The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in thousands of cases in the United States and Canada since 1979. He conducts courses on negotiation behavior that focus on neuroscience and the study of decision making. He is author of “Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner” (George T. Bisel Co. 2006). He is a member of this newsletter’s editorial board, and the CPR Institute’s Panels of Distinguished Neutrals.
The Master Mediator

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statement that what I am about to say is not literal but an expression about what I perceived, perhaps erroneously, to be happening. These conversations are always short and end with grins, some sheepish, some not, as we get back to the business at hand.

MEDIATOR ERROR

The word error comes from the Latin “errare,” which means to wander or to roam. This is apt for mediators since what is important is movement so that the process does not become static or stuck.

Christopher Moore refers to what the mediator does as “moves” in his book, “The Mediation Process” (2nd ed. Jossey-Bass 1996). As mediators we create a hypothesis, theory, or path, and test it with specific questions, statements or engagements between participants. We are flexible and we improvise. Once a technique or tool does not work, effective mediators abandon it and do not fall into the trap of escalating commitment to a failing method.

Mediators must be agnostics in their meta-analysis of what they are doing in this—and the next—moment. Mediators, unlike adjudicators, do not search for truth but seek movement around what the profession’s literature frames as obstacles, barriers, challenges, and impasses.

In my first CPR Institute website column eight years ago (referenced in the previous July/August 2013 column and available here: http://bit.ly/18LXvEO), I noted that mediators are like well-worn carpets where the wear patterns from the repetitious paths are easily observable. People stick with what usually works.

It is common to hear mediators say “I tried that, I was wrong, and I won’t do it again.” The challenge is for mediators to roam and wander without fearing error, while maintaining a confident control of the process.

One trap for speakers or deciders is to get so invested in their decision that this escalates their need to avoid loss. Cognitive psychologists refer to this as the irrational escalation of commitment.

(Not) Knowing The Answers

The issue: The drive to vindication.

The real mediation challenge: ‘Obstacles, barriers, challenges, and impasses.’

Defining success: ‘Mediators are effective when they approach conflicts with deep honesty, empathy, flexibility, and creativity.’

Our ego driving us to be right is tempered by the humility required of the task at hand. This allows what Ken Cloke encourages in his wonderful book “Mediating Dangerously: The Frontiers of Conflict Resolution” (Jossey-Bass 2001), where he advocates risk taking as essential when challenging interests and positions. This approach may attempt to eliminate demonization and victimization by igniting controlled chain reactions without full knowledge of the outcome and fallout.

Mediators are effective when they approach conflicts with deep honesty, empathy, flexibility, and creativity. They may err, but if they are sufficiently grounded and skilled they can correct with the next set of moves.

* * *

Years ago, a colleague explained to me that mediation is not like litigation where you ask only questions with known answers. Unlike litigation, mediation is a forgiving process. Hard falls are cushioned by confidentiality and the lack of permanency of any record of the proceedings.

The caucus model also cushions all blows and provides an arena to explore things in invisible ink. If things do not work, people say no. The mediator then engages in a dialogue to explore what might satisfy the self-determined interests of the participants.

Disputants are rarely in a worse position than when they started the mediation process when the mediator respects the risk of errors but does not fear to act.

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Arbitration

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where the exceeded powers challenge to an award was rejected by the courts. Along the way, this article points out practical considerations that may be useful to parties, advocates, and arbitrators seeking to protect the finality of awards challenged on the exceeded powers ground.

REAL WORLD DIFFICULTY

There are limited statutory grounds on which a court may vacate an arbitration award. Litigators and arbitrators are well aware that the Federal Arbitration Act authorizes vacatur only where (1) “the award was procured by corruption, fraud or undue means;” (2) where “there was evident partiality or corruption in the arbitrators;” (3) where “the arbitrators were guilty of misconduct,” e.g., by refusing to postpone the hearing for good cause shown or by refusing to consider material and pertinent evidence; or (4) where “the arbitrators exceeded their powers, or so imperfectly executed them that a … final and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(available at http://bit.ly/120BmfV). Most state arbitration statutes mirror these statutory vacatur grounds. In addition, courts in some jurisdictions also permit vacatur if the arbitrator’s award exhibits