opening statement in the initial session, whether that will be done is a process matter deserving of discussion and possible agreement before the initial joint session. Pre-mediation discussion with counsel helps focus and saves time; I plan for it regularly.

Location of Settlement Conference

Judicial settlement conferences universally begin in a courtroom with all parties present. The aura of the courtroom can be a reality check to parties unfamiliar with the surroundings. By contrast, private mediations often are scheduled in the office of a party's attorney or some other neutral location. If visiting a courtroom may have an impressionable effect, I suggest that for a private mediation counsel arrange that the settlement conference be conducted at the Courthouse.

Mediation Openings

Although judicial settlement conferences often include an opening addressing confidentiality, ex parte communications, schedule, process, and advantages of settlement compared with a jury trial, my private mediations now include a written statement of these things with emphasis on what a party can achieve with settlement and lose without it. For example, what can be achieved is control, choice, certainty, privacy, and closure, all of which are lost if there is a trial. A party also can save time, money, risk, dignity, stress, and sometimes a relationship, all also likely lost if there is a trial. Providing a written list of what parties can achieve upon settlement should encourage them to ponder the advantages and make necessary concessions to obtain a reasonable agreement.

Recording Agreements

Pursuant to Rule 80(d), A.R.Civ.P., no agreement between the parties is binding if disputed unless it is in writing or made orally in open court and entered in the minutes. Such a recording is easily made during a Judicial Settlement Conference when the Judge sets forth the terms of a settlement on the record with a courtroom clerk recording the matter and filing a minute entry with the terms of an agreement. Confidential settlements also can be sealed and referenced in the public record. For private settlements, it is important that any agreement be completed and signed by the parties before the mediation ends so that any dispute about the terms can be avoided. To this end I now ask the parties to bring a copy of the essential terms of an agreement to the mediation to be incorporated into a signed agreement. I consider that when a party thinks about the terms before the conference the process is expedited and settlement is more likely.

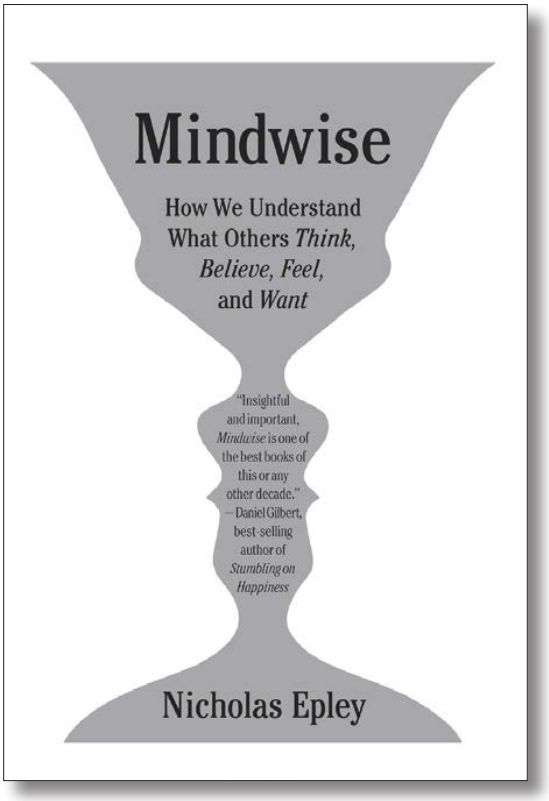
Conclusions

Judicial settlement conferences afford the advantages of a judge experienced in conducting trials and knowledgeable about verdicts. The courtroom with judicial staff provides a useful forum for conferences that enhance timely recording of agreements. Scheduling availability and time for preparation are the principal disadvantages. Private mediations allow for longer conferences, more flexible scheduling, and probably more time for in depth preparation by the mediator. Mediators may have experienced fewer jury trials, and finalizing an enforceable written agreement will require pre-mediation preparation of terms by the lawyers so an agreement can be signed before the mediation ends. ADR

BY SHERMAN D. FOGEL

Mindwise

How We Understand What Others *Think, Believe, Feel* and *Want*



Nicholas Epley | Hardcover | 272 pages | Knopf Publishing | 2014

Listening to the radio while driving back to the office one day, I heard Nicholas Epley, who I had never heard of, being interviewed about his new book, *Mindwise*. Before the interview was over, I had already turned the car around and was headed more than five miles out of my way to the nearest bookstore (there are not too many left) to buy the book. I'm glad I did. Although *Mindwise* is neither about mediation nor written specifically for mediators, it is extremely relevant to what we do and how we do it. Were it not for the fortunate happenstance of catching Mr. Epley's interview that day, I probably never even would have heard of this fascinating book.

If your idea of mediation is that it is just about analyzing and evaluating possible litigation outcomes, and maybe doing a cost-benefits analysis, you won't find much of interest in this book. If, on the other hand, you think understanding how the minds of the disputants work, maybe even how your own mind is working, and how the workings of all of those minds impact the dispute and possible avenues to resolution, *Mindwise* is for you. The title, *Mindwise*, doesn't give much away, but the book's subtitle, *How We Understand What Others Think, Believe, Feel and Want*, is part of what caught my attention during Mr. Epley's interview.

Nicholas Epley is not a lawyer, but a psychologist. He received his PhD in psychology from Cornell in 2001, and was an assistant professor at Harvard until 2005. He is currently the John Templeton Keller Professor of Behavioral Science at the University of Chicago Booth School of Business. He has published numerous articles regarding his research in professional journals, has written for the *New York Times* and the *Chicago Tribune*, and is the recipient of several awards for his work.

Mindwise begins with a discussion about how we all intuitively read the minds of others, so that our daily interactions with those around us are the result of inferences we draw about what they are thinking, feeling, believing and wanting. Mr. Epley has done extensive research and experimentation to examine not only how, but how well, we actually read the "thoughts, motives, attitudes, beliefs, and emotions of others."

Looking at *Mindwise* from the prospective of a mediator, one of the most important findings of Mr. Epley's work is the disconnect between how well we think we understand what is going on in the minds of others, and how well we actually do. We tend to believe we accurately understand what others are thinking and feeling much better than we really do. In fact, he demonstrates that we don't even understand our own minds as well as we think we do. The inferences we draw about the minds of others are frequently mistaken, but we tend to act upon them as if they were true. In the context of conflict management and dispute resolution, Mr. Epley's observation is spot on:

> *That we cannot read anyone's mind perfectly does not mean we are never accurate, of course, but our mistakes are especially interesting because they are a major source of wreckage in our relationships, careers, and lives, leading to needless conflict and misunderstanding.*

As mediators, we understand that, unlike a fact finding trial, our goal is not necessarily to find the "truth," but to examine, and help the parties to examine, each of the parties' perceptions of the facts from their individual perspectives. Each party's perception is his or her reality. But frequently, certain of those perceptions are so

removed from objective reality that they can only properly be characterized as misperceptions. It is those misperceptions that often are at the root of the dispute, and need to be defused as a predicate to any meaningful negotiation of resolution. For example, a misperception encountered in almost every conflict involves a party's inference of bad motive and/or bad faith on the part of the other. Although ill motive or bad faith may exist, it is relatively unusual, and more often than not, each party is acting in good faith and in what they simply believe to be their own best interests, without any evil intent. These misperceptions are the result of misreading the mind of the other, but thinking one has read it correctly.

Mr. Epley divides the mistakes we make trying to understand the minds of others into two categories: (i) mistakes of engagement, and (ii) mistakes of inference. With regard to mistakes of engagement, he give us two very interesting chapters, one describing the dehumanizing effect of failing to engage the mind of another, and the second discussing the reality problems resulting from attributing a mind to the mindless. Probably more relevant to our work as mediators, however, is his discussion of mistakes of inference, or as he labels this section of the book: "What State Is Another Mind In?".

When trying to understand the mind of another, Mr. Epley notes that we tend to use three strategies:

> *We project from our own mind, use stereotypes, and infer a mind from a person's actions. Each strategy provides insights but can lead to predictable mistakes.*

He devotes one chapter to each of these strategies, and particularly focuses our attention on the kinds of mistakes each of these strategies can produce. This is of particular relevance to us as mediators, because the better we are able to understand how the parties are misreading each other's minds and why, the more effectively we are able to select the appropriate interventions that get everyone past the impasses and to resolution. Also, the more introspective we are as a result of what Mr. Epley teaches us, the more we will come to understand how our own mistakes that result from our misreading the minds of the disputants and their representatives can actually cause the process to fail. Hopefully, the better we understand how even our own minds are working during the process, the more likely we will be able to reduce the number and kind of mistakes we make while conducting a mediation.

In the last chapter, "How, and How Not, to Be a Better Mind Reader, Mr. Epley, although not necessarily intending to talk to mediators, provides invaluable guidance for us. We have probably all been taught at one time or another that one useful technique is to have the parties each put themselves in the other's shoes and see things from the other's perspective. Mr. Epley points out, however:

> *What's more problematic is that if your belief about the other side's perspective is mistaken, then carefully considering that person's perspective will only magnify the mistake's consequences. This is particularly likely in conflict, where members of opposing sides tend to have inaccurate views about each other.*
>
> *Instead, we must first actually find out what the other's perspective is (perspective getting), before we can carefully consider it, and that "requires asking and listening, not just reading and guessing."*

The mediation process is uniquely suited to actually learning the other's perspective. When you read the last chapter of *Mindwise*, you cannot help but think about the safe environment mediators create, in which there is confidentiality and a facilitator with no power to adversely affect the parties. As Mr. Epley says:

> *The secret to understanding each other better seems to come not through an increased ability to read body language or improved perspective taking [which he distinguishes from perspective getting discussed above] but, rather, through the hard relational work of putting people in a position where they can tell you their minds openly and honestly.*

Mindwise: How We Understand What Others Think, Believe, Feel and Want is filled with engaging explanations of experiments conducted by Mr. Epley, as well as real life stories, to illustrate his conclusions. As a result, the book is not only thought provoking and educational, but eminently readable. I highly recommend it to anyone who wants to improve their mediation skills without reading another "how to do it" book on mediation. ADR

Mr. Epley teaches us, the more we will come to understand how our own mistakes that result from our misreading the minds of the disputants and their representatives can actually cause the process to fail.

 After 40 years as a trial lawyer, Sherman Fogel is now a full time mediator and arbitrator, and is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Arizona. He frequently speaks on arbitration and mediation at programs sponsored by the American Arbitration Association, the American Bar Association and the State Bar of Arizona. He has been selected for inclusion in the 2008–2015 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. Mr. Fogel can be reached by phone **602-264-3330**, email **mede8@msn.com** or through **www.shermanfogel.com**.

HOW TO

ADDRESS SPOUSAL MAINTENANCE IN FAMILY LAW MEDIATION

by ALONA M. GOTTFRIED

Spousal maintenance is one of the most complicated topics to discuss in divorce or legal separation mediations. There is no adopted formula to use, unlike child support calculations, and the law is vague enough so that two vastly different positions may be "reasonable." Further, it is a topic fueled with emotion. Many people feel more offended by the thought of paying spousal maintenance than almost anything else. Also, participants who feel emotionally injured by his/her spouse sometimes attempt to use spousal maintenance as a way to make the spouse pay "penance." Finally, spousal maintenance is a complicated topic because there are so many moving pieces: how much, how long, paid in what increments, paid through what manner, under what conditions?

The following is information from which participants in mediation may benefit to resolve a spousal maintenance issue.

Explaining Spousal Maintenance

While mediators cannot give legal "advice," they can give legal information. The following is a basic explanation that seems to satisfy most mediation participants. A copy of the governing statute (A.R.S. § 25319) can also be provided to mediation participants upon request.

Spousal maintenance is support paid to a spouse in a divorce or legal separation action. It is intended to help certain spouses get back on their feet financially, or to provide assistance to people that will never be able to support themselves.

To qualify for spousal maintenance, one of the following factors must apply:

- The requesting spouse must not have sufficient property, including the property awarded in a divorce or legal separation, to provide for that spouse's reasonable needs;
- The requesting spouse must not be able to support him/her self through appropriate employment, or that spouse must care for a child that, because of the child's age or condition, requires that spouse to not earn an income;
- The requesting spouse contributed to the educational opportunities of the other party;
- The marriage was of a long duration, and the requesting spouse's age may prevent him/her from gaining employment that would allow him/her to be self-sufficient.

Once it is determined that a person qualifies for spousal maintenance, the next questions are: how much spousal maintenance and for what length of time? The Court looks at thirteen different factors to determine the length and duration of spousal maintenance. The factors include: the length of the marriage, the standard of living the parties enjoyed, the paying spouse's ability to pay and the resources of the party receiving support.

Understanding the Benefits of Resolving the Issue in Mediation

Using mediation to resolve a spousal maintenance issue has the following benefits:

- Going to court on the issue of spousal maintenance is very risky. The Court has a lot of discretion, and it is impossible to accurately predict the outcome of a contested spousal maintenance issue. If the same case is tried in front of five different judges, parties are likely to get five different spousal maintenance awards.
- The Court only has the authority to enter modifiable spousal maintenance, unless the parties agree otherwise. This means that either party can ask the Court to change the spousal maintenance Order (increase or decrease the time period it is awarded or the amount awarded) if the request is made during the term of the spousal maintenance award. With an agreement, the parties can choose to make spousal maintenance non-modifiable (meaning, no matter what happens, neither party may modify the terms of spousal maintenance, without the agreement of the other party). Some people like this option because it provides them with certainty.
- With an agreement, the parties can enter other flexible terms,like:
  1. *Allowing spousal maintenance to automatically end under defined conditions (like if the party receiving spousal maintenance cohabitates);*
  2. *Allowing spousal maintenance to decrease or increase in amount over time, either automatically or based, for example, on the amount of money the receiving spouse is earning (for example, if a party earns X, spousal maintenance decreases or increases to Y);*
  3. *Allowing spousal maintenance to continue past remarriage. Absent an agreement otherwise, spousal maintenance ends on the receiving party's remarriage or either party's death;*
  4. *Parties can also be more creative about the methods of payments, though they should talk to an accountant to confirm the payment method does not disqualify the payments from being considered spousal maintenance.*
- It can be quite expensive and time consuming to litigate the issue of spousal maintenance. To prove ones case, extensive discovery is often needed. Also, sometimes multiple experts are needed – like forensic accountants and vocational experts. Sometimes parties share experts, but, often, each party retains his/her own expert, thereby exponentially increasing the cost. By contrast, when parties reach their own agreements in mediation, most of that cost can be avoided as the parties work together to find a good compromise, without the risk and cost associated with litigation.

Determining the Participants' Needs and Abilities

Often, the mediation participants' decision regarding the terms of spousal maintenance comes down to one party's need and the other's ability to pay. A modicum of reasonableness and common sense, which can be brought out by a skilled mediator, is needed to determine the duration of spousal maintenance (Were the spouses married two years, or thirty? Is the receiving party twenty years old or eighty?). To help determine needs and abilities, it is useful for the mediation participants to complete a written budget.

Use of Experts

A financial planner skilled in divorce issues can help the participants determine their needs and abilities in a more sophisticated and accurate way, which sometimes helps mediation participants break an impasse on the issue of spousal maintenance. The participants can also choose to jointly retain a vocational expert to assess the earning ability of a spouse who has been out of the job market. Even when experts are used in mediation, the costs are lower than in litigation because the parties generally jointly retain one expert, and the expert's role is limited – trial preparation and testimony are not necessary.

As with all mediations, it is recommended that the participants consult with a "mediation-friendly" attorney before entering into an agreement, if they are not already represented. Additionally, spousal maintenance has tax consequences, so participants are also encouraged to consult with an accountant before making a final decision on a spousal maintenance agreement. ADR

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This is a general interest article only and is not intended to be legal advice.

Creating an "APPEAL BY CONTRACT" Clause in an Arbitration Agreement is a Long Shot

by DAVID C. TIERNEY

Twenty years ago, Judge Lankford stated in *Heinig v. Hudman*, 177 Ariz. 66, 74, 865 P.2d 110, 117 (Ariz. App. 1994), that in the event of an attack on an arbitration award,

> *"The Superior Court's jurisdiction in a confirmation proceeding is limited to considering opposition on statutorily enumerated grounds, A.R.S. § 12-1512, and to confirming or rejecting the arbitration award." citing* Arizona Public Service Co. v. Mountain States Telephone and Telegraph Company*, 149 Ariz. 239, 244, 717 P.2d 918, 923 (Ariz. App. 1985).*

In the federal circuits, a whole slew of cases has considered the question whether, **by contract**, parties can "create jurisdiction" in the Courts to hear "appeals" of questions of law resolved by arbitrators in their final awards. A recent article on this subject is Reuben, "Personal Autonomy and Vacatur after *Hall Street*," 113 Penn. State Law Review 1103, 1105 (2009) in which the author says:

> In recent years, however, some parties have expanded their autonomy over the process by contractually agreeing to permit courts to engage in substantive review, sometimes called "enhanced judicial review" or "contracted judicial review," of arbitral awards under the FAA for errors of law.

In *Hall Street Associates v. Mattei, Inc.*, the U.S. Supreme Court resolved a clear and deep split in the circuits and **emphatically rejected this practice**. This decision constitutes arguably the most significant constraint on party autonomy in arbitration that the Court has imposed. This holding by the Court was a landmark in and of itself. But in so ruling, the Court also staked out three additional important mileposts for arbitrations conducted under the FAA. First, the Court held that the grounds for judicial review under the FAA **are limited to those grounds that are specifically enumerated in the statute**. This is significant because the decision affects the many so-called "non-statutory" grounds for judicial

> review of arbitration awards under the FAA, such as manifest disregard of the law and public policy… Finally, the Court held that the finality goals of arbitration outweigh the freedom of contract of participants. (Emphasis added).

In our own Ninth Circuit, twelve years ago, the judges resoundingly rejected the idea that the jurisdiction of the Federal Courts could be "increased" by the parties creating a contract provision stating that alleged arbitrator errors of law in an award could be the subject of "appeals" to the Federal District Courts. In *Kyocera Corporation v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9th Cir. 2003), Judge Reinhardt wrote that the FAA (9 U.S.C. §§ 9, 10, & 11) (which are nearly identical to A.R.S. §§ 12-3022 and 3033) provide "grounds [which] afford an extremely **limited review authority**, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."

The *Kyocera* Court noted:

> "Congress had good reason to preclude more expansive Federal Court review. Arbitration is a dispute resolution process designed, at least in theory, to respond to the wishes of the parties more flexibly and expeditiously … Proponents of arbitration cite its potential for speed and informality … Broad judicial review of arbitration decisions **could well jeopardize the very benefits of arbitration**, rendering informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process." (Emphasis added).

Courts across the Nation have considered State (uniform) laws governing arbitration and have **followed** the U.S. Supreme Court's 2008 *Hall Street Associates* decision as to the FAA's not allowing the parties, by contract, to **expand** the review powers in the Courts as regards arbitration awards. *See Optimer International Inc. v. R.P. Bellevue, L.L.C*, 170 Wash. 768, 246 P.3rd 785, 787 (Wash. 2011); and *HL 1 LLC v. Riverwalk L.L.C.*, 2011 Me 29, 15 A3rd 725 (Me. 2011). Courts in Tennessee, North Dakota, Illinois, Michigan, and Massachusetts have followed the *Hall Street Associates* lead. Courts in Texas and California have gone a different way.

Against this backdrop, ten months ago, our Court of Appeals issued its opinion in *Chang v. Siu*, 234 Ariz. 442, 685 (Ariz. Adv. Rep. 18, 323 P.3d 725 (Ariz. App. April 22, 2014), Judge Johnsen writing. The case involved a stipulation that a contested divorce would be arbitrated (pursuant to § 12-3001 *et seq.*, the RUAA) and that each party "preserved" its "right to appeal a final arbitration award to the Arizona Court of Appeals, and that appeals shall not be taken to the Superior Court of Arizona". Unhappy with the arbitrator's award, the husband moved for a rehearing, asking that the arbitrator "amend" the final award and the arbitrator declined, citing§§ 12-3020 and 3024. The wife went to Superior Court for an order confirming the award, got it, and the husband then appealed that ruling to the Court of Appeals. Judge Johnsen wrote, "the question first presented by this appeal … is whether and to what extent parties may by agreement avoid the procedural and substantive limitations our statutes and common law impose on the review of a private arbitration award." She concluded, "parties may not by agreement create appellate jurisdiction where it otherwise would not exist." (Headnotes 1 and 5). But Judge Johnsen noted that in the *Hall Street Associates* decision, the U.S. Supreme Court had expressly left open whether, under **State** arbitration statutes, parties could agree to more extensive judicial review than under the FAA. In Headnote 11, Judge Johnsen deftly sidestepped deciding the issue saying: "We need **not decide** whether Arizona law allows parties to contract for expanded appellate review of the merits of the arbitrator's award, however, because husband and wife did **not** make such an agreement here." (Emphasis added). Judge Johnsen said the paragraph in the parties' stipulation (quoted above in this article) was **not** a clear effort to **create** an appellate review of alleged errors in the award in excess of the statutory limitations on reviews of arbitration awards.

The 2014 *Chang* opinion has failed to nudge Arizona into the column of the States which already have hold that no party **can create** increased judicial review, because of the 5 or 6 statutory limitations. See A.R.S. § 12-3023 re: corruption, partiality, refusal to postpone, etc., as being **the** statutory grounds for attacking a final arbitration award.

There is a case of record in Maricopa County Superior Court (*DLR Group, Inc. v. Maricopa County*, No. CV2011-004206) where the *Hall Street Associates* issue of a contract clause "creating" a broader right of appeal was briefed. In that case, Judge Hugh Hegyi ruled that the reasoning in *Hall Street Associates* did apply to the RUAA in Arizona. He ruled that parties cannot "jump over" A.R.S. § 12-3023 and create in a Court, any Court, a broader appeal ability of the arbitration award than the listed **statutory** bases. I was involved in that case. That ruling was not appealed, but the briefing done in that Superior Court case may be of help to anyone grappling with this issue.

This important issue awaits a Court of Appeals ruling, one which I believe we will see in the next year or two.

Say What you Mean – Not What You Think You Mean

THE PLAIN MEANING RULE IN MEDIATION

Often times what we mean to say, or even what we actually say, comes across and is interpreted as something completely different than what we intended. This is even more evident in this the digital, or internet age. However, the lessons from long ago remain the same.

There have no doubt been many articles written and speeches made about the importance of using plain speech or relying upon the common meaning of words and terms in our conversations. Practicing attorneys understood the "plain meaning rule" to apply to understanding and interpreting legislative intent in the creation of laws. Even with these guidelines, trouble is waiting just around the corner.

I learned well over a decade ago that to garner the trust of those with whom I was mediating I had to be able to communicate with them and enable them to communicate with me as well. This simple task had to be accomplished without regard to differences of race, creed, culture, sex and sexual orientation, religion and national origin. A daunting task perhaps, but I felt confident that it was one that I could easily accomplish. After all, I had great legal and ADR training, experience and worked with people from differing backgrounds my whole life. I could surely talk to anyone. But one day the inevitable happened and reminded me of the importance of speaking plainly.

I was mediating an injury case with a plaintiff who was a slight, older woman from an island nation in the Caribbean. She was well dressed and spoke "the Kings English," as we used to say, and I seemed to get along well enough with her. As was my habit I met with her and her attorney in private to discuss the basics of mediation. I launched into my speech about mediation and the role of the mediator as I had been taught and everything seemed to be going well.

That is, until I explained that in being a mediator, I would often present the position of the other side as the "Devil's Advocate". Whoops!

This sweet woman paled noticeably. Had I not known better I would have sworn that she broke out into a cold sweat. I asked if she was feeling OK, and she asked to speak with her attorney in private... immediately. I obliged and stepped out of the room. When her attorney stepped out he had a grin on his face and told me that we were done.

When I asked her attorney what had happened and the reason we needed to terminate the mediation, he told me that she was a very religious woman of a faith that I had no experience with and little knowledge of. It seems that when I employed the commonly used and I perceived as a commonly accepted term of acting as "the Devil's Advocate," she understood my statement to mean that I was in allegiance with the Devil. I requested of the attorney that I have moment with his client and he obliged, not want-

>

ing to waste the day and hopeful that I would be able to clean up the mess that I admittedly created.

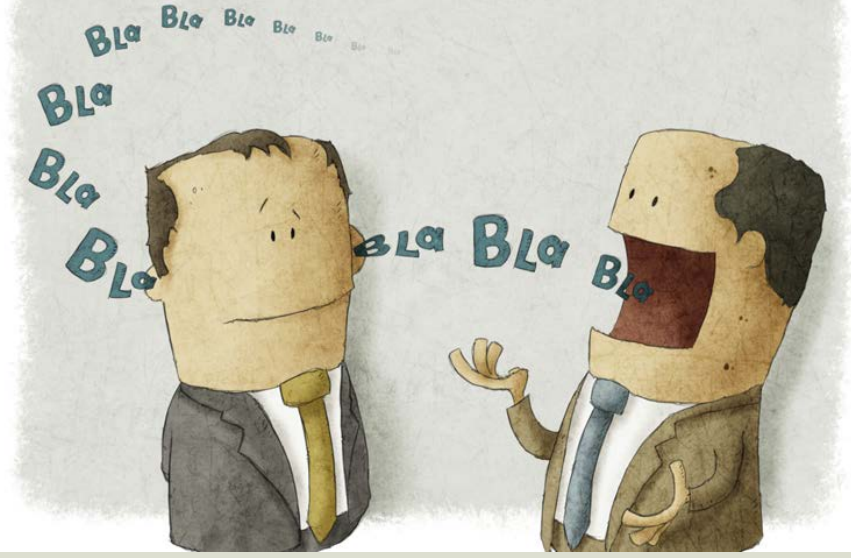
I apologized profusely to her, explaining that I meant no insult by my statement. I explained that I was truly a "God-Fearing" man, and had used an expression that was commonly used to explain when a person is presenting an adverse position (the position of the "other side"), without presenting it as their own statement. I told her that I was certainly not aligned with Satan and admitted my ignorance and carelessness in the use of the term, presuming that everyone would understand it in the same manner. She started to relax a bit, and I asked her to explain for me what her particular religious belief system was about as I was not familiar with it.

I invited her to "teach" me in an effort to cause her to share and communicate with me. I asked more questions of her as a means of understanding, and certainly being careful not to phrase my questions in an interrogating or derogatory manner. Basically, I used my skill and training in the use of questioning to enable and empower her. She reacted to it favorably, thanked me for spending the time to explain myself to her, and we were able to proceed and ultimately settle the case.

The lesson was simple enough but not without cost. It took a good half hour to overcome the issue that I created, which I assured both counsel would go unbilled. It caused me probably as much duress that I did in this woman, perhaps even more. As a mediator we are not supposed to create conflict – we are supposed to help parties resolve it.

The lesson in all of this is not complicated to figure out, and this was more of a reminder to me than a new lesson: **You can't speak plainly enough.** Don't presume that a person will interpret what you are saying exactly as you intended. Even in situations where you have more in common than I did with this woman, don't take that liberty unless invited and even then, do so carefully. In my example above, I would guess that it would have been *permissible* to use the phrase in the event that this woman had herself referred to me as the "Devil's Advocate". I used the word *permissible,* as even though you can get away with it, you probably do not want to.

When and to what extent is it "permissible" to relax a bit? PERHAPS when the party with whom you are having a conversation opens the door to it buy using slang or a term of art, thereby putting it into context. I emphasise PERHAPS, as it is still better by default to remain plain and clear in your speech. Let them stretch the boundaries, but don't necessarily follow yourself.



The lesson in all of this is not complicated to figure out, and this was more of a reminder to me than a new lesson:

You can't speak plainly enough.

Don't presume that a person will interpret what you are saying exactly as you intended.

One must be careful not to slip into the trap of relaxing their speech and ultimately demeaning themselves, or as some refer to it as "lowering themselves" to another's level. Doing so only causes a person to become more emboldened and perhaps even more ingrained in their position. They will begin to think that you are on their side or validating their position as the correct one. Coming back from that and obtaining concessions in a mediation setting may not be impossible, but it will certainly have become more difficult as a result.

This article does not warrant too deep a dive into a discussion of doing research on the background of the parties with whom you are mediating as a means of preparing, but it does warrant a brief discussion of how to initially gauge your speech to ensure that you are communicating properly. My first suggestion would be to look to the nature of the action itself for a guide. If you are mediating a work-related injury on a construction site, you will certainly need to use different speech than you might for a mediation involving a corporate merger gone south, or a professional negligence matter.

Strange as how this is an article on the use of appropriate speech and I feel the need to clarify what I just said! Don't misunderstand or read my last statement to indicate that you should presume that those involved in a workplace injury dispute on a construction site are any less educated, informed

or eloquent than those involved in the corporate merger. The point is perhaps you should *not* approach them differently, at least initially. You may consider initially speaking in terms of "hurt" versus "injured"; "really bad" versus "grievous"; "wrong" versus "incorrectly".

You must also be sensitive to the age of the phrase itself. Remember looking up words in the dictionary and seeing the word "*archaic*" pop up? The same applies to when you are communicating with someone. I am not only referring to age appropriate speech but "times appropriate" speech. Bytes are not always taken as a means of sustenance just as posting to a "wall" does not necessitate the use of glue or nails! Sadly, as time goes on words and phrases adopt new meanings and we must constantly be on guard that we use words and phrases in a manner in which the recipient will clearly understand our intended meaning.

There is also the fact that many words, terms and phrases that will actually drop from use altogether. As a lawyer, we used to be taught legal terms phrased in Latin. I learned early on that my clients didn't know the difference between the phrases "ipse dixit" and "res ipsa locator," so why was I still using them?

This is even more critical in this the digital age. When you actually speak with someone you hear tone, tenor and inflection in their speech. You know when they are happy, sad and agitated. You know clearly when you have angered someone. But how many times have you written an e-mail only to have to make a telephone call to explain yourself? Most communication between people these days takes place across the internet in written form. Sometimes, it does not even consist of complete words or statements LOL!

A great deal of care must also be taken when communicating with foreign born individuals or those who don't speak the same language as you. Plain meaning has to go almost to a rudimentary level to ensure that the translation given or understanding taken is one that even a young person could understand. Similarly, people from one region of the United States may not use the same verbiage as from another area. A great example of this although perhaps a bit simplistic, is the use of the word "soda" for "pop" for "cola" and vice versa. The point being, plain meaning must be used to make certain that all bases are covered!

What we say is not always understood as what we meant to say. Care must be employed to make certain that the people who we mediate with, who we are communicating with, are truly fully engaged in that conversation. Only then will they be able to completely participate on an equal basis in any negotiations taking place, and be able to exercise their independent judgement and decision making processes.

The plain meaning rule goes way beyond legislative interpretation. It goes to the heart of what we as mediators do: ***communicate and foster communication***.

save the date: wednesday, june 24, 2015 (8:45am–Noon)

The State Bar of Arizona ADR Section is sponsoring a morning seminar at this year's State Bar of Arizona Annual Convention. The seminar is entitled, ***Case Law Update, Cutting Edge Concepts & Contemporary Issues in Dispute Resolution.*** The morning session will address two topic areas as outlined below (***see W-2***). Please join our panel of experts for this engaging seminar. 3 CLE Ethics Credit hours are available upon completion.

save the date: wednesday, june 24, 2015 (2:00pm–5:15pm)

The State Bar of Arizona ADR Section is also sponsoring an afternoon seminar at this year's Convention. The seminar entitled, ***Patterns of Communication Within Mediation and Negotiation,*** will offer a presentation from a nationally known expert as well as interactive exercises (***see W-7 below***). Please join us for this highly informative seminar. 3 CLE Ethics Credit hours are available upon completion.

SEMINARS

W-2 — WEDNESDAY MORNING — WEDNESDAY JUNE 24 — 8:45 A.M. – NOON

Case Law Update, Cutting Edge Concepts & Contemporary Issues in Dispute Resolution

PRESIDENT'S AWARD

Curious about how current innovations in neuroscience impact the dispute resolution processes? Interested in current decisions affecting ADR? The program will address two topic areas: (1) current research in neuroscience and ways in which ADR processes are impacted by issues such as Implicit Bias, Reactive Devaluation and Fear Response and (2) discussion and analysis of recent ADR decisions.

Presented by:	Alternative Dispute Resolution Section
Chair:	Steven Guttell, Steven M. Guttell PLC
Committee:	Michele Feeney, Michele M. Feeney LLC Renee Gerstman, Wells & Gerstman PLLC Alona Gottfried, Simmons & Gottfried PLLC Steven Kramer, Law Office of Steven P. Kramer
Faculty:	Hon. Ted B. Borek (Ret.), Pima County Superior Court Dr. Jo Ann Pina, ADA Coordinator, Maricopa County Community College District
Panel:	J. Emery Barker, Mesch Clark and Rothschild PC Thom Cope, Mesch Clark and Rothschild PC Tamra Facciola, HR Solutions Center, Maricopa County Community College District Steven Kramer, Law Office of Steven P. Kramer

3 CLE ETHICS CREDIT HOURS

W-7 — WEDNESDAY AFTERNOON — WEDNESDAY JUNE 24 — 2:00 P.M. – 5:15 P.M.

Patterns of Communication Within Mediation and Negotiation

PRESIDENT'S AWARD

James Dolan MA, LPC is a nationally known psychotherapist who has studied and researched negotiation and conflict resolution from a psychological perspective. The program will consist of presentations and interactive exercises exploring: (a) improvised communication within a structured, managed setting, (b) paradox and re-framing and (c) understanding how culture influences interactions with authority figures and between parties holding greater or lesser power. The program will enhance attendees' understanding of and proficiency in mediation and negotiation, by better understanding psychological and cultural influences in the mediation/negotiation process. Mr. Dolan will address concepts and theories in neuroscience and neuropsychology that can help attorneys better understand and function in conflict resolution settings, and provide practical advice that flows from application of these concepts and theories. He will also address the role of improvisation in mediation and negotiation, and the importance of improvising within the guided context of mediation. Mr. Dolan will discuss specific cultural/ethnic trends, their origins, and the importance of understanding, respecting and working with mediation participants whose perspectives and reactions may be quite different from those of Anglo-Americans.

Presented by:	Alternative Dispute Resolution Section
Chair:	Steven Guttell, Steven M. Guttell PLC
Committee:	Michele Feeney, Michele M. Feeney LLC Renee Gerstman, Wells & Gerstman PLLC Alona Gottfried, Simmons & Gottfried PLLC Steven Kramer, Law Office of Steven P. Kramer
Faculty:	James H. Dolan, MA, LPC, Point Blank Services, Dallas TX

3 CLE ETHICS CREDIT HOURS

2015 State Bar of Arizona Annual Convention

Register online at azbar.org/convention

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL
CASE # 12-345-678-910-JQK

In the Matter of the Arbitration Between:

ABC, LLC, *Claimant*

AND

NOLAWYER4US,LLC, *et al.* , *Respondents*
_____/

PRELIMINARY ORDER # 2*
(Assigned to Arbitrator Kenneth L. Mann, Esq.)

ORDER PROHIBITING *PRO SE* REPRESENTATION FOR RESPONDENTS, STRIKING RESPONDENTS' PLEADINGS, *et al.

As indicated in ¶ 10 of preliminary order # 1, this Arbitrator is neither omniscient nor infallible. I have learned that the Arizona Supreme Court is more restrictive than some other states as to the instances in which it allows persons who are not members of the State Bar of Arizona to represent entities or other third-persons in arbitrations. Neither of the two primary exemptions applies here: (i) if the arbitration is conducted under the auspices of the State Bar Of Arizona Fee Arbitration Committee, or (ii) if the representative in the arbitration, among other things, is: "A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction… ." [1]

Mr. Doe indicated at the preliminary hearing that he was a non-practicing attorney with Illinois. (And Ms. Roe either acknowledged or implied at the hearing that she is not a licensed attorney.) A current status search of the website for the Illinois Supreme Court Attorney Registration and Disciplinary Commission (www.iardc.org) elaborates that although Mr. Doe was admitted in Illinois on January 2, 1968, his current Illinois registration status is "voluntarily

[1] /*See* Arizona Supreme Court Rules 31(a)1,2A,3,B(1),(c),(d)(11),(27). (The supreme court has jurisdiction over the practice of law and the unauthorized practice of law ("UPL"). The practice of law includes representing another in, among other things, an "other formal dispute resolution process such as arbitration and mediation." The exemption for State Bar of Arizona fee arbitration proceedings is granted in Rule 31(d)(11), and the exemption for attorneys admitted in sister states is provided in Rule 31(d)(27) and ER 5.5:"Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.") Rule 42 -- and specifically, ER 5.5(c)(3) thereunder – provides the sister state exemption for ADR proceedings. It states: "(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:…(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission."

retired and not authorized to practice law." A fair reading of the Arizona Supreme Court's exemption language suggests it is written in the present tense, so that "admitted in another … jurisdiction" means *currently authorized* to practice in that jurisdiction, and does not apply to someone who was admitted 45 years ago but is no longer authorized to practice law in that jurisdiction.

Accordingly, based upon: the foregoing; the discussion in *n. 1;* Arizona Supreme Court Rule 31; and ER [Ethics Rule] 5.5(a) of the State Bar of Arizona's Rules of Professional Conduct promulgated under Arizona Supreme Court Rule 42, which reads: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so* [Emphasis added], it is this Arbitrator's conclusion that because neither Mr. Doe nor Ms. Roe is authorized to practice law in this Arizona arbitration, this Arbitrator will be violating ER 5.5(a) by aiding and abetting the unauthorized practice of law if they are permitted to continue to represent the Respondents herein.

THEREFORE, Preliminary Order # 1 should be and is modified and superseded by the following provisions to the extent they are inconsistent with Preliminary Order # 1:

1. Respondents are directed to retain legal counsel to represent them in this proceeding. Said legal counsel shall**, by 4 pm, MST, October 11, 2013**:
   (a) File and serve a notice of appearance herein; and
   (b) Contact claimant's counsel to at least arrange a telephonic meet and confer for a mutually convenient date and time, as elaborated upon below.

2. Respondents' counsel shall be an active member of the State Bar of Arizona in good standing or else otherwise authorized under ER 5.5(c)(3) to represent Respondents in this arbitration proceeding. If "otherwise authorized under ER 5.5(c)(3)," the notice of appearance shall state the basis of the "otherwise" authorization.

3. All of Respondents' pleadings and motions (including all correspondence which might liberally be construed as pleadings or motions) which have been filed by Respondents with AAA to date should be and are hereby stricken, and the AAA's letter of September 23, 2013 to Claimant's counsel requesting a response by September 30, 2013 to Mr. Doe's recent letter for the Respondents should be and is likewise rendered moot.

4. If Respondents choose not to retain counsel to represent them herein -- or if they retain counsel but decide not to file any future pleadings or motions herein [other than a motion for attorneys' fees and costs and the abridged *China Doll* filings by counsel at the conclusion of the final hearing as discussed in Preliminary Order #1] -- Respondents shall nevertheless be deemed to have generally denied all of Claimant's material allegations.

5. In furtherance of the foregoing, in all events, and at the risk of redundancy, whether or not Respondents' counsel, if any, files any pleadings, and even if Respondents fail to timely retain counsel, the burden of proof on liability and damages is on Claimant. Accordingly, even though Respondents shall not have the right to object to testimony or exhibits, cross-examine or present witnesses, etc. if they don't retain counsel, Claimant nevertheless shall be put to its proofs by this Arbitrator for the final hearing, and shall produce its exhibits, witness discovery, and testimony as ordered in Preliminary Order # 1 unless and to the extent hereafter modified by a meet and confer agreement or otherwise.

6. At their telephonic meet and confer, counsel for the parties shall attempt in good faith to determine:

(a) Whether, and if so, which and to what extent the discovery deadlines and final hearing date set forth in preliminary order # 1 should be maintained or extended;:

(b) Whether either or both parties should file amended pleadings and/or motions, and if so, by when;

(c) Three mutually agreeable proposed alternative dates and times for the final hearing if an amended final hearing date is desired;

(d) Any other matters that counsel desire to stipulate upon, if any;

(e) If applicable, as outlined in Preliminary Order #1, any matters upon which a further preliminary hearing is necessary (and three mutually agreeable dates and times for same); and

(f) To the extent practicable, a stipulated proposed order on those matters the parties could agree upon, with blank spaces or alternative box choices for any matters needing final resolution by this Arbitrator.

7. Pending receipt of a notice of appearance from Respondents' counsel and a telephonic meet and confer that reaches contrary agreement, Claimant's counsel should continue to anticipate that the current discovery deadlines and final hearing date will continue to be operative, as it is at least conceivable that counsel for Respondents may forego their own formal pleadings and simply review Claimant's production on exhibits and witnesses and produce their own.

Signed in Scottsdale, Arizona, this 26th day of September, 2013.

By:_____
Kenneth L. Mann, Arbitrator

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from the editor

by Thom Cope

As always this edition could not have been possible without the sterling efforts of section members responding to my call for articles. Thanks to all of you who contributed to the success of this newsletter. Again I encourage everyone with an idea for an article to contact me at any time. Or if you have published somewhere else, we can re-publish it for the benefit of our section members.

Also, there would be not be a newsletter without the assistance of the AZ Bar staff. Thanks to them as well.

I hope you all have a fun and enjoyable summer. Be Well. Thom Cope