

Negotiating With Native American Wisdom

By Joe Epstein, Esq. and Susan Epstein, Esq.

Twelve years ago I opted to leave the litigator's path I had been traveling 25 years for a new path as a mediator. That change in direction has resulted in the opportunity to meet and work with people from all walks of life, people who have had an incredible diversity of life experiences. The conflict that has brought them before me has changed their lives in a variety of ways—some profoundly. Deep emotions often infuse these conflicts. Clearly, rational analysis of conflict issues alone is not sufficient to get to the heart and soul of individual or corporate conflict. In order to reach the core of the conflict I have found it necessary to design a mediation process which creates a sense of fairness and connects with people's emotional side. Interestingly, I have found that Native American values and traditions can provide a framework for today's negotiators and mediators.

Several years ago a friend encouraged me to journey with him to visit with a Navajo Medicine Man. Stepping into another world, I found a wise, humble, spiritual man, who is the best listen-

er I have ever "listened" to. I have since spent time with a great story teller from the Jemenez Pueblo. I participated in healing and blessing ceremonies, and in sweat lodges. I have been honored to carry a talking stick made for me by a Lakota Sioux elder. As a result of these warm contacts, I have developed a healthy respect for the insight and wisdom of Native Americans and their traditions. In 2003, I wrote an article, "Native American Wisdom: Lessons Learned for Mediation," (Fall 2003, Vol. 22, No. 1, P 27-31). This article builds on my earlier article, but with a greater depth of experience and appreciation of the values discussed. This article deals with some of the traditions of Native America which I believe go to the soul or core of effective negotiation and mediation.

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Listening and Silence

Listening

"...A good listener really hears what a person is saying and is not thinking of what the reply should be. It takes a great deal of energy to be authentically present and truthfully listening. Such listeners have a quiet mind and a very good memory because they are only hearing the conversation, not talk mixed with other thoughts of their own."

Jamie Sams, *Earth Medicine*, (Harper-Collins 2003), P 143.

A good listener is focused. A good listener who is in the "zone" picks up on key words and phrases and is able, if he wishes to do so, to ask the speaker about each. The question may be about what was meant or may explore the feelings behind what was articulated. A good listener taps into the depth of what was said and the emotions and feelings behind the words. In addition, the good listener hears the sounds of what is left unsaid. The unstated may ring as loudly as a prairie thunderstorm or as softly as a doe's breathe. What a negotiator or a mediator does with these sounds is the magic of the music of negotiation and mediation.

The quiet, calm, patient focus of a good listener requires great energy to be truly present and truly listening. The good listener has peacefulness, serenity, and self-esteem which allow him to have a quiet mind. Intense listening results in a good memory where competing thoughts become like white sound and never overshadow the speaker. A good listener is willing to set aside his ego and be self-effacing, allowing another to take center-stage, while he steps back into the shadows. Thus, the good listener, negotiator, or mediator foregoes his need to respond until later in the day, after trust, rapport, and regard have been established. The very best technique for good listening is silence, which then can be supplemented by reframing, paraphrasing, summarizing and other active listening techniques.

Silence

“If you ask us, ‘What is silence?’ ‘we will answer’ ‘It is the Great Mystery. The holy silence is God’s voice.’ ‘If you ask’ ‘What are the fruits of silence?’ ‘we will answer’ ‘They are self-control, true courage or endurance, patience, dignity, and reverence. Silence is the cornerstone of character.”

Kent Nerburn, editor;
The Wisdom of the Native Americans, (New World Library 1999), P 87.

Silence is the most powerful part of good listening. Silence can be spiritual. The acknowledgment and respect that can flow from silence can create a special connection between partners in conflict, a connection that can have a spiritual feeling and dimension. Some liken this feeling to a mutual flow of energy. Parties, negotiators, and mediators must lay down the arms of conflict in order to be open for this energy flow to occur.

There are two important types of energy that flow from silence. On one side of the coin of silence is the character and strength that flow to the listener,

and on the other side of the coin is the connection that the reverence and spirituality of silence can stimulate.

To my mind, silence is the most potent and respectful tool in the negotiator’s and mediator’s toolbox. It requires patience and courage to allow another to state her case, to share her emotions, and to express her feelings. This quiet display of courtesy and confidence also may reflect acknowledgment and appreciation of another’s perspective. This alone may bring about healing and acceptance and an understanding by the speaker that the world is not always as we wish it to be. Silence goes to the soul and the spirituality of mediation. Silence allows another to have voice and the opportunity to vent, to express anger, resentment, and rage. When another is allowed to express ones emotions and feelings, this often helps build a bridge to conflict resolution. Allowing another to express oneself gives that person the opportunity to find new insight.

Respect

“When we show our respect for other living things, they respond with respect for us.”

Arapaho proverb, Kristen Maree Cleary, Editor, Native American Wisdom, (Barnes and Noble 1996), P 16.

Often when people are in the midst of conflict, they are in a heightened state of arousal experiencing hurt, envy, loss, rage, or anger. A person involved in conflict experiences disappointment, loss of self-respect and self-esteem, distrust, and loss of respect for others.

In this rainstorm of emotions, feelings, and loss, it is difficult to maintain or enhance both self-respect and respect for your partner in conflict. Yet, time after time I have found that parties can build the bridge to resolution when they show another respect. More often than not the show of respect engenders respect in turn. Mutual respect then becomes the foundation of a new bridge of trust.

Listening, silence, and respect, are ingredients that parties, negotiators, and mediators can use to effectively build a partnership in resolution and a bridge of understanding. These ingredients go hand-in-hand with the additional building blocks of truth and trust.

Truth and Trust

Truth

“Treachery darkens the chain of friendship, but truth makes it brighter than ever.”

Conestoga proverb
Kristen Maree Cleary, Editor,
Native American Wisdom
(Barnes and Nobel 1996), P 60.

“It does not require many words to speak the truth.”

Chief Joseph Nez Perce, Kent Nerburn, Editor, The Wisdom of the Native Americans, (New World Library 1999).

“The truth is never black and white... There are usually as many truths as people or situations involved... Every living thing has a sacred point of view and is given the right to express that truth through the way that life is lived.”

Jamie Sams, Earth Medicine
(Harper Collins 1994), P 60.

Books and numerous articles have been written about the ethics of negotiation. In negotiation and mediation, attorneys have guidelines that provide a framework to guide their conduct. That framework is the Code of Professional Conduct and the law on negligent and fraudulent misrepresentation. However, is negotiation poker an amoral “game” with legality the only constraint? Is there a way in our competitive environment to reward truth and good reputation? Can attorneys negotiate and mediate in a way that would allow them to look in the mirror the next day and like the person they see? Does the golden rule rather than the gold rule in our relationship with others? If sharp dealing is the price of winning today, what is the

price you pay in reputation tomorrow? What is the model of behavior attorneys and mediators set for the parties and themselves?

Would it be impossible to go back to the morality of Native Americans and forge friendship with truth rather than trying to build closure of a conflict on the quicksand of treachery? If there is a spark of the Creator in each of us, can we dishonor him in the name of situational morality? Native American tradition would challenge us to take the "red road" or the more challenging and more difficult path of honorable negotiations. Curiously, at mediations it is the party who interrupts, speaks the loudest, and speaks the most often who frequently has the least to say and who is hiding what he'd prefer to stay hidden. As it is said, it doesn't take many words to tell the truth.

People who engage in honest negotiation and mediation with a true interest to find an honestly brokered resolution will acknowledge that truth is not black and white and that each party has a "sacred point of view." Making this simple acknowledgment, parties find a way across the sharp divide of a gorge to the prairie of peace. Experience tells me that the high road also known as the "red road" is easier to travel when the negotiators or parties know each other, when there is an ongoing relationship that the parties wish to maintain, and when there is equality in bargaining power. While the "red road" is obtainable within the context of distributive bargaining, it is a more difficult journey.

Trust

"The more you know the more you will trust and the less you will fear."

Medewin Prayer (Ojibway),
Joseph Bruchec, Editor, Native
Wisdom, (Harper San Francisco
1995), P III.

Often in negotiations, we fear what we do not know. This fear can paralyze negotiations and frustrate conflict resolution. So, rather than keeping cards in the hole, parties should consider playing

more cards open earlier in the negotiation. This facilitates building trust and moving towards early dispute resolution. With a foundation of trust, parties can reach out to touch their fingertips in friendship and then with greater understanding they can build a stronger foundation. Following truthful and open sharing of information, parties connect to come to a mutually satisfying closure.

Circle and Connection

Circle

"We have great meaning in symbols, and the Circle has become the closest representation of the Mystery of Mysteries, for its sacred form symbolizes oneness, wholeness, and totality.... It encompasses all things beginning and movement, closure and completeness, fulfillment and fruition. It is the struggling of the seed, it is the promise within the bud, and it is the beauty of the bloom.

When we become part of a Circle, a sense of connectedness and awareness is created. Experience and memory, present and past, intertwine. It reveals a kind of wisdom, one that results from observation."

Gabriel Horn, *The Book of Ceremonies*, (New World Library 2000), P 26.

The circle that symbolizes and embodies oneness, completeness, fulfillment, and connectedness for Native Americans can be brought into the negotiations and mediation process. In my mediation process, I figuratively bring people into a circle, a talking circle, not a general session. A talking circle (a Native American tradition) engages informal, honest, open, and respectful communication, while general sessions tend to engender formal, closed, and combative communication. A talking circle, often combined with a talking stick, sets a moral tone that demands mutual respect. There is much wisdom that modern society can garner from our Native American brothers and sisters. If we acknowledge that we are all connected, that we are all part of a

circle, maybe we can be more forgiving and understanding. According to the well known Native American writer Jamie Sams:

"Talking Circles are what we use to bring problems out into the open, to find solutions, to share our feelings and experiences, and to honor the Sacred Points of View of every person present. To interrupt a speaker is to bring dishonor on his or her words, to bring dishonor on one's upbringing, one's family, tribe, clan, and action."

Jamie Sams, *Earth Medicine*, (Harper Collins 1994), P 124 .

Thus, talking circles reflect the oneness and connection between people. They encourage dialogue, dignity, and respect. They encourage courtesy and honor. They call on us to travel the high road or the "red road."

Connection

"...the Lakota Holy Man Black Elk said, 'Peace.... comes within the souls of men when they realize their relationship, their oneness, with the Universe and all its powers, and when they realize that at the center of the Universe dwells Wakam Tanka, and this center is really everywhere. It is within each of us.'"

Kurt Kaltreider, Ph.D., *American Indian Prophecies*, (Hay Howe, Inc. 1998), P 130.

Black Elk spoke of peace coming to those who recognize that there is a spark of holiness in each of us. If we recognize that there is a spark of enlightenment within us and a connection between all people, what does this say about our conduct in negotiation and mediation and what does it say about the moral code that we bring to negotiation and mediation? When we recognize that we are all connected, can we justify holding onto hate and revenge? Can we allow ourselves to be victimized, and can we abuse power or act dishonestly? Should attorneys and their clients negotiate taking the "black road" or should they travel the more difficult

“red road.” The answer based upon Native American tradition of honor and respect is clear.

Humility

“One major difference between our people and those of the dominant society today is humility. Among our people, no matter how far or how high a person goes, they know they are small in the presence of God and universe.”

Lincoln Tritt (Gwickin Athebascan), 1988 cited by Joseph Bruchal, Editor, *Native Wisdom*, (Harper San Francisco 1995), P 86.

People can take over a negotiation and a mediation by not taking over, by stepping back, and allowing another to step forward. This selfless act of humility allows others to take center stage and to exercise autonomy in relation to the important decisions that need to be made to resolve their conflict. When I step back at mediations and allow the parties this power to step forward, it often leads to the parties supplying me with the answers to their own questions. Unbeknownst to the speakers, often they supply me with the clues and the keys to bring their conflict to closure. By taking center stage, a party in conflict can convince themselves of the steps necessary to resolve their dispute. Often mediators can succeed with humility while overtly taking control of a mediation. Thus, often the most successful negotiators say very little as they remember that they have two ears but only one mouth. Humility and subtleness is more difficult to sustain, but they can be more rewarding in the end.

Fear and Courage

“...To banish fear you must know your path and trust yourself – and the work around you. With trust comes confidence. Self-confidence banishes fear.”

Red Road Ethics, Terry Jean, Editor, *365 Days of Walking the Red Road*, (Adams Media Corp. 2003).

“One has to face fear or forever run from it.”

Hawk, Crow, cited by Terri Jean, Editor, *365 Days of Walking the Red Road*, (Adams Media Corp. 2003), April 21st.

Fear is a core emotion that results in the related feeling of anxiety. Both can be disabling. Both can cause a party to freeze up and avoid conflict. Fear and anxiety can make parties feel that they have no choice but to fight. In still other individuals, fear and anxiety can lead to capitulation or surrender. Fear and anxiety associated with confrontation and conflict can have physical and psychological impacts such as clamminess, heart palpitations, increased blood pressure, and a rapid heart rate. A person’s thought process, when fearful and anxious, can be frozen, with people feeling like a deer caught in the headlights. Attorneys, adjusters, risk managers, executives, businessmen, and claimants can all share this unsettling experience of fear.

The risk of loss must be faced rationally. Risk analysis is a necessary part of conflict resolution. Careful and concrete analysis allows a party to plan his settlement strategy: when to faint, when to bluff, when to press, when to retreat, and when to sue for peace. Risk analysis before negotiation and mediation reduces fear and anxiety because parties have a better understanding of the process and more realistic expectations. Since fear and anxiety can be anticipated, planning should lead to better preparation. Better preparation leads to a greater sense of control and to great self-confidence. Both help reduce disabling fear and anxiety.

Even with careful preparation, there are times when the facts of conflict put one party at a disadvantage. If the dominant party refuses to build a bridge for a face saving retreat, an underdog may have no choice but to fight. To paraphrase Crazy Horse: “It just may be a good day to fight and a good day to die.” And, on such occasions, the under-

dog who meets the challenge with courage may just win the battle.

The real challenge may be in finding a way to resolve a conflict without engaging in a battle that leaves one party the conqueror and the other party the vanquished. Sometimes the hardest trick is to grab a satisfactory settlement when defeat in the courtroom is likely. Parties must find the courage to face their fear of conflict or they will forever run from it.

Knowledge and Wisdom

“...Once again, Grandson, knowledge is of the mind and wisdom of the heart. And wisdom is emotional, it becomes part of our lived experience, and that is its power. We can and we will use it to make changes in our lives and in the world.”

Kurt Kaltreider, Ph.D., *American Indian Prophecies*, (Hay Howe, Inc. 1998), P 185.

This Kurt Kaltreider quotation goes to the heart of the understanding that we need to be effective in negotiation and mediation. Knowledge is important for the rational analysis of conflict issues, and the law provides the structure for the rational analysis of rights in litigation. Knowledge, however, is not enough. Wisdom is needed, too. Wisdom is knowledge leavened with heart. Wisdom is knowledge mixed with soul and spirituality. Wisdom encompasses the emotions and the feelings that are part of conflict. Wisdom applied to conflict enables us to change lives in a positive way. Sometimes the competitive arousal engendered by conflict can cause negotiators and parties to focus on knowledge, rather than wisdom. The beauty of mediation allows a neutral to lead parties to the higher level of wisdom. Let me put this analysis another way. A knowledgeable negotiator may carefully and correctly craft pertinent legal analysis. This analysis, however, does not make him a dealmaker. Knowledgeable analysis often leaves negotiators short of the mark because they do not address the emotional components

of conflict. This requires the added ingredient of wisdom. Man is not thought alone. Man is both thought and emotion, and wisdom taps into the emotional aspect of conflict.

Reconciliation

“...If there is discord among your people, intercede. Take your sacred pipe and walk into the midst. Die if necessary in your attempt to bring about reconciliation.”

Kurt Kaltreider, Ph.D., American Indian Prophecies, (Hay Howe, Inc. 1998), P 153.

While rage and revenge may be feelings that permeate conflict, it is powerful when negotiators and mediators can move clients towards reconciliation. In some instances, this aspiration may be beyond our grasp. But, if we, like Native Americans, have a metaphorical calling to carry the sacred ceremonial pipe that tradition says was offered by the White Buffalo Woman to the Lakota Sioux, we can walk into the midst of conflict with the courage to engage people who are in turmoil. Being in the midst of conflict is not easy; it takes insight, instinct, intellect, connection, persuasiveness, courage, heart, soul, and spirituality to help parties lay down the arms of conflict and join hands in reconciliation. It also takes calmness, centeredness, patience, and focus that some call mindfulness. I see it as a special awareness of others that allows us to connect with others in a unique way. This willingness to connect can permit the pre-existing poison to dissipate and allow a bridge of appreciation and understanding to evolve.

Spirituality

“...there’s another aspect of living this life, and that’s the path Native American people call the “red road” – the road that leads to life, the road of spirituality, the spirit road. How do we become spiritual? By having an experience of oneness with the Great Being. We can’t understand it and we

don’t try to analyze it – it’s a feeling in our heart and soul that inspires us.”

Bear Heart, *The Wind is My Mother*, (Berkley Books 1996), P 182

Bear Heart speaks of the “red road,” the spirit road, as opposed to the easy way of the black road. The red road is the more difficult road. It is more challenging. It is the road that calls us to take on the more difficult journey of the higher road of honesty, integrity, and morality. It calls out for the best in us. In conflict, it is the difficult challenge to see a friend in a foe, to move from partisan perception to openness, and to move from opposition to appreciation. Taking the “red road” means applying spirit and soul to the hostile environment of conflict, as it is the place that peace can be forged. Some modern writers call this heartfelt mediation, others call it transformative mediation, and still others call it peacemaking. Let us today call it taking the challenge of the “red road.”

Conclusion

We can negotiate in the typical fashion. In negotiation and mediation clients may expect the typical distributive poker-playing approach to negotiation and mediation. There is nothing wrong with an approach that extols winning, promoting one’s perspective, and winning with zealous advocacy. It can be done with out deceit and deception. Taking the “red road” does not mean abandoning one’s perspective or goals. But, taking the less traveled road, the more challenging and inspiring “red road,” allows us to reach for the core of the soul and spirituality of mediation. Taking the “red road” requires one to really listen to another. It requires a desire to be respectful. It means building or rebuilding a relationship based on truth and trust. It means having the courage to engage conflict in a positive way that addresses both the rational and the emotional aspects of conflict. It means approaching conflict resolution with wisdom, a sense of reconciliation, and a sense of spirituality and soul.

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