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NEWS

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Successful Annual Advanced Mediation Training Workshop

The ADR Commission hosted its 8th Annual Advanced Mediation Training Workshop, **"Best Practices in Mediation: Bring It On"** on Wednesday, October 20, 2010, at Lipscomb University. The featured presenters at this year's workshop were all Distinguished Fellows in the International Academy of Mediators and nationally recognized mediators and ADR trainers. The presenters were Tracy Allen, Lee Jay Berman, Eric Galton, and Jeff Kichaven. The workshop was a huge success with over 200 mediators in attendance.

2011 Renewal Information

The **2011 Renewal Forms** were distributed in September via email. If you have not received your 2011 Renewal Form, please contact Catherine Homra at 615-741-2687 or Catherine.Homra@tncourts.gov immediately. The deadline for submission of your 2011 Renewal Form is December 31, 2010.

If you wish to go on inactive status, you must notify the ADR Commission in writing of your intentions.

Recession Advice for Mediators

Practice Development, Business of Mediation and Skill Development Committee Column

Published in the American Bar Association Section on Dispute Resolution's

Just Resolutions

January 2009 Edition

by Lee Jay Berman

While many believe that mediation is a recession-proof business, the truth is that a difficult economy slows every business and practice as people have less money to pay for things. When a mediation practice slows, there are three things that mediators can do to make productive use of increased down time. They can increase their marketing efforts (attend more networking events, update websites, etc.), improve or update the administrative infrastructure of their practices, and they can hone their skills.

Continued training for mediators is critical only to those mediators who want continued success. The marketplace is fickle, and mediators who continue to grow and add new tools to their toolboxes thrive, while those who plateau find their practices ebbing. Users of mediation services - litigators, adjusters, house counsel, executives - become disinterested if they think that they know all of a mediator's tricks. Mediators must stay fresh and grow or be left behind. This is the reason for many mediator panels and organizations requiring minimum continuing mediator education (CME) for their members. But even absent such a requirement, each mediator should have such a goal or requirement for themselves.

Just as lawyers don't know everything about the practice of law after law school and doctors don't know everything about the practice of medicine after medical school, mediators don't know everything about being masterful mediators after a 40-hour course or even after a master's degree.

The start of a new year is a good time for every mediator to take an honest inventory of their strengths and weaknesses. Those who used post-mediation evaluations should revisit them to see what clients are telling them, and the mediations that ended without resolution should be contemplated (see "[Impasse is a Fallacy](#)").

The first question might be, "What do you wish your mediation training had included?" I recently asked this question on the [International Arbitrators and Mediators Listserv](#) and invite readers here to add to the ongoing list.

The second question might be, "If I could add one new tool to my repertoire, what would it be?" And the third question might be, "Who would I like to study with to learn some new tools?"

In founding the new [American Institute of Mediation](#), I spent a lot of time discussing these issues with our other core faculty members (Erica Fox, Ken Cloke, Jim Melamed, Woody Mosten, Doug Noll, and Mel Rubin), and decided that as we were building this new training institute from the ground up, we might rethink how training is done. Mediators may want to look at their own training experience in this way in deciding what metaphorical muscles need building or toning.

Back to fundamentals.

As mediation training has grown in the academic settings, and more private mediators seek out their training there, rather than community mediation programs, the experience has become more like academic instruction than hands-on training. With this shift, the emphasis on core skills such as listening deeply, skillful reframing and maintaining a balance between inquiry and advocacy has been substantially reduced. These skills are a mediator's real secret weapons. Even experienced mediators can get into a rut after a while, focusing on thinking about how to solve a problem on an intellectual level, that dialogue becomes more like debate. A workshop that emphasizes the core fundamentals upon which mediators rely can impact a mediator's practice immediately.

Advanced Skills.

It is often said that we don't know what we don't know. What better way to find out than to take a great advanced skills course? But for really new skills, stretch outside of your box and take a course from someone whose background and style are completely different from yours. Unless, of course, you want to get better at doing what you already know.

Specialization Skills.

When the market is quiet, it is a great time to brush up on an area of law that has not been an emphasis for you to this point. Investigate legal updates in employment law, intellectual property law, family law, real property, lending and land use law, professional malpractice, construction, and any area of law that might be a logical next step. In addition to the substantive knowledge, consider seeking out mediation courses that specialize, in order to learn insights into effective mediation tools in those areas, usually taught by mediators experienced in that niche.

The Business of Mediation.

Nobody likes to market and network. But it still beats accounting, budgeting and projecting any day. When was the last time you had a workshop on building your practice or looked into a tool like the Mediator's Start Kit or Woody Mosten's Mediation Career Guide to help streamline the paperwork and correspondence that a practice requires? A mediation practice is a business and it must be treated as one. The truth is that many mediators today have moved laterally from law, psychology or other fields where business management wasn't necessarily a priority in the degree track. Good business people say that it's not how much you make, but how much you bring home that counts.

Deeper Learning.

If you always wanted to learn more about the psychology of conflict, reading body language, neuro-science of the brain, neuro-linguistic programming, heart-mind coherence, connecting wisdom traditions to conflict resolution or any other deeper learning, this is a great time for that. What makes mediators truly masterful is understanding what is going on behind the curtain for the people at the table. Reading the non-verbal signs that people are offering gives a mediator an insight that cannot be measured. Wouldn't you want to know more about what people are really thinking and feeling?

Work on You.

I have told the professionals who study with me for years that the people at the table are making up their minds about you as you are introducing the process to them. Whether in joint session or private sessions, while you're covering confidentiality and your role as the mediator, they are sizing you up: Is she smart enough? Is he compassionate enough? Is he old enough? Does she like me? Why does he seem so stiff? Can I trust her if I tell her the truth? What a mediator brings into the room with them, from self-confidence, temperament, body language, voice, presence and energy affects what participants think of the mediator, it affects what information the mediator does and does not get to hear, it affects the effort they put into the session, and it affects their optimism about getting a resolution. Most of what a mediator brings into the room is unconscious. Masterful mediators meditate or do something to cleanse themselves before walking into a mediation. Learning more about one's self and working on one's energy and temperament can send a very different tone for the day, and often bring about a completely different path for the day's events.

In the end, the marketplace for mediation is a competitive one. Asking attorneys or clients why they picked a certain mediator over the others, the answers are often mumbled. The primary answer in commercial mediation is because that mediator settled the last case. The nuances listed above are what makes the difference between settling 90% or more as opposed to 75% of the time.

In family law, the answers lean more to the experience and the mediator's temperament. Those answers lie above, too.

Here's wishing you all a very happy new year, with lots of successful resolutions, and hoping you will take the time to carve out some time for you - to grow and develop further and add some tools to that toolbox. As the great UCLA basketball coach John Wooden once said, "It's what you learn after you know it all that counts."

Lee Jay Berman is President of the new American Institute of Mediation based in Los Angeles and author of the Mediator's Starter Kit. He began as a full-time mediator in 1994 and has successfully mediated over 1,300 cases. He is a Fellow in the International Academy of Mediators and a Diplomat with the California Academy of Distinguished Neutrals and The Daily Journal named him one of California's 2008 Top Neutrals. He is Director of the "Mediating the Litigated Case" program at Pepperdine's Straus Institute in Malibu and was national chair of the Training Committee for the ABA's Section on Dispute Resolution from 2003-2007. He has conducted trainings in Delhi, India, Amsterdam and Dubai, and has trained judges from the Kingdom of Jordan and mediators from post-war Croatia. He can be reached at leejay@mediationtools.com.

2011 Regional ABA Representation in Mediation Competition

The University of Tennessee College of Law will be hosting the 2011 Regional ABA Representation in Mediation Competition. While the precise timetable for the event has not yet been finalized, 8-12 teams from law schools all over the Southeast will be competing for 1-2 days at the UT COL over the weekend of March 11-13, 2011. This is a wonderful opportunity for law students to engage in well-designed mediation simulations and to receive valuable feedback on, and to improve, their practice skills.

However, in order to provide this valuable experience, the competition relies upon experienced mediators to serve as mediators/judges for the event. Accordingly, UT's Becky Jacobs would like to enlist Tennessee mediators to participate in these roles to showcase our commitment to the advancement of our profession. UT hopes that you will be a part of the program. For more information, you may reach Professor Jacobs at jacobs@utk.edu.

The Concept of Reciprocity in Mediation

In response to my October 2006 article, "Purchasing Habits of Sophisticated Mediation Services Consumers," I received the following startling e-mail from a prominent Southern California Judge

by Jeff Kichaven

Your article is very well written, but I dispute a point you make. In my 30-year career as a business litigator, I was often asked to recommend mediators. Almost always, attorneys told me they wanted mediators who were aggressive, arm-twisting interventionists. They often specifically said they did not want the sort of mediators who, claiming to value the "process," would not twist arms. I know many [Southern California] attorneys who travel up to the [San Francisco] Bay Area for aggressive mediators in one particular firm because they believe there are few to be found in Southern California. I recall a mediation with that firm where the mediator told my client, a very sophisticated CEO, that he would be an idiot if he did not accept a \$5 million dollar proposal. I cringed. The CEO loved it, and settled. It seems we have surveyed different samples in arriving at our conclusions, but I did enjoy your article

This jurist's comments are serious and deserve serious reflection. Ultimately, the reality he reflects should cause the commercial mediation community to reject two clods of conventional wisdom that have retarded the growth and acceptance of our services by many of our litigation brethren. To satisfy clients, commercial mediators must learn to love—not disdain—"evaluation." To understand both why and how to do that, commercial mediators must also remember to love—and again, not disdain—lawyers.

How I Learned To Stop Worrying and Love "Evaluation"

"Evaluation" in commercial mediation is nothing more than sharing helpful information based on our knowledge, experience, and training. It's common decency! We expect it from all professionals, commercial mediators included.

It's instructive to compare developments in psychotherapy, a field to which mediation is sometimes compared. Remember the stereotype of the monocle-wearing Freudian therapist, sitting near the patient on the couch, never hearing a word? Conventional wisdom at work once again. Now, a more popular approach is typified by Dr. Mark Goulston of Los Angeles, a psychiatrist, partner at the national management consulting firm, Ferrazzi Greenlight, and author of *Get Out of Your Own Way at Work* (Perigee, 2006):

- I will occasionally say to my clients, "What you're attempting to do is stupid, foolish and even idiotic and I will fight you on it rather than have you wake up in a week or a month to realize just how destructive to you it was."
- For some fortunate reason, I am rarely perceived as condescending or judgmental. This has enabled me to be very direct, blunt, and use very foul language to make a point, because it comes off to the client as clearly in their best interest.
- If the intent is to humiliate, ridicule, belittle or excoriate—as, in a mediation, some lawyers might want a mediator to do to retaliate for how their "unreasonable, unrealistic, and completely infantile" clients have treated them—then the words won't even matter. The negative tone, pitch and body language will say it all.

- But if the intent is to let the patient, or client, stay as "Grand Poo-Bah" but still do the right thing in terms of putting this chapter behind him or her, then you can use almost any words you want.
- Over 90 percent of the clients with whom I have used this approach have liked my shows of force in this way and many have even thanked me, admitting they know that they can really get in their own way.

So, the challenge: If psychotherapists can take this activist approach, why can't commercial mediators? Because, let's face facts, it is hard for lawyers to break bad news to their own clients. The lawyer's fears are real: Loss of client confidence and loyalty, reputation for toughness, future business. So, as Dr. Goulston has done, commercial mediators must heed the wisdom of Alexis de Tocqueville in *Democracy in America*: "Men do not receive the truth from their enemies, and their friends scarcely offer it to them; that is why I have spoken it."

Beyond the Platitudes

To be effective, the mediator's evaluative truths must go beyond the paleomediation bromides of the 1980s, "This case will cost a lot to litigate" and "Lots of people have been surprised by losing when they should have won." If these are the mediator's only tools, then as soon as he leaves the room, someone is sure to sneer dismissively, "He says that to everybody." He might as well walk into a bar and ask, "What's your sign?" Mediators need to engage based on the specifics and realities of each particular case. Just as psychotherapy patients expect therapists to be direct, honest and specific, in an appropriate way, so do the clients of the commercial mediator.

But how direct, honest, and specific is it appropriate for a mediator to be? The answer lies in the concept of reciprocity. Just as litigators need honesty from mediators, mediators need honesty from litigators. Mediators need signals from litigators regarding how far to go. A mediator cannot effectively work at cross-purposes from a client's own lawyer. Although few clients understand legal ethics, they do understand, at some inchoate level, that their own lawyer owes them a fiduciary duty of undivided loyalty, and a mediator does not. At some level, the mediator is interested in "the deal." So if a mediator's advice conflicts with a lawyer's advice, the odds are overwhelming that the client will favor her own lawyer over the mediator.

Litigators and mediators need to communicate, before the day of mediation if possible, about the intramural challenges the litigator faces, so that together they can plan the interventions with the client that are most likely to work.

Critically, look at where our judge wants the mediator's evaluative missile fired: At his own client. In this regard, the judge is 100 percent right. With appropriate preparation and coordination between a litigator and a mediator, an emotional, stubborn, or even ideological client can often be nudged from anger into acceptance, and then settlement. But sometimes, clients are not ready to put a situation behind them. It can take some time for the steamship of emotion behind a lawsuit to make a U-turn. Excessive pressure in these cases will only backfire. The art of the mediator, in teamwork with the litigator, is therefore to assess the client's likely reaction to different kinds of influences or pressures, and to be able to change course or even stop if nothing seems to be working that day. That's where appropriate follow-up is key.

By contrast to our Judge's scenario, if one side wants the evaluative assault directed at the other side, it is not likely to work. If your case is really as strong as you think it is, and nobody on the other side "gets it," even after months or years of litigation, there's probably not much a mediator can do. With luck, though, opposing counsel does "get it," and will signal the mediator that help is needed with his client as well.

How I Learned To Stop Worrying and Remember To Love Lawyers

Effective commercial mediators approach their task with malice toward none and charity toward all—even lawyers. Much conventional mediation training takes the condescending view that lawyers just get in the way, and mediators have to eliminate them at best, work around them at worst. More paleomediation cliches.

Every year, about 500 lawyers ride up the elevator to my office. Maybe 2 percent do a poor job. The other 98 percent are well-prepared and are putting their clients' interests ahead of their own. That's my definition of a good job. So I trust them until they prove themselves unworthy of trust, and I am rarely disappointed. Conversations with other commercial mediators lead me to believe that my experience is typical. So when litigators ask me for help with their clients, I am almost always happy to oblige.

Mediators are here to help lawyers and their clients make the best decisions possible under the circumstances. Most will decide to settle, but some will not. When we follow up with those who do not, their emotional states may change and more settlements will follow. For those few risk-takers who, with their eyes wide open, insist on vindicating their Constitutional right to a jury trial, well, it's a free country, right?

In every case, though, the people in the room deserve our best. As mediators, our experience, skills, and training give us knowledge, opinions and—if we are lucky—wisdom, that can help them make better choices. Generally, we need not resort to vulgar obscenities, but on those few occasions when we must do so to get our point across, so be it. Whether our diction is elevated or crass, though, a spirit of charity and loving kindness toward the litigators and their clients requires that we not sit silent.

Jeff Kichaven is "California Lawyer Attorney of the Year - 2006 " in Alternative Dispute Resolution. A premier mediators of litigated cases, Jeff is an Honors Graduate of the Harvard Law School (J.D. Cum Laude 1980) and a Phi Beta Kappa Graduate of the University of California at Berkeley (A.B. Economics, 1977). Jeff has been a full time mediator since 1996 and handles approximately 150 cases per year in a wide variety of civil litigation contexts. Jeff won "Attorney of the Year" honors for his leadership of the mediation profession, as 2005 President of the Southern California Mediation Association and co-author of its groundbreaking Amicus brief in *Rojas v. Superior Court*. In addition, Kichaven is Adjunct Professor at Pepperdine University School of Law and a Fellow of the International Academy of Mediators. He is an Officer of the ABA's Tort, Trial & Insurance Practice Section (TIPS) and has also served on the Governing Council of the ABA's Section of Dispute Resolution. Jeff has also Chaired ADR Committees in three ABA Sections (Business Law, Intellectual Property and TIPS). In 2004, his course, "Advanced Mediation Training for Insurance Coverage Cases," won a "Special Award for Innovative Excellence" from TIPS, and was repeated in 2006. In June, 2006, Jeff will demonstrate his commitment to diversity by moderating a panel on "How to Succeed as a Mediator" for the ABA's Conference for the Minority Lawyer.

Important ADRC Dates

- December 8, 2010**Rule 31 Mediator Applications Deadline for ADRC review on January 25, 2011
- December 31, 2010**Deadline for 2011 renewal forms
- January 25, 2011**ADR Commission Meeting, Administrative Office of the Courts, Nashville

We Would Like to Hear From You!

The Administrative Office of the Courts gladly accepts articles from ADR professionals for publication in the *ADR News*. For more information, please contact Catherine Homra at Catherine.Homra@tncourts.gov.