



## Reflections VII

By Joe Epstein, Esq. & Susan Epstein, Esq.

### Introduction

This is the last in our series of articles about reflections on mediation. In our articles, we have tried to address points that are both on and off the beaten path of conflict resolution. With the use of a wide variety of sources, we have covered topics that occur to us as being important in our work as pragmatic but thoughtful mediators. It is our hope that “partners in conflict” and their able advocates will find our reflections helpful in their pursuit of conflict resolution. Conflict may be healthy, but closure is even healthier. We appreciate you having joined us in this multi-series of reflection about the ins and outs of mediation and hope it was as helpful you as it was fun for us. This last segment of our series ranges from ritual to trust with stops along the way to dissect the art of conflict resolution.

### I. Role of Ritual in Mediation

Ritual calls us into alignment with purpose and meaning. It takes us out of the rush of the ordinary into a place of contemplation. It moves people away from the prepared, rehearsed or well-worn story and creates space for something new to emerge. It enables people to speak more from their core or from their hearts because the ritual context ensures what is about to occur with importance.<sup>1</sup>

This quotation from Lois Gold’s essay has a tone of meditation about it. In meditation, we gather ourselves and become

centered and calm as we approach our core. We slow down and create space for thinking and feeling. We can bring the centering and focusing aspects of meditation to the mediation process by our demeanor and by the nature of the process, we apply. The rituals we use as mediators set a tone for the mediation. If the mediator’s ritual is to have a “cup of coffee” with each participant, he can create a calming rhythm and pace. The mediator can pull the poison and the pain from the conflict and allow the parties to tell stories to be told and appreciated. For example, the wise mediator first listens and then listens some more. Then armed with another’s story the mediator becomes a storyteller as well. The sage mediator uses stories that reflect that he has listened and understood what he has heard. Respectful listening and calmness are aspects of mediation that ritual can help establish. As stories have an ending, so do rituals. So “ritual” can also set an expectation of closure or resolution - a key goal of mediation.

### II. Self-Actualization

...When we rely on others’ praises to feel worthwhile, we go up and down emotionally, depending on what others say. We become extremely vulnerable and are easily influenced because we don’t know clearly what we believe, or even if we do know, we lack the confidence to express it.<sup>2</sup>

Mediators need to be self-actualizing. That is, they need to be confident and appreciate the fact that theirs is often a role of pleasing everyone or no one and they have to be willing to do either or both during mediation. If they are not self-actualizing they will bow to the manipulation of others and move like a pinball in a pinball machine. Self-actualizing means knowing yourself, having the self-confidence to listen to what others are saying, recognize what you are feeling, and playing the role of a devil's advocate. Self-actualization in the context of mediation involves seeing the path to resolution and confidently assisting others along that path.

Space, purpose and calmness, the hallmarks of self-actualization, enable mediators to keep the rudder steady as he navigates the ship of settlement through the violent waves of conflict to the safe harbor of resolution. The key to doing so is the ability to stay steady within oneself.

### III. Use of Silence in Mediation

In stillness, the mind becomes clear. Silence can access higher mind rather than reactive mind.<sup>3</sup>

Many faith traditions have silence retreats to train people to look within and to reach heighten sensitivity. Silence allows you to listen another way. Put differently, it allows you to see around the corner and through other barriers. It is this silence that allows you to hear what is unspoken, to sense the fear, grief, and anger that lurks in another. Wise men can become sages when their silence allows others to find their own way or answer. One's silence allows for another's airing of their emotions. The expression of these emotions will

sometimes dissipate their energy, other times it allows others to appreciate their intensity.

One of our authors has written the following meditation that he has found helpful in calming himself and others in the midst the swirl of conflict and emotions during mediation.

#### *Silence*

*In the Silence, I can hear the snowflake fall.*

*In the Silence, I can hear the ripple of the brook.*

*In the Silence, I can hear the butterfly.*

*In the Silence, I can hear my heartbeat.*

*In the Silence, I can hear my Loved One's voice.*

*In the Silence, I can hear God's whisper.*

*In the Silence, I can feel my oneness with God.<sup>4</sup>*

Listening to the stated and unstated emotions of others is the first step towards dealing with conflict. Silence is the foundation for connection and the establishment of trust, which are two building blocks for effective conflict resolution.

### IV. The Role of Spirituality in Mediation

There have been times, during the course of a mediation or facilitation, when I have had the impression that something more important than the agreement is emerging, that the conflict is itself just a vehicle for the creation of something sacred, something whole, something holy.<sup>5</sup>

One of our authors has participated in a mediation involving the death of a

clan elder. During our mediation, each child had an opportunity to hold a powerful Native American totem called a Talking Stick. With a sense of reverence, respect and humor as each told a story about his or her relationship with the deceased. It led one child to share the clan story of creation in the context of their "wrongful death" action. This process allowed the parties to "let go" in a "traditional" manner and move toward resolution. For some who participated there was both a spiritual and transforming experience.

### V. The Role of Tone in Mediation

It has since occurred to me...that even the most prosaic conflicts have a subtle musical quality about them. In the first place, there is the explicit music of the parties, reflecting in their contrasting tempos, pitches, inflections, timbers and tone of voice...second, there is the mediator's calming, measured, propitiating, yet hopeful tone...third, there is a emotional attunement of the listener to the music that transmits, more accurately than word, the emotional experience of the storyteller...<sup>6</sup>

The tone of mediation is often set by counsel or by the mediator. This tone may cover power, respect, understanding, competitiveness, hostility, openness and more. Parties need to be mindful of the tone they create, as there is an important message that the tone sets. Parties need to "listen" for the tone that others are creating as well as the tone they themselves are creating. In mediation, no one can afford to be tone deaf, while the mediator should set a positive tone as part of his or her ritual of mediation.

Counsel, who respect each other, may set the tone in how they approach each other and the underlying conflict. How the parties distinguish between the conflict problem and each other may be telling in this music of mediation. The tone may change during the course of mediation and experienced mediators and negotiators are fast to pick up on the changes. Breaks, rearranging of the ensemble, humor, and other tone sensitive techniques can make or break a mediation. The mediator can serve as a conductor of the music, tone and rhythm of the mediation process.

## VI. Self-Awareness and Self-Disclosure

You've got to be moving toward the heart of the matter, got to burn people's souls. You've got to get inside of people. That is where it all is. And you can't get inside of them unless you open yourself up to get inside of. Follow what I'm saying? The key to other people's hearts is finding the key to yours. You've got to receive, got to open up yourself to get inside somebody else.<sup>7</sup>

This powerful quotation, from the streetwise and flamboyant Jesse Jackson, tells it like it is; but often mediators are afraid to listen to this powerful message. As mediators, we read about personal sagas and encourage participants to share their feelings and emotions. In this context, should we be afraid to share a bit of our own life experiences with them? Now, we are not speaking of the mediator who spends the day telling others how great he or she is and all that he or she has done. We are speaking of knowing when it is appropriate to share a like

experience. Again, we do not mean sharing, as one defense attorney did in a severe birth injury case, his experience of raising a child with a minor learning disability. His "sharing" rang false and sounded condescending. Rather, we are speaking about a participant who has actually experienced a very similar loss being willing to share that experience. With appropriate self-disclosure, it is possible to walk together, to connect with an empathy and compassion. Taking off the mask of controlled professionalism by sharing personal experience the mediator allows a special flow of connection and the establishment of trust. This can only occur with an authentic and genuine sharing of a unique bond of fellowship.

## VII. The Value of Transformative Mediation

...transformative mediators concentrate on empowering parties to define issues and decide settlement terms for themselves and on helping parties to better understand one another's perspectives... transformative mediators help parties recognize and exploit the opportunities for balancing strength of self and connection to others.<sup>8</sup>

Too often mediators lapse into their former authoritarian roles of successful trial attorneys and experienced judges. Doing so usurps the power of the participants and disenfranchises them. To the extent possible mediators should inform and coach, listen and consider,

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and work with subtlety. They should be a Socratic guide, a Devil's Advocate and a sage storyteller. They should model positive soul-traits such as humility, patience, understanding, compassion and loving-kindness. This is the power of transformative mediation.

Parties do best when they have the autonomy to make their own way in the resolution of their conflict. Parties like have a sense of control. That sense from having choices along the path to resolution is a powerful expression of transformation that many mediators miss. For example, this may mean involving parties in the negotiation strategy. Frequently, we will give folks a menu of negotiation options for them to select from during the course of the settlement process. Such respect and opportunity allows parties to grow and to continue their journey with a sense of justice, fairness and control. This empowerment and acknowledgment enhances their self-esteem and creates new opportunities for growth and healing. The growth and healing come in being engaged in writing the end of one life chapter and writing the opening of another chapter. These are examples of the building blocks of transformation that mediators can make available.

### VIII. The Power of Storytelling in Mediation

I'll tell you a story. Come close to the fireplace and listen. I'll tell you a story. As the cold night gathers outside, the story will cozy and change us at once.

What follows this opening? A universal act – an instinctive choice to weave words together, inviting listeners into a circle. It is an act both ordinary and

powerful. The telling reveals meaning and makes meaning at once. It is an invitation to connection, mystery and learning.<sup>9</sup>

We all have stories to tell in the midst of mediations. We should tell them in their time, as their expression is critical in the cause of conflict resolution. They should be shared and the tapestry of the tale used in a way that informs others. Storytelling conveys the tale of one's take on the life changing conflict in a manner in which others can hear it and witness the tapestry tale.

Once, a child - the first in her family to attend college and the best adult English speaker of her family - told the story of her father's change from coach, guide and determined wage earner to diaper wearing, disabled workshop attending and brain injured incapacitated adult. Without a dry eye, everyone re-adjusted his or her attitudes and case values at mediation.

What is even more important than telling your story is excelling in listening to another's story. First and foremost, if you listen, others will respect you and listen to you in turn. You will learn more from your listening than you will from your telling. The act of listening to another's tale enables you to appreciate what is important to someone else and gives you the insight needed to find the keys to persuasion and to resolution.

Note that you cannot be heard unless you have borne witness to another. Gifted storytellers speak in a "language" that their audience understands and appreciates. Stories that use parable, metaphors, fill-in-the-blanks, detail and emotional energy are the most effective in creating a connection and understanding.

### IX. The Power of Stereotypes in Mediation

We organize images and theories that help us interpret events and behavior...this leads us to see what we expect to see and to interpret what we see according to our assumptions and understanding...but we may also ignore new ideas and behave in ways that damage our ability to work with others...our tendency to prejudge can damage or preclude a working relationship...<sup>10</sup>

Thinking with stereotypes is like writing in shorthand, it is like thinking in headline news. At times headline news is all the news you need but in the midst of conflict, such a quick and facile read is often misleading and can be dysfunctional. Detail and discernment are lost in the mad dash for a speedy solution. In mediation, one side or another too often deprecates the other. We depersonalize and generalize without specific evidence. We jump to conclusions often on biased past experience reinforced by like-minded cohorts who reinforce our negative impressions. This rush to first impressions based on limited specific information can be pernicious. First impressions are generally lasting and overconfident impressions. Notwithstanding contradictory subsequent evidence, this unfortunate filter of contrary information paralyzes our thinking, blocking consideration of new information. Participants in mediation need to be on guard for the often ill-informed and too casual use of negative stereotypes. The key is to check your stereotype hat in a "hatcheck" and put aside partisan perceptions and prejudices. Effective dispute resolution requires consciously tearing down

stereotyping which too often unwittingly creates barriers to conflict resolution.

### X. Trust Is a Crucial Element in Mediation

Trust indicates a willingness to become vulnerable to another based on confident, positive expectations of the other's conduct. It has often been phrased as the 'glue' that holds relationships together and enables individuals to perform more efficiently and effectively...trust is critical to negotiation...<sup>11</sup>

Trust is an essential building block to conflict resolution. It is the foundation for the credibility that accompanies mediators and parties alike at the mediation table. If a mediator or a partisan

(advocate or party) wants others to accept what they are saying, first they must create a foundation of trust. Trust builds positive expectations and reasoned reliance, while distrust creates fear and negative expectations.

Establish trust by being open, respectful, acknowledging of weakness and being fair and being candid in the course of the dispute resolution dialogue. Your word is your bond. Calmness, balance and thoughtfulness help evoke trust and reliance.

### Conclusion

Through our multi-part series of reflections and observations ranging from accountability to trust, we have tried to create a negotiator's toolbox to

help lawyers, adjusters, risk managers, and others involved in the mediation process. Our goal has been to provide you with the tools you need to be persuasive and effective in building a bridge to conflict resolution. We are hopeful that you will come to your next mediation armed with a well-equipped toolbox that helps you build your next successful mediation. ▲▲▲  
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#### Endnotes

- <sup>1</sup> Lois Gold, *Mediation and the Culture of Healing* in BRINGING PEACE INTO THE ROOM 202-203 (Daniel Bowling & Daniel Hoffman eds., 2003).
- <sup>2</sup> THUBTEN CHODRON, TAMING THE MIND 100 (2004).
- <sup>3</sup> Gold, *supra* n. 1.
- <sup>4</sup> Joe Epstein, *Silence*, TRIAL TALK, Aug/Sept 2012 at 32.
- <sup>5</sup> Sara Cobb, *Creating Sacred Space* in BRINGING PEACE INTO THE ROOM 215 (Daniel Bowling & Daniel Hoffman eds., 2003).

<sup>6</sup> KENNETH CLOKE, J.D., LL.M., PH.D., THE CROSSROADS OF CONFLICT 198-199 (2006).

<sup>7</sup> KENNETH CLOKE, J.D., LL.M., PH.D., MEDIATING DANGEROUSLY 25 (2001) (quoting Jesse Jackson).

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<sup>9</sup> MICHELLE LEBARON, BRIDGING TROUBLED WATERS 218 (2002).

<sup>10</sup> ROGER FISHER & SCOTT BROWN, GETTING TOGETHER 154-155 (1989).

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