Tipping Points in Mediation: Critical Thresholds in the Process

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Ever since Malcolm Gladwell's book, "The Tipping Point: How Little Things Can Make a Big Difference," was published in 2000, the term "tipping point" has been commonly (perhaps overly) used to describe all kinds of situations far removed from those intended by Morton Grodzins, who originated the phrase while studying the integration of American neighborhoods in the early 1960's. The concept has come to mean any process that, beyond a certain point (the "tipping point"), proceeds dramatically: the moment of critical mass, the threshold or boiling point. The term finds its origin in sociology, although it has been commonly used in other fields such as chemistry, mathematics and environmental issues. So too has it found its way into the mediation lexicon to describe critical events where concepts or notions that seemingly play a minor role, cross a certain threshold and become unstoppable forces in the resolution, and in some cases, the complication of disputes. In my mediation practice I have encountered many examples of how one dramatic moment, event or thought can change the complexion of the dispute resolution process, both positively and negatively.

To Litigate or Mediate

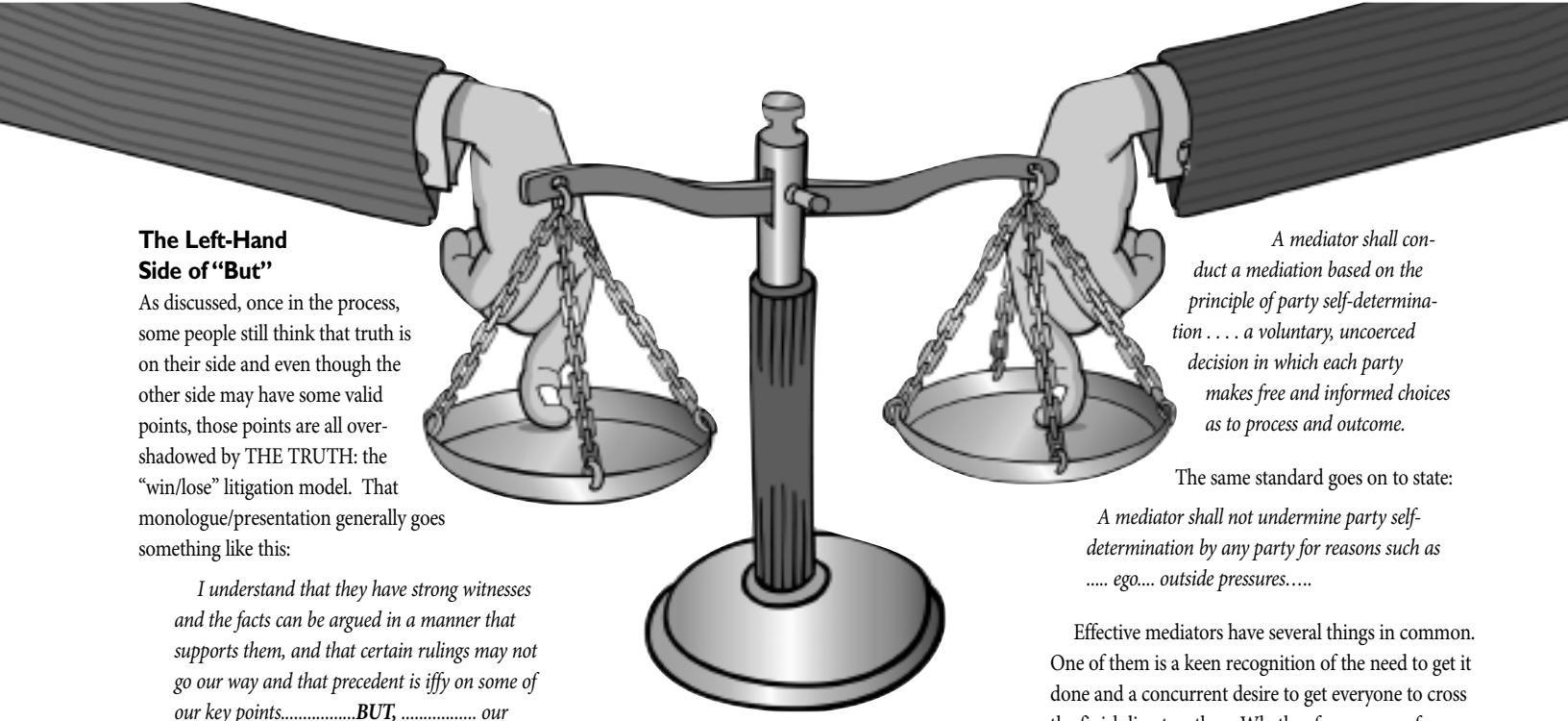
Believe it or not, the initial decision, as to which resolution vehicle to use has its critical thresholds, or its tipping points. On the day I write this, I have met with the CEO of a company that has developed its own ADR process because of what the chief describes as her fatigue caused by seemingly endless and costly litigation "....that has led us nowhere. It was time for us to do something constructive, that made sense for our company and shareholders. Something predictable, where we had control. Litigation left us empty and exhausted. We had reached the tipping point."

Litigation was the preferred means of truth seeking and problem solving in American culture and history for a long time, but after World War II some subtle shifts started occurring. According to my esteemed colleague, Oregon mediator Robert Benjamin, at the dawn of the Cold War it became clear that traditional competition and confrontation were too costly. In the global context it was also deadly and negotiation was brought to the fore once again to be tried as a method to resolve conflicts. People like Fisher and Ury and their Harvard Project on Negotiation and their writings made a good case for collaborative, interest–based negotiation that sought, in part, to diminish the role of the usual battle seen in litigation. But, as Benjamin relates, negotiation still had its truth based, truth-seeking opponents:

> *Despite the rationalist cover, however, negotiation remains problematic because it essentially challenges the core Enlightenment principles of reason and the quest for truth, which are the bedrock of "techno-rational" society's belief system. Negotiation often requires that the pursuit of the truth of a matter be set aside in deference to reaching a pragmatic understanding. If you are right, and the evidence backs you up, negotiation is nothing less than an unprincipled sellout. The "myth of rationality" is firmly ingrained in our system of thinking, and negotiation fights against that mythology every step of the way.*

I see what Bob Benjamin means on a frequent basis. Litigators, who have a hard time putting on the mediation hat, fight for truth, and I, the mediator, preach that there isn't only one truth. There are four sides to a story. Yes, FOUR. Yours, theirs, the truth (which we rarely get at even though we think we do), and what a trier might do and which might not resemble any of the above. Tough medicine for people who believe in the "myth of rationality." The decision to mediate and then proceed in a non-competitive manner, to transform from the quest for truth to the appreciation of intangible virtues (such as predictability, finality, closure and, most important, control), requires lots of momentum. Participants need to reach the tipping point and continue beyond in order to conduct the negotiation unhindered by the mythology.

Participants often hear from me that the dispute is not about wins or losses or truth, but about getting it done. It is about closing chapters. As the aforementioned CEO observes, it is about the business of the company getting done, something not exclusively about core truths. Those who are willing to approach this "tipping point" and understand collaborative negotiation, can be ever so much more effective in the mediation setting. Thinking on these issues may be tough to change and may take immersion in the process itself to accomplish the necessary adjustments.



The Left-Hand Side of "But"

As discussed, once in the process, some people still think that truth is on their side and even though the other side may have some valid points, those points are all overshadowed by THE TRUTH: the "win/lose" litigation model. That monologue/presentation generally goes something like this:

> *I understand that they have strong witnesses and the facts can be argued in a manner that supports them, and that certain rulings may not go our way and that precedent is iffy on some of our key points.....**BUT,** ..... our witnesses are stronger and when the jury truly understands the facts after our presentation of them, and we get the right rulings, or the wrong rulings reversed and make clear for the appellate court why this case is distinguishable.....*

I suspect many of you find this humorous because we see it so often. How many of us haven't encountered the argument—workplace, professional, domestic, you name it—where the other party is just waiting for you to finish so they can let you have it with, "Yes, but....."? For sure, we all have experienced it. They haven't even been listening. This is what I refer to as the "Cognitive Dissonance" factor. Basically, hearing and seeing what you want and ignoring the rest. The boundaries established by the litigation rules of the road—the Rules of Civil Procedure and the Rules of Evidence—force lawyers, the helmsman of many of the disputes in this society, to too often make arguments and massage facts in an advocatory manner that doesn't necessarily lend itself to the resolution of the dispute, or for that matter, resemble the truth. What I describe as fitting round arguments into square holes and square arguments into round ones: arguments fashioned to persuade strangers—a judge and jury—not opponents.

Mediation gives us a unique opportunity to listen in a manner unlike any listening we can undertake in a courtroom. More importantly, we can speak candidly. Since mediation is a confidential and privileged proceeding, we may even be able to agree with positions that oppose what we are advocating (those on the left side of but), thereby upping our credibility stock.

To be effective, the mediator needs to help disputants be aware of this potentially negative tipping point, this threshold of "but," thereby helping people get out of the advocatory mode and into the mediative one. For example, applied to the above presentation, focusing the advocate on the left-hand side of but, ("Whoa fella, let's back up and concentrate on the first part of what you are saying," usually gets a good smile) that portion containing the minuses of her case may help garner some of the concessions necessary to gain the ultimate compromises essential for the resolution of the dispute. My experience has been that participants who are able to acknowledge this threshold, help themselves in the process. A mediator's adage: "Candor is rewarded by the process." Openly appreciating and concentrating on the negatives, the left-hand side of but, is part of that candor.

When Push Comes to Shove

Now for a negative tipping point that is too often crossed by mediators. Once it happens it gains momentum, taking on a life of its own and by the time you realize the mistake has been made, it's usually too late. I have had the great fortune to do neutral work exclusively for a living for several years and through that work I have had the equally good fortune to get to know a lot of very good mediators from around the country and the world. When we talk shop, a leading topic falls into the category of "Professional regrets: What I would have done differently." There are two that I write about here. One involves the neutral injecting himself or his opinions or desire to get it done, into the process. The other, when so injecting oneself, doing so prematurely. A little personal push in the wrong direction or with incorrect force can quickly turn into a shove—the tipping point—that can make everything go south in a hurry.

Mediation is, first and foremost, about the participants and THEIR resolution of THEIR dispute. This is well-established mediation philosophy and doctrine recognized by the various standards of practice for mediators. For example, Standard I of the ABA Model Standards of Conduct for Mediators makes clear:

> *A mediator shall conduct a mediation based on the principle of party self-determination . . . . a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.*

The same standard goes on to state:

> *A mediator shall not undermine party self-determination by any party for reasons such as ..... ego.... outside pressures…..*

Effective mediators have several things in common. One of them is a keen recognition of the need to get it done and a concurrent desire to get everyone to cross the finish line together. Whether for reasons of pure ego or altruism, or more probably somewhere in between, we want to get it done. However, that desire has to serve the self-determination of the participants, and sometimes maintaining the balance can be excruciating. We need to remind ourselves that nobody hired us, the mediator, to be the judge. Naturally, even we neutrals have opinions, sensibilities and even biases, but weighing in can be deadly. The prophylaxis is an abundance of patience and knowing that the moment we say, "I think" or that something "will be" as opposed to "may be," we run a high risk of losing a good part of our audience. More critically, we run a risk of being viewed as the judge and not the neutral, thereby undermining some of our most valuable currency: credibility as a neutral.

The capacity to wait, and then wait some more, is an important part of a good neutral's repertoire. Participants must feel the process is theirs and that they got it done. Not a third-party neutral. That is not to say that opinion or evaluation does not have its place. A lot of what we do as neutrals inherently reflects our biases and sensibilities. But statement and timing of the opinion or the evaluation is in and of itself an art form that is the result of a lot of wisdom and experience and the resulting patience.

Unless we have brought disputants close enough, and unless there is absolute confidence of disputants in our neutrality and credibility, we neutrals must be ever vigilant of the negative "tipping point" of weighing in and even where weighing in may be appropriate, doing so prematurely. The ability to walk away and come back another day takes a lot of experience and confidence, especially given the pressures and desires of participants and mediator alike, to get it done.

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When Want Turns to Needs

The "dualism" of want and need as it relates to the transition from one to the other during a mediation may be the most dramatic and gratifying example of tipping points in mediation. I say dramatic because when it happens, participants often transition from wants that are in conflict to a conclusion of needs that are complimentary on several levels. In the world of mediator talk this may be considered a form of transformation. From time to time I have kept an informal scorecard of expressed degrees of desire during the course of the negotiation with respect to the use of the terms "want" and "need." When that "meditative moment"—the time during which things start jelling in the mediation—takes place, it is very interesting to me as the neutral to note the expression of interests as needs. This gives me a good opportunity to explore with the participants how essential expressed interests may or may not be. Many times their importance is not as vital as perceived. It also gives the neutral an opportunity to take a step out onto his or her proverbial "balcony" and think about how those needs might be consistent with the other participants in the process (i.e., commonality of interests).

The "urgency toward the moment of need" may be the most important tipping point in the mediation since it may indicate the above opportunities along with disputants' willingness to tease themselves away from hardbound demands and set ideals, move beyond them and touch—perhaps even embrace—some of those on the other side. Instead of viewing the need as an inflexible hard line, it is important for the parties and neutral to get beyond the apparent rigidities of the moment and understand the optimistic messages, which may include recognition (and appropriate comment from the neutral, if it isn't recognized) that the negotiated resolution and its intangible virtues of closure and control may be unobtainable within the more than uncertain, uncontrollable litigation process, that may continue to define need only in negative terms of unfulfillment.

As for the gratifying part, that is another, if related, aspect that I will save for a different day. Suffice it to say that seeing dispute and conflict giving way to closure and fulfillment—whether parties are conscious of it or not—is a gratifying experience. The human benefits of negotiated resolution in terms of salvaged relations and resources, good will and keeping disputants away from the full contact sport of litigation, are remarkable and may even outweigh the economic benefits that come along with that negotiated resolution.