The Master Mediator

Part II: Being Right, Even When Wrong, Must Not Stop the Neutral's Push to Resolution

BY ROBERT A. CREO

Last month, columnist Bob Creo looked at the behavioral need to prove yourself right, and began discussing how that fundamental drive translates into ADR behavior. This month, he discusses mediation room practices to get to a resolution—and avoid a fight over who was wrong.

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In "An Essay on Criticism," Alexander Pope, wrote:

'Tis with our Judgments, as our Watches, none
Go just alike, yet each believes his own.

This poem, written in 1709, confirms the permanence of the ability of humans to stick with their story despite reasonable doubt.

Orthodoxy comes from the combination of the Greek words for right, or true, and belief. My experience is that when it comes to their case, most litigants are orthodox. If a mediator can transform them to agnostics in a one-day session, that is remarkable.

If disputants leave with a reversal of right and wrong, then the parties have transcended the conflict itself and all participants should be proud to have participated in creating a new reality.

Even in cases rooted deeply in family and business relationships that are mediated in many sessions over time, my experience is that core beliefs do not change and resolution is based upon a change in behavior, expectations, the necessity for closure, or avoidance of uncertainty, risk, and transaction expense.

The phrase "Let it go" does not involve the process of transforming the other disputants and reflects a decision to adjust internal emotions and external behavior to accommodate a resolution.

My approach in mediation to this problem is not to attempt to find facts, conclusions, positions, or interests. These are identified, and often then legitimized by me, with the recurrent explanation that this task is for the judge, jury or arbitrator.

I attempt to be transparent about how I define my task within the parameters of how the parties pursue and establish self-determination. I believe in an opening session. I do not subscribe to the view that the joint session should be eliminated to avoid polarization of the participants.

I am explicit in the orientation and explain that many mediators and advocates avoid joint sessions for these reasons. I explain that the purpose of hearing positions of the other side is not to be converted but to understand the contentions and language of the conflict that may play out in a courtroom—and maybe also gain some insight into the motivations and emotions of the other participants.

I avoid loaded words such as right, wrong, truth, false, justice, and fairness. I speak about being accurate and making correct predictions. My communications emphasize uncertainty and the impact of favor and disappointing outcomes.

One trap is for speakers or deciders 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.

Robert A. Creo

Counsel especially are prone to becoming engaged in games where proving being right or avoiding a perceived loss of credibility, overshadows all else. It is easy to create this type of contest under the guise of principle. It is often difficult to distinguish between the admirable fighting for principle and the irrational escalation of commitment.

It is a fundamental function of the mediator to step between counsel and redirect them to the interests of the clients. Mediators develop a variety of tools to refocus the advocates away from the personal battle.

I may ask them and the clients how important it is to have their legal or strategic positions vindicated in a courtroom. I have taken counsel aside to explore engaging in a series of interpersonal contests, such as arm wrestling, foot races, trivia, spelling bees, or other displays of physical or mental prowess.

I preface these queries with a transparent

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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.

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(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. Mediators may err, but if they are sufficiently grounded and skilled they can correct with the next set of moves.

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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.

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