by Jerome F. Weiss

Mediation Myths

The American Bar Association's section on dispute resolution recently held its Sixth Annual Conference in New York. In addressing a plenary session of the conference, Microsoft Mediator Eric Green drew my attention to the potential stakes and impact of mediations: consequences that range from the welfare of individual claimants and litigants to the very existence of the institutions we represent. Mediation is of particular importance in a time when there is scrutiny of issues such as institutional resources, finance and corporate governance within a litigation context. Although the focus of Green's comments was corporate governance issues and how related disputes are resolved (the Tycos, Enrons and Microsofts), the implications for anyone involved in mediations – disputant representatives and mediators alike – were clear.

The more we deal with mediation-related processes – an inevitability in the present legal landscape – the more important it is for us to know about those processes, both myths and realities. The following observations consider some commonly believed myths or fictions I have encountered in my mediation practice. In light of the format constraints, I cover only a few of the many myths that exist, reserving for later articles misconceptions that abound.

"The Mediator Is Merely a Go-Between Who Simply and Purely Conveys Those Messages Given to Him by the Disputants"

The role of the mediator should certainly be much more than what this heading suggests, but also less than the obverse proposition – "IT IS TOTALLY UP TO THE MEDIATOR WHO IS TO BE VIEWED AS THE ULTIMATE PROBLEM-SOLVER," which is also a myth. I have access to the research paths that people take to my website, including the key words they use in their inquiries. I recently noticed an inquiry that involved the following key words: **success+rate+of+mediator.** This search suggested a commonly held myth and its negative impact: People look to the mediator to achieve success for them.

The truth is any successful mediation involves a process that is somewhere between these two myths. While the mediator is in charge of the process, the participants are in charge of the outcome and this fact should never be lost. I have found during the many mediations I conduct each year that while I was taught during my training that I was a neutral, in many ways I am not. I find that my job includes sophisticated strategizing, modeling, reality testing and even manipulation employed in order to break an impasse. None of these roles reflect the detached neutral who merely conveys messages. They all involve an expertise that reflects a very active participation and, at times, a leadership role. It would, however, be a mistake to leave it there inasmuch as it takes the participants to add the focus and create the outcome.

We mediators are in many ways what Green calls "fudgers and fuzzers." He makes this statement without apology. We keep the participants at the table and the discussion continuing. It's not that we aren't good at getting disputes resolved. We should be excellent. In fact, we are trained in skills most lawyers are not, but those skills should not be confused with factual determination, legal analysis and those things that only the disputants and their representatives can authoritatively bring to the mix. What the parties should look to us for in terms of expertise is our understanding of the methods and devices that accomplish that which is regrettably not within the litigator's toolbox. Namely, to employ those devices (e.g., models, boundaries, techniques) that engage people in the process and drive them to resolution from a perspective that the disputants and their representatives by definition do not have; a neutral vantage point, without a stake or a "horse in the race," but with an interest only in resolution.

Most importantly, to strike a balance that lends itself to success – somewhere between the two propositions – participants need to be aware of the process and be prepared to engage, which they are often not prepared to do because of a misplaced reliance on one of these two myths.

"Mediation Is a Totally Rational Process That Will Help Solve the Irrationality"

Certainly part of this proposition is a myth. While mediation may help resolve some of the irrationality or ambiguity, it is not a totally rational process. It is not always neat or simple. It may not appear logical. We know that by the time you get to the neutral's office, your dispute may be a mess with little, if any, meaningful communication. But that fact alone, that the case may need help, should not be reason to think it will be quickly resolved by a simple wave of the mediator's rationality wand. The opposite, that it is going to be difficult to resolve, may be more predictable.

It is clear from the studies and research that the approaches and views mediator's take manifest a remarkable variation. Likewise with the mediator's understanding of the mediation process; so much so that there is now a move-

ment afoot arguing that mediators take a more integrated view of the process. That having been said, the reality is that intangible elements such as intuition and emotion comprise as much of the skillful mediator's arsenal as the more tangible and definable skills that we may usually expect of the neutral. Believe me, good decision making in crisis is not necessarily the result of a pro forma approach or format or any one cookie cutter methodology that might be taught in a skills training course. Mediation decision-making and the resultant impact on the process doesn't always happen that way. More likely, it is the result of the experience and savvy of the neutral. Yes, savvy. Innate or practical understanding or know-how. Common sense that is often based on experience.

Professor L. Randolph Lowry, the director of the Straus Institute for Dispute Resolution at Pepperdine University School of Law, spoke on this subject at a workshop I recently attended. While he does not undervalue the basic academic elements that go into a good mediation, he advances the proposition that good decisions in crisis are not always because of a set methodology or strict adherence to process. Rather, Lowry says many of the best outcomes in mediation are the result of "the mysterious dimension of a mediator's work," which is his description of experience and intuition. The bottom line here is that while a lot of professionals can "talk the talk," the intuitive or reflexive response of the experienced mediator is sometimes an essential component in "walking the walk." So be prepared for some events that may not fit into your idea of rationality or logic.

"Mediations Occur Only in Bad Cases Where Everything Else Has Failed and They Should Only Take Place on the Eve of Trial"

Most of the skill-teaching emphasis in the practice and law schools is still on litigation and trial skills, even though the majority of disputes are resolved through negotiated resolution; however, we lawyers are not the experts we think we are in negotiation. In fact, I find a lot of lawyers admitting how inept they are when it comes to really figuring out the negotiated solution to the case. The fact is that there is a very small category of "bad" cases, and it's usually that small number of cases that go to trial. The large majority of filed disputes (more than 95 percent) are resolved through a negotiated resolution, but such resolution may require the assistance of mediation which often results in a mutually acceptable settlement of the dispute.

Lots of cases that should settle don't because disputant representatives are reluctant to admit they may not have the keys to solution: There is a certain "I can do it myself" attitude we lawyers develop. The attitude exists for understandable reasons; however, in my opinion the biggest reason for this reluctance is one we don't understand. We lawyers are rarely given the realistic option of "I don't know the solution" or "I can't figure it out" or, for example, "I can't tell you the value." If we gave the oftentimes honest answer – "I don't know" – we wouldn't have clients. We wouldn't have jobs. There are lots of "not bad cases" where legal representatives might do a lot to help settle the case by sharpening the facts and focusing the issues and analyzing the law, but where a neutral's assistance may be required with respect to those methods and techniques that help bring about settlement.

Likewise, we shouldn't have to endure the entire litigation gauntlet in order to try to settle. Too often it is an awkwardness or litigator's autopilot that serves as an easy escape from the hard work of resolution. There's no reason why disputes have to wait until the end of their legal lifetime in order to be settled. There should be no secrets or surprises between good lawyers and so, no reason not to share information earlier with an eye toward problem solving, something we lawyers should arguably focus on first and foremost. The skillful neutral can often help in getting us there earlier, and once we get there, helping us get it done.

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