You Never Can Tell

by Jerome F. Weiss

George Bernard Shaw never ceases to amaze me with his observations—especially his psychological insight and perception of mankind. He is right up there with Dickens and Shakespeare with respect to conflict analysis and disputative dialogue. His play, "You Never Can Tell," does not disappoint in this regard, even though Shaw intended to write a comedy that would be more popular than profound. However, Shaw was Shaw and he could not resist his own acute insight.

It is a story about a divorcee, Mrs. Clandon, who returns with her three children to England after spending several years abroad; all of them are estranged from her husband and their father, a man named Crampton. Typical of many of Shaw's characters, Mrs. Clandon is progressive. She is an "advanced woman, accustomed to defying public opinion and with no regard for what the world might say of [her]." She has written and published numerous "how to" pamphlets and books and is extremely liberated and free-thinking for her Victorian times and culture. In Act III, Mr. McComas, her solicitor, urges her to reintroduce and reconcile the family with her estranged husband. She wants nothing to do with her ex, deploring his false propriety and convention.

The solicitor nevertheless encourages her to at least attempt civil contact and end the years of estrangement. In so doing he speaks to her in terms that appeal to my mediator's mind, since he touches upon some key elements that I use in my ADR practice to help parties get through and past some of the personal and usually irrelevant issues that may be preventing them from addressing the tougher ones, if they indeed actually exist beyond the personal clutter. In imploring Mrs. Clandon, McComas tells her:

"But was it altogether his fault? . . . Let me make one last appeal. Mrs. Clandon, believe me, there are men who have a good deal of feeling, and kind feeling, too, which they are not able to express. What you miss in Crampton is that mere veneer of civilization, the art of shewing worthless attentions and paying insincere compliments in a kindly, charming way. If you lived in London, where the whole system is one of false good-fellowship, and you may know a man for twenty years without finding out that he hates you like poison, you would soon have your eyes opened. There we do unkind things in a kind way: we say bitter things in a sweet voice; we always give our friends chloroform when we tear them to pieces. But think of the other side of it! Think of the people who do kind things in an unkind way – people whose touch hurts, whose voices jar, whose tempers play them false, who wound and worry the people they love in the very act of trying to conciliate them, and yet who need affection as much as the rest of us. Crampton has an abominable temper, I admit. He has no manner, no tact, no grace. He'll never be able to gain anyone's affection unless they will take his desire for it on trust....."

There are two important negotiation and mediation messages here. First, don't get hung up on personal baggage, who is presenting an idea or how it's presented; and second, it's not necessarily only what you say, but also how you say it. This applies to everyone at the table: the disputants, their representatives, and even the mediator.

In dispute resolution and negotiation we often yearn to see a level of personality and expression from opposing parties and their representatives that is usually absent. We seek, even sometimes presume, kinship in terms of personality, values and approach even with our adversaries, and have difficulty understanding when it is not automatically present. When finding no similarity or commonality on a surface level with our opponents—perhaps seeing only dissimilarity—we are hard-pressed to then explore the merits of the dispute. In fact, we oftentimes use these personal and perceptual differences to fuel our substantive differences, and in turn, the controversy. Our personal standards and preferences are ours; understanding that not everybody is going to embrace and manifest those standards is essential if we want to get to the core of the dispute needing resolution. You can't judge a book by its cover and, as problems solvers, we have an obligation to get beyond the cover and into the text.

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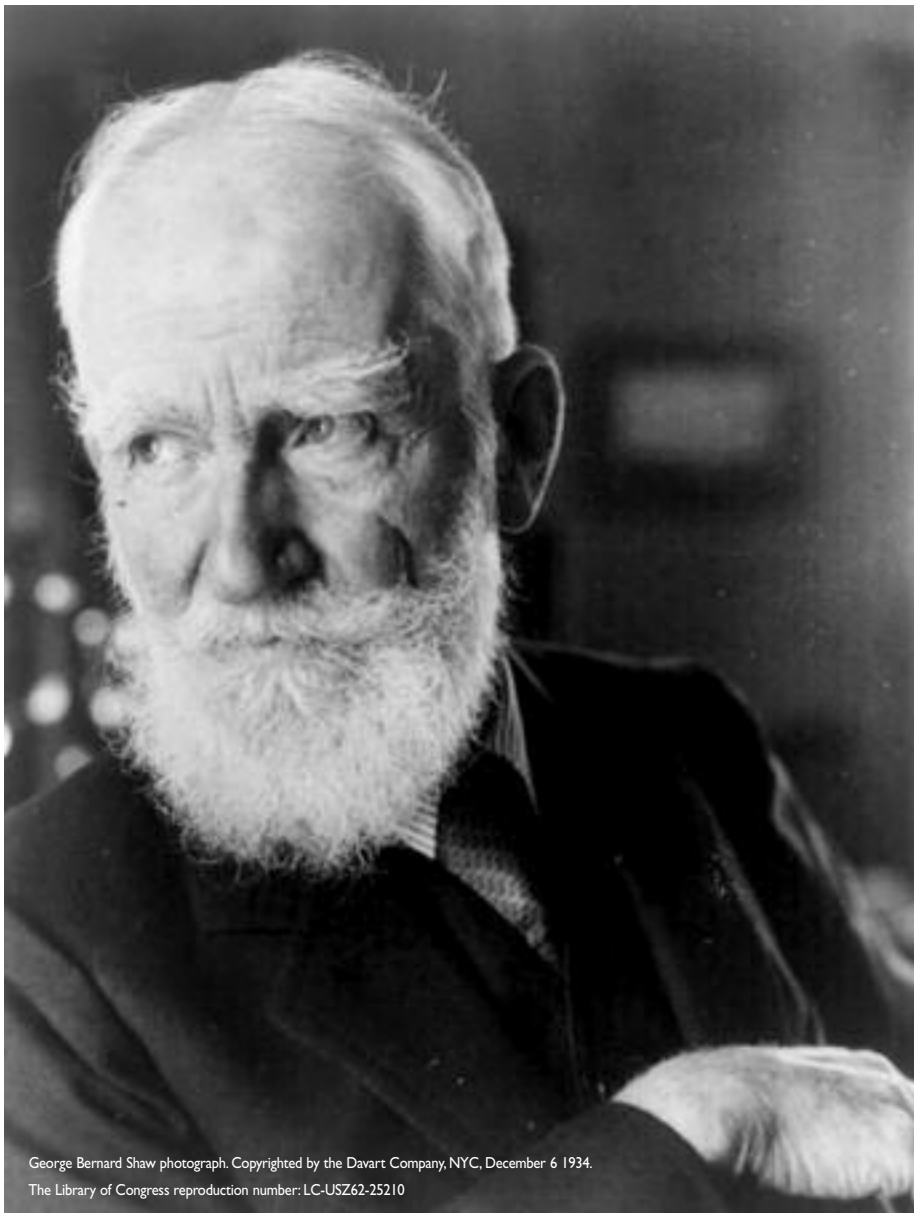
As a neutral I relate to Shaw's words. I am constantly reminding mediation disputants that conduct they're experiencing does not necessarily convey what is intended. It is the job of the neutral/mediator to assist the parties in revealing what may be the hidden or less obvious meanings, or the more subtle renderings of what is going on with the other side. Fisher and Ury, in their seminal work resulting in "Getting to Yes, Negotiating Agreement Without Giving In" (Boston: Houghton Mifflin, 1981), understood that physical, cultural and personality distinctions and behavior oftentimes hinder negotiated resolution—some behaviors and characteristics can be so dissonant from what we are personally conditioned to that we can't get past them. It is part of the neutral's job to help surmount such issues so that the parties can see those factors (more) relevant to the dispute at hand.

As usual, Fisher and Ury hit it on the head: "A basic fact about negotiation [and]... easy to forget... is

People are always blaming their circumstances for what they are. I don't believe in circumstances. The people who get on in this world are the people who get up and look for the circumstances they want, and, if they can't find them, make them.

- George Bernard Shaw



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that you are not dealing with abstract representatives of the 'other side,' but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. So are you." Remember, first and foremost, negotiators and disputant representatives are people.

Reaction to a stated position in a negotiation or mediation does not exist in a clinically pristine environment. The points and counterpoints of any negotiation are built upon an architecture that includes personality and perception as part of its framework. This applies to both sides of the equation. We not only have to be aware of this factor in our opponents; we must also be vigilant with ourselves. We need to ask certain key questions in any dispute when we find ourselves reacting counter-productively to a personality or individual characteristics.

What can we do to separate the negative effect of "people differences" from the substance of the dispute? Here are two suggestions, each of which would merit an article by itself. First, one needs to understand that most personality differences are not absolute roadblocks to resolution. We need to get beyond them, even if it entails a slight detour. Furthermore, these differences are rarely, if ever, personally aimed at us, existing instead for a multitude of other reasons. Once we understand these two points, we can employ certain techniques to overcome the problems described above. Using such things as open discussion—yes, diplomatically discussing what we think may be obstructing the negotiation—isn't a bad thing. To some of us, it may seem a little bit touchy-feely, but if an issue is indeed getting in the way, why not talk about it? Many times we react to what we perceive the other side is thinking or doing, which in a conflict may often be the worst kinds of things we can imagine. Why not respond with the best of what might be imagined and point it out to the other side? For example, if you think the other side is expecting us to continue to scorch the Earth and batter them, let them know you don't think the negotiation and mediation is the time to be doing that; point out that you are really there to assess any commonalities you can mutually build upon by speaking with, instead of at, each other.

We also should not react to emotion, even though it's hard not to. It takes a lot of discipline to prevent both sides from reacting emotionally, but integration of this point into our personal repertoire is essential. Parties walk out of mediations over the strangest things, which in my experience usually have nothing to do with the substance of the dispute. We litigators like to win and can be awfully stubborn about that point alone. We need to look at the "stubbornness factor" to determine if it has surpassed the substance and merits of the case and become a driving force of the negotiation.

Communicate, communicate, communicate and, by all means, show them you are listening. This also

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The Cleveland Bar Association Receives Harrison Tweed Award

Don Saunders *(right)*, director of Civil Legal Services for the National Legal Aid and Defender Association, presented the Harrison Tweed Award to Past CBA President David A. Kutik *(left)* at the ABA Annual Meeting in Chicago in August.

The Cleveland Bar Association received the prestigious Harrison Tweed Award for its pro bono initiative, Our Commitment to Our Community, at the American Bar Association Annual Meeting in Chicago.

The Harrison Tweed Award was created in 1956 to recognize the extraordinary achievements of state and local bar associations that develop or significantly expand projects or programs to increase access to civil legal services for poor persons or criminal defense services for indigents. The award, given annually by the ABA Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association, is presented during the ABA Annual Meeting at a joint luncheon of the National Conference of Bar Presidents, National Association of Bar Executives and National Conference of Bar Foundations.

The Cleveland Bar Association was honored for its initiatives to increase pro bono participation and improve the delivery and coordination of pro bono legal services. The CBA launched a three-prong, interrelated campaign that has been highly successful and has created much excitement and energy within the legal community.

"Our Commitment to Our Community" (OCTOC) is a pledge campaign established to increase pro bono service among Cleveland's law firms, law departments and individual lawyers. Each participant makes a commitment to provide a specific project with a specific number of hours of pro bono or community service, as well as to track and report their hours of service. In addition, law firms agree to follow "core principles," which include creating a pro bono budget, providing billable hour credit for pro bono activities and encouraging lawyers at all seniority levels and practice areas to participate. In just the first six months of the campaign, 28 law firms, three law departments and numerous individual lawyers – representing more than 2,000 lawyers – pledged 71,300 hours in pro bono and public service for calendar year 2005.

This increased commitment to pro bono service enabled existing pro bono programs to expand. It also led to the CBA's collaborative project with the Legal Aid Society of Cleveland to develop and organize new pro bono clinical programs. In addition, the CBA convened the Pro Bono Improvement Task Force, which is composed of representatives from various pro bono providers in the community. The Task Force works on breaking down barriers in communication among providers, promoting cooperative approaches to service delivery and to understanding and responding to the volunteer needs of each provider.

"They have been invaluable over the years in providing pro bono legal services, and their most recent efforts, Pro Bono for Nonprofits and Project PillowTex, are creative and innovative approaches to the newly identified legal problems confronting their community."

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issues in adr

means communicating with ourselves. During the course of any mediation or negotiation, parties and their representatives must constantly ask themselves whether they are separating the relationship from the problem and whether they understand the other side's perception. It is important to ask whether we are separating our concerns/fears from their intentions, since the two rarely have any meaningful relationship. Of course, this all presumes that we are there to resolve the dispute.

It is part of the neutral's mission to help disputants do something they often cannot do alone: separate the substantive issues from the relationship. With the help of a skillful neutral, parties can craft and explore the more positive messages and deal with the issues at hand. Shaw was right. You never can tell the message from the appearance of the messenger, and with the help of the neutral and a healthy share of cooperation and patience from ourselves, you never can tell how boundless the possibilities may be of finding common ground and resolving disputes.

Jerome F. Weiss is a Cleveland lawyer who practiced in the areas of complex and general litigation before founding Mediation Inc. five years ago. He now devotes his practice entirely to mediation-related activities and alternative dispute resolution. He is the current chairman of the ADR Committee of the Cleveland Bar Association, where he was also a former trustee. He can be reached at mediator@mediationresolve.com *or on the web at* www.mediate.com/mediationinc.

CLEVELAND BAR ASSOCIATION

OUR COMMITMENT TO OUR COMMUNITY

To take part in this award-winning program or for more information, go to www.clevelandbar.org or contact Mary Groth, director of pro bono and community programs, at (216) 696-3525 or mgroth@clevelandbar.org.