



THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Negotiating Justice: Anchoring, Bias, Dad, and Sotomayor

by Victoria Pynchon



I do not recall the day on which I learned I spoke with an “American” or “West Coast” accent but I remember it coming as a surprise to me. As Cristof, the director of *The Truman Show* says of his “creation,” the happily oblivious Truman Burbank, “We accept the reality of the world with which we are presented.”

The fact that people question whether a woman, an African American, a Latina, or (gasp) a gay, bi-, Lesbian, or transsexual, jurist would be “biased” by his or her unique perspective is dispiriting to anyone who is not (you’ll forgive my use of the term) an old white man. As many people in high (*The New York Times*, CNN) and low (Twitter) places rightly pointed out during the nomination hearings for Sonia Sotomayor, no one asks whether a white man will bring his prejudices to the bench. Why? Because white men “have no accent.” The dominant culture does not think of itself in terms of race (it doesn’t have to) and the people with power do not need to ask themselves thorny questions about their attitudes toward their own race and gender.

Here’s an example from *The New York Times*: “Speeches Show Judge’s Steady Focus on Diversity, Struggle”

WASHINGTON—In speech after speech over the years, Judge Sonia Sotomayor has returned to the themes of diversity, struggle, heritage and alienation that have both powered and complicated her nomination to the Supreme Court. She has lamented the dearth of Hispanics on the

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Message from the Section Chair

by Simeon H. Baum



Over the last two quarters, since the launch of the first issue of *The Resolver*, the Board of the FBA’s Alternative Dispute Resolution Section has convened monthly to reflect on the state of ADR and opportunities for the section. From the fortunate vantage point of this section’s chair, I would like to share with *The Resolver* readers some reflections on the significance of ADR, a brief report on the activities of the past two quarters, and some observations and visions on the promise of the section and of the dispute resolution field.

The Promise of Dispute Resolution

A host of reasons drew us to law school. Of course, we all want to make a good and honorable living. But at the core, a healthy number of us hoped to help others through the practice of law and perhaps gain wisdom in the bargain. We *juris* doctors, like our medical counterparts, aim to relieve suffering, but through work on our social “mechanism.” We repair breaches of faith, correct breaches of contract, and shift property or money to compensate wrongs and help those who have suffered from acts or omissions of others.

Labor in law, however, reveals life to be messy and multi-variegated. We find odd variations in the ladder of statute and *stare decisis*, and also observe that the wants and circumstances of parties do not necessarily fit into neat classifications of right and wrong, tort or breach.

Live parties in dispute call into question the uniform objective “mechanism.” We also see the human, subjective realm all too often overlooked. Not hornbook black and white, or case law grey—human life is in living color. And the most significant enterprise might be not developing the objective legal structure (which, of course, remains critical), but helping the people involved.

How we practice law also matters. For years, the bar has highlighted the importance of civility in legal practice. Beyond the tone of siblings at the bar, there is also the question of consequence from litigation of disputes. We benefit mightily from the adversarial system. But do our goals *always* entail fighting oppression? Does pursuit of justice necessitate corpses on the floor?

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Sometimes, the preferred goal involves transforming conflict into harmony. This approach preserves all parties but alters the quality of their interaction, reorients them, and opens possibilities of resolution that offer optimal solutions and adjusted ongoing behavior. It promotes values of caring for all people, empowering all, fostering creativity, and promoting both compassion and justice. Our subject is not just the legal system, but the nature of actual life and the human heart. As desired consequence, at times, rather than a final judgment, we see a living resolution emerge like a butterfly from the chrysalis of conflict's entanglement.

Activities and Promise of the FBA Dispute Resolution Section

These reflections express a core motivation underlying the ADR Section and its availability as a forum, resource, voice, and network for all lawyers interested in the varied field of dispute resolution. Precisely because we federal practitioners are fundamentally concerned with *the people* whose lives, liberties, and wellbeing are supported by our federal system, thousands of lawyers are now regularly engaged in dispute resolution, through negotiation, mediation, arbitration and the host of related processes.

Over the last few months, the section has been actively promoting thoughtful development and use of ADR processes. On Nov. 17, 2009, appropriately in collaboration with the FBA's Environment, Energy and Natural Resources Section and other bar groups, the section was a participating sponsor in a terrific program on environmental ADR presented through the Kheel Center on the Resolution of Environmental Interest Disputes. Entitled "Changing Times—Changing Practice: Effective Legal Strategies to Resolve New Environmental Disputes," the conference explored the use of ADR mechanisms to address environmental problems, with a focus on challenges of convening these processes where multiple issues, stakeholders, and jurisdictions are involved. Particular thanks are given to Rachel E. Deming, who worked tirelessly to bring together and promote the program, which featured a host of experts, including Edna Sussman (who authored the Fairness in Arbitration Act piece in the last *Resolver* issue) and long active FBA member Cherie Shanteau-Wheeler. Held at the closest thing to a regal setting New York City offers—the University Club—the program presented 21 speakers who addressed various issues, including President Obama's memorandum on collaborative governmental decision-making; the adjustment of property rights in communities threatened by sea level rise; the siting of energy generation and high technology energy facilities; and new regulatory approaches to mitigate climate change involving CO₂ emissions and energy consumption.

In addition, on Dec. 11, 2009, I joined Ninth Circuit Chief Mediator Claudia Bernard to speak in mediation in the federal context at the Hawaii Chapter of the FBA's First Annual Conference. Our piece, entitled "Federal Mediation Tips: Procedural and Substantive Pathways to Happier Endings" fit into a fantastic all-day program that included

a Supreme Court review, developments in federal litigation, a copyright and creativity slideshow, and, finally, a cautionary tale on the legal status of Native Americans presented by FBA President Lawrence Baca. The chapter's decision to host this event at the Royal Hawaiian hotel on Honolulu made the program all the more appealing. We thank Hawaii Chapter President Howard McPherson and the other chapter members for making this event happen.

A further effort by the ADR Section has been its active outreach to all FBA chapters for the appointment of local chapter ADR Section liaisons. We are pleased to report that there has been a positive response to this effort. We welcome Mark Briggs (El Paso); Paul Burns (Phoenix); Peter King (Tampa Bay); Hon. Leo Papas (San Diego); and Helle Rode (Oregon); and look forward to their active participation in the work of the section and in the promotion of quality ADR processes in your respective venues. We encourage the other chapters, and their members, to take us up on this invitation and appoint a local liaison to this ADR Section.

One of our hopes is that the chapter liaisons will be able to spread nationally, yet on the local level, the idea of holding "fireside chats" with CLE and cocktail networking components, featuring leaders in the ADR field with something of value to share. These speakers can range from a circuit court mediator, to a district court ADR administrator, to a U.S. magistrate judge who is active in the informal resolution of cases, to a local mediator or a practitioner who represents parties in ADR processes. This would be a wonderful way to spread the news of best practices in the field while enhancing familiarity of counsel with both processes and practitioners. It is an optimal use of the unique FBA structure, in being both national—a single idea—and local, *i.e.*, chapter based.

The section is also looking forward to putting on an ADR piece at the FBA's 2011 Annual Meeting and Convention in Chicago. We invite your thoughts and participation in this effort. More broadly, the ADR Section conducts open telephonic Board meetings monthly. These calls commence at 4:00 p.m. and are scheduled for the following dates: March 26—at the FBA Midyear Meeting in Arlington, Va.; April 23, May 21, June 18, July 23, and August 20. All section members and liaisons are invited to participate in these meetings and share with us your thoughts and questions on the state of the field and ideas for worthy projects. We look forward to hearing you online and to seeing you at key FBA events.

Simeon Baum is the president of Resolve Mediation Services Inc. (www.mediators.com) in New York, N.Y. Since 1992, he has been active as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator, and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Donald Trump's \$1 billion lawsuit over the West Side Hudson River development. Baum has successfully mediated over 800 disputes.

U.S. Justice Department Mediation Program for Disputes Arising Under the Americans with Disabilities Act

In each issue of *The Resolver*, we will provide information on mediation programs available to resolve disputes arising under federal law. In this issue, we provide information concerning the U.S. Justice Department's Mediation Program for the resolution of disputes arising under the Americans with Disabilities Act. All information recited here is taken from the DOJ's ADA Home Page at www.ada.gov/mediate.htm

The ADA Mediation Program at the U.S. Department of Justice

The U.S. Department of Justice established a Mediation Program for the resolution of disputes arising under the Americans with Disabilities Act in 1994. The DOJ ADA Mediation Program operates under a contract with the Key Bridge Foundation. The ADA mediation program provides no cost mediation for complaints under Title II (public entities) and Title III (private entities).

Examples of resolutions achieved by the DOJ ADA Mediation Program as described on the program's website include the following:

Barrier Removal

1. A Michigan bowling center agreed to install a platform and ramp to one of its bowling lanes within one month. The center also renovated its entire second floor to make it accessible and added accessible parking spaces.
2. An Ohio shopping mall and movie theater agreed to make renovations to provide accessible restrooms, parking, and movie theaters within three months. Three of the five movie theaters will be made accessible and movies will be rotated between theaters so all movies will be shown in the accessible theaters. In addition, the theater will provide accessibility symbols in its advertisements to show which movies are in the accessible theaters.
3. An Ohio hotel agreed to remodel its lobby restrooms to be accessible to persons with disabilities, increase the number of accessible parking spaces near the hotel pool, research the cost of installing accessible restrooms by the pool, and train personnel about how better to respond to the needs of persons with disabilities. The hotel also apologized to the complainant and her family and provided a free weekend package for them at the hotel.

Effective Communication

1. A Maryland doctor who had refused to pay for a qualified sign language interpreter for a patient's office visit agreed to institute a policy for hiring interpreters and notifying deaf patients that sign language interpretation will be provided on request at no cost to deaf patients. The doctor also agreed to train office staff about effective communica-

tion with patients with hearing impairments and to pay the complainant \$300.

2. In New York a person who represents people who are deaf or hard of hearing complained that a doctor refused to hire qualified sign language interpreters for patients with hearing impairments. The doctor agreed to provide a qualified sign language interpreter for a patient's office visit when a request is made at least one week in advance. The doctor agreed that the request may be made by the patient's representative, or via a telephone relay communication, or by any other means chosen by the patient. The doctor also agreed to educate his office staff regarding this policy and the ADA.
3. A person with a visual impairment complained that a Massachusetts educational institute did not provide information about course offerings in alternative formats and did not make reasonable modifications in their procedures and practices to enable people with disabilities to take the courses. In addition, the person complained that the institute had a safety policy that excluded people with disabilities based on broad generalizations instead of actual risks. The institute agreed to make information about registration times and course offerings available on audio tape on a telephone information service used by people with disabilities. The information will also be available for distribution on audio tape and in large print if requested. The institute agreed to modify its admission policy and make determinations on a case-by-case basis as to whether a particular individual with a disability is able to function adequately and safely in a class. The institute agreed to make every effort to assist a person with a disability to attend the class of his/her choice. Technical assistance will be requested from various disability organizations so that all available information may be considered in order to assist a person with a disability to participate in a class in the most effective way.

Policies and Procedures

1. In suburban Maryland, a wheelchair user complained that a restaurant refused to allow her mobility assistance dog to enter. The restaurant owner apologized and agreed to educate himself and his staff about the ADA. He agreed to contact other professionals in his field, as well as a restaurant trade organization, to inform them of his experience and educate them about the ADA. He agreed to make a donation to a charitable organization for service animals.
2. A private Virginia preschool agreed to hire a specialist to educate staff about behavior modification techniques to be used with children with behavioral disabilities and to

Mediation Confidentiality in Federal Court

by Phyllis G. Pollack

In the Summer 2009 issue of the *Resolver*, I published the article “Mediation Confidentiality: A Federal Court Oxymoron.” There I noted the limited protection federal courts give mediation confidences. Even though § 4 of the Alternative Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2998 (105th Cong. 2nd Sess.) (Oct. 30, 1998), codified at 28 U.S.C. §651-658, 652, authorizes each district court to adopt local rules providing for mediation confidentiality, the courts, citing Rules 408 and 501 of the Federal Rule of Evidence, have instead fashioned a very limited “federal mediation privilege” that can be pierced under numerous circumstances.

Among the cases I cited for that proposition was *Babasa v. Lenscrafters Inc.* (9th Cir. 2007) 498 F.3d 972. In that case, the Ninth Circuit affirmed the district court’s decision to admit into evidence correspondence within the scope of California’s mediation confidentiality laws. California’s confidentiality laws did not apply, held the court, because the evidence was proffered for the purpose of establishing diversity jurisdiction, a decision to which federal law applied.

Though unpublished, we now have an opinion from the federal trial court in the Northern District of California—*Benesch v. Green*, 2009 WL 4885215, Case No. C-07-3784 EDL (N.D. Cal. Dec. 17, 2009)—applying California’s mediation confidentiality statutory and case law in a diversity proceeding. In that legal malpractice action, Magistrate Judge Elizabeth D. La Porte concluded that California’s state courts would have barred the plaintiff from testifying about any communications during the course of the mediation on the ground that they were protected by California Evidence Code § 1115, et. seq. The district court did so without discussing the reason(s) why California law applied in the first instance nor did the Ninth Circuit’s *Babasa* decision. If district courts (and eventually the Ninth Circuit) follow *Benesch* California litigants proceeding in federal court under its diversity jurisdiction will be able to rely upon California’s strictly applied mediation confidentiality protections.

The *Benesch* court was asked to resolve a dispute concerning the admissibility of communications in preparation for and at a mediation conducted in a California state court proceeding (*Benesch I*). The mediation in *Benesch I* was concluded when all parties executed a document entitled “Terms of Settlement,” which was meant to reduce the parties’ mediated settlement agreement to writing (term sheet). The plaintiff subsequently resisted enforcement of the term sheet as not accurately reflecting her intentions. The plaintiff’s opposition to its enforcement was denied and an order enforcing the term sheet settlement was entered. *Id.*

The plaintiff thereafter filed a malpractice action against in the San Francisco Superior Court against, inter alia,

the attorney who represented her in *Benesch*. Defendant removed the action to federal court where it proceeded under the that court’s diversity jurisdiction. 28 U.S.C. §1332(a). Two years after removal, the defendant sought leave to amend her answer to assert that the plaintiff’s complaint was barred by California’s mediation confidentiality statutes (California Evidence Code §1115 et seq.).¹ Defendant also moved for summary judgment on the ground that California’s mediation confidentiality statutes “... preclude[d] plaintiff from establishing her malpractice claim and [precluded] defendant from meaningfully defending herself” against the plaintiff’s claims. *Id.*

Though the court denied defendant’s summary judgment motion, it did so holding that California’s strictly interpreted mediation confidentiality protections would bar the defendant from disclosing any mediation-related communications with her client in support of her defense to the malpractice action. In so doing, the district court ruled that the recent California case of *Cassel v. Superior Court*, 179 Cal. App. 4th 152 (Cal. Ct. App. Nov. 12, 2009)²—was likely wrongly decided by the majority. *Id.* at _____. The federal court adopted the reasoning of the *Cassel* dissent, which it found to be “more persuasive” than the majority opinion and more “true to the statutory language” of California Evidence Code § 1119, as well as more in line with the California Supreme Court’s injunction not to create implied exceptions thereto. *Id.*, citing *Ticknor v. Choice Hotels Int’l Inc.* (9th Cir. 2001) 265 F.3d 931, 939 (“The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum. In doing so, federal courts are bound by the pronouncements of the state’s highest court on applicable state law”). *Id.* At *7 (*Emphasis in the original.*)

Although *Cassel* has since been accepted for review by the California Supreme Court (suggesting that *Benesch*

¹Because plaintiff filed a non-opposition to defendant’s motion to amend her answer, the court naturally granted it.

²A February 5, 2010 California Judicial Council News Release announced the acceptance of review by the Supreme Court of the *Cassell* decision on the following issues:

- (1) Are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evidence Code sections 1115 through 1128?
- (2) Is an attorney a “participant” in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under Evidence Code section 1119, subdivision (c) and 1122, subdivision (a)(2)?

could well be correct) an examination of *Cassel's* reasoning, as well as *Benesch's* deserve attentive readings.

In *Cassel*, the petitioner sued his former attorneys for malpractice, alleging that they forced the petitioner to accept a sum far less than was acceptable to him which was subsequently memorialized in a mediated settlement agreement. The issue before the California appellate court was whether communications solely between petitioner and his own counsel in preparation for and on the day of the mediation itself were protected by mediation confidentiality. The majority held that such conversations were *not* protected, with the dissent strongly objecting. *Id.* at *6-*7.

The issues raised in the federal *Benesch* action were similar—whether the party pleading attorney malpractice or the party defending against it—could introduce into evidence otherwise protected communications between attorney and client for the sole reason that they were had in preparation for or during a mediation. The *Benesch* court was so focused on the propriety or impropriety of the majority decision in *Cassel* that it did not even mention the propriety of applying California's rules of evidence in a diversity proceeding. We can only assume, therefore, that the Court was following the principle that state law supplies the rule of decision when its jurisdiction is based upon diversity of citizenship “with respect to an element of a claim or defense as to which State law supplies the rule of decision.” F.R. Evid. 501.³ In *Benesch*, the application of California's mediation confidentiality rule of evidence would determine whether any evidence contrary to the admissible mediated settlement agreement could be admitted for the purpose of proving that counsel failed to follow her client's instructions in reducing that agreement to writing.

Because both *Benesch* and *Babasa* were diversity cases, their holdings seem irreconcilable. The difference between the two, however, is meaningful. As the Ninth Circuit explained in *Babasa*, federal law applies whenever the court is determining

³Surprisingly, no mention was made of the Ninth Circuit's decision in *Babasa v. LensCrafters, Inc.*, 498 F. 3d 972 (9th Cir. 2007).

whether the amount in controversy is sufficient to *give rise* to diversity jurisdiction. *Babasa, supra* at 974-75. That being the case, held the court, federal law must also apply to determine whether an allegedly confidential mediation communication constituted notice for purposes of removal jurisdiction. *Id.* Once a federal *assumes* jurisdiction based upon diversity, however, it is well settled that state laws of privilege apply. *Id.*

Although the California confidentiality provisions are not evidentiary privileges (see *Simmons v. Ghaderi*⁴) if they were properly characterized as such, the *Benesch* court's decision would be unassailable. If not, a good case could be made for the disclosure in federal court of mediation confidences inadmissible under state law but admissible under the Federal Rules of Evidence or federal common law.

Both because *Benesch* is unpublished and because the justification for the use of the California mediation privilege could well be in error, the conclusion in my previous article is all the more apt post-*Benesch*: beware and be wary: “mediation confidentiality” and/or “mediation privilege” in federal court varies so widely from case to case that no attorney can be confident of predicting that court's reaction to state confidentiality laws.

Caveat: On Jan. 19, 2010, the parties to *Benesch* jointly filed a Notice of Settlement in Principle requesting that the next status conference be postponed for 60 days to allow their settlement to be documented and the action dismissed.

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⁴The *Babasa* Court incorrectly identified California's mediation confidentiality provisions as “privileges.” See *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008) (refusing to extend evidentiary waiver provisions applicable to evidentiary privileges on ground that mediation confidences are not privileged).

ADA PROGRAM *continued from page 3*

have an ADA specialist educate staff about the requirements of the ADA. The preschool also agreed to formulate a new policy to address problems identified by parents of children with disabilities and to make a \$150 donation every year for five years to an advocacy training center for parents of children with disabilities.

- 3. A New York dance club agreed to institute a policy to accommodate people with disabilities when they call to make arrangements to attend functions and to review all future contracts with performers to ensure that performers do not interfere with accessibility. The club also agreed to identify barriers and remove them if readily achievable, to*

provide four complimentary tickets to the complainant for any performance the complainant chooses and to make a substantial compensatory payment to the complainant.

To find a local mediator with an ADA specialization call

Key Bridge Foundation
1-888-528-1609 (VOICE)
1-800-630-1051 (TTY)
202-274-1824 (Fax)

NEGOTIATING *continued from page 1*

federal bench. She has exhorted young people to value immigration. She has mulled over the “deeply confused image” America has of its own racial identity. And she has used on more than one occasion a version of the “wise Latina” line that she has spent much of this week trying to explain.

My Dad—a dust bowl refugee—lawyer at 42 and bench officer by 52, used to say that there “should be dumb politicians, to represent the dumb people.” He was exaggerating, of course, to make the point that a representative government should represent all of the people and not just the privileged majority.

Was Dad’s life-view affected by his humble origins, his “struggle” to overcome his lack of a completed high school education and a culture of poverty, as well as the burdens of his gender in mid-century America (burdens which assumed only men were obliged to work to support their families)? You bet it was. Did anyone ask whether Dad was going to bring a white, male, Depression-era bias to the bench? No. Did he? Of course he did. Still, Dad leaned as far away from his mid-century white male privilege as he could, drafting “marital” agreements for gay clients from the late 1960s until he went on the bench; voting against his economic self-interest in every Presidential election (proudly asserting that he paid more in federal income tax than he used to make in salary during any given year); and supporting all civil rights movements—for African-Americans, Chicanos (the term of that day), women, and gays.

Dad was a good guy aware of his biases and willing to push against them. It is not, however, possible for any of us to be without bias as an article in the *Cornell Law Review*—“Blinking on the Bench: How Judges Decide Cases”—demonstrates. The article is about anchoring—the principle that negotiators will be influenced by any number that enters the negotiation environment, no matter how random. The research subject of “Blinking” demonstrates the power of anchoring on judicial decisions. In the excerpt below, note the repeated use of the word “intuitive”—a word usually associated with women but not only a woman’s talent or trait.

The first example of intuitive judicial decision making arises from studies of a phenomenon that psychologists call—anchoring. When making numeric estimates, people commonly rely on the initial value available to them. This initial value provides a starting point that—anchors the subsequent estimation process. People generally adjust away from the anchor, but typically fail to adjust sufficiently, thereby giving the anchor greater influence on the final estimate than it should have. In short,—the number that starts the generation of a judgment exerts a stronger impact than do subsequent pieces of numeric information.

We have found that anchors trigger intuitive judicial decision making. In one study, we demonstrated that a demand made at a prehearing settlement conference [\$10 million] anchored judges’ assessments of the appropriate amount of damages to award. ... The \$10 million anchor influenced the judges. Judges in the control group awarded a mean amount of \$808,000 and a median amount of \$700,000, while judges in the anchor group awarded a much larger mean of \$2,210,000 and median of \$1 million.

In another study, we tested whether a motion to dismiss would also affect judges’ damage awards. We presented participating judges with a similar fact pattern and asked judges in the control group,—[H]ow much would you award the plaintiff in compensatory damages? We gave the judges in the anchor group the same background information, but also told them that—[t]he defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of \$75,000. We asked these judges to rule on the motion, and then asked them,—If you deny the motion, how much would you award the plaintiff in compensatory damages?

Because the plaintiff clearly had incurred damages greater than \$75,000, we viewed the motion as meritless, as did all but two of the judges. Nonetheless, the \$75,000 jurisdictional minimum served as an anchor and resulted in lower damage awards from those judges exposed to it. The judges who had not ruled on the motion awarded the plaintiff an average of \$1,249,000 (and a median of \$1 million), while those judges who ruled on the motion to dismiss awarded the plaintiff an average of \$882,000 (and a median of \$882,000). Thus, the \$75,000 jurisdictional minimum anchored the judges’ assessments, as they awarded roughly \$350,000 (or nearly 30%) less on average.

Both anchoring studies suggest that the anchors had a powerful influence on judgment. This was true both when the anchor bore essentially no relation to the magnitude of the claim and when the judges knew full well that they were supposed to ignore the anchor. In both cases, the anchor triggered intuitive, automatic processing that the judges were unable to override.

This is what we litigators and trial attorneys do for a living. We try to “anchor” judges. We “spin” the facts and expand the outer reaches of the law in the way that helps our clients. We read judicial profiles to know as much about a judge—his or her background, politics, charities, family life, and prior decisions—as possible so that we can speak his or her language. No one knows better than litigators and trial lawyers how important an individual judge’s background,

ethnicity, political affiliations, and the like are.

When I was litigating a nine figure environmental coverage action, I routinely brought color-coded coverage charts that represented my point of view to every oral argument. Opposing counsel always griped and the judge always overruled his objections because my charts made the complex and sophisticated coverage analysis easier to understand (from my point of view). What perplexed me was opposing counsel's failure to ever do the same. The judge ruled in my favor on every major issue before her and I guarantee you it wasn't because I was "right."

Meta-Anchoring

It's not just numbers entering the negotiation environment that influence decision-makers, it's also the way in which the information pertinent to the case is characterized. I don't need to tell lawyers this, all of whom were weaned on this proposition: if you don't have the facts, argue the law, and if you don't have the law, argue the facts.

In the brilliant *3-D Negotiation*, authors Lax and Sebenius recommend "meta-anchoring" to obtain your preferred negotiation outcomes as follows:

To meta-anchor effectively, look creatively at various ways to characterize the negotiation problem. Some characterizations have clear implications for the appropriate kind of resolution, or at least the most appropriate process and personnel needed to get there. For example, framing a negotiation as "a routine extension of an existing deal" may receive far less scrutiny than approaching it as a "new contract," even when the substantive issues are identical.

The authors go on to describe a negotiation in which a small company seeking to be acquired by a larger one "identified two likely competing meta-anchors."

The first viewed the transaction as the purchase of R&DCo on a stand-alone basis. The second viewed the deal as an attempt to create synergy by combining R&DCo's technological expertise with Acquirer's sales, marketing and distribution; by using R&D's technologies in other markets; and by using the buyer's greater size to win new sales for R&DCo. In this way, it would be possible to divide that synergy between the two companies. The approach adopted was as follows:

"Almost monthly, we turn down an approach from potential acquirers who want to value us on a stand-alone basis. We're interested in talking to you because of the significant potential synergy between our two companies. If you want to discuss how we value and divide the joint gains from combining our companies, we're very interested in talking with you. However, if you only want to consider our stand-alone financials, you'll be wasting our valuable time as well as ours. Do you think it makes sense to proceed?"

The small company redefined its value as its future value merged with the acquirer rather than its present unmerged value. Then the small company suggested that the expanded value be divided equally because that value was due to both company's contributions in equal measure. That's "meta-anchoring" at its best.

So back we come to Sotomayor and the fuss raised about her probable biases before she ascended to the Supreme Court bench. Does she now bring a viewpoint heretofore unrepresented there? Yes she does. Does that give her an unfair advantage over all the highly qualified white men who might have been nominated in her place? I suppose it might, but our job in populating the Supreme Court bench is not to find the numerically "best" person for the job (highest LSAT score, first in class, editor of law review, most charitable, most acceptable disposition, etc.) but the best person to round out the current bench so that it is somewhat representative of the people that it serves.

Dad would have supported Sotomayor, and though I lost him to the future ultimately in store for all of us just last year, I'd still like to thank him for instilling in me the values that made me a supporter too.

Victoria Pynchon is a mediator with ADR Services Inc. and an arbitrator serving on the American Arbitration Association's Expedited Commercial panel in Los Angeles. She is also a member of the Distinguished Panel of Neutrals with the International Institute of Conflict Prevention and Resolution in New York City. She is a settlement officer for the U.S. District Court for the Central District of California.

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Tips on How to Negotiate and Acquire Negotiation Skills

by Simeon H. Baum

When attempting to address the modest subject of how to negotiate and acquire negotiation skills, I am reminded of the narrator's comment in *Moby Dick*:

One often hears of writers that rise and swell with their subject, though it may seem just an ordinary one. How, then, with me, writing of this Leviathan? Unconsciously my chirography expands into placard capitals. Give me a condor's quill! Give me Vesuvius' crater for an inkstand. Friends, hold my arms! For in the mere act of penning my thoughts of this Leviathan, they weary me, and make me faint with their outstretching comprehensiveness of sweep, as if to include the whole circle of the sciences, and all the generations of whales, and men, and mastodons, past, present, and to come, with all the revolving panoramas of empire on earth, and throughout the whole universe, not excluding its suburbs. Such, and so magnifying, is the virtue of a large and liberal theme! We expand to its bulk. To produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it.¹

Hundreds of books have been written on this theme.² Moreover, all of us go through life negotiating in myriad circumstances. Thus all of us are experts in this area. What can one add that is meaningful for a brief article on this hoary forebear of all ADR processes?

What follows is an effort to capture key ideas and approaches that appear to have nearly universal applicability and to put them into a helpful, simplified framework. For starters, the simplest format follows and expands upon the advice of the ancient Greeks: know yourself, know others, know the world. It then turns Taoist and adds a fourth component, recognizing that negotiation is very much a process: "the Way."

NOSCE TE IPSUM (KNOW YOURSELF)

This phrase, inscribed above the entrance to the ancient temple of Apollo at Delphi, captures a core injunction for negotiators.

Know Your Interests.

In their well known negotiation model, Fisher and Ury—and the vast majority of proponents of joint, mutual gains,

¹Melville, *Moby Dick*, Ch. 104.

²Some recommended reading includes: Fisher & Ury, *Getting to Yes*; Ury, *Getting Past No*; Mnookin, *Beyond Winning*; Shell, *Bargaining for Advantage*; ABA Section on Dispute Resolution, *The Negotiator's Handbook*.

cooperative bargaining models—suggest that ideal negotiation involves the identification of the interests of each party, a search for options that will best satisfy those interests, and consideration of alternatives to any proposed deal in light of those interests. At the outset, in order to be effective, a good negotiator must be familiar with the interests that he represents—his own, his group's or his principal's.

Before starting any negotiation, it is useful to be clear on what one needs, and to give thought to how best one might satisfy those needs. "What do we need? What are we trying to accomplish?" should be expressly asked in advance. Are we trying to maintain a client base? Are we trying to avoid damage to good will or a reputation? In the labor context, are we trying to stay within budget in light of other material costs; increase productivity; cut down on health costs; improve our risk picture for experience rating by insurers; improve morale? Knowing the needs can direct the strategy and also can keep one alert to opportunities that might arise in the course of negotiations.

Keep a Tab on Your Emotions & Inner Life.

Beyond this, it is vital to be in touch with ones actual feelings, thoughts, and impulses at any point in time. In *Getting Past No*, Ury advises negotiators not to react to provocative actions or comments by one's negotiation counterparty. Reactions can lead to escalation. They can also cloud chances to learn about the other and can prevent the negotiator from responding positively to the needs and feelings of the other in a way that enhances the quality of communication, cultivates relationship, smoothes the bargaining, builds trust, and captures opportunities for mutual gain. The prerequisite for preventing undue reactions is sufficient self awareness to identify ones emotions and inner responses, including value judgments, before they are given expression.

Cultivate a Disciplined Self Consciousness.³

A disciplined self-consciousness is a negotiation treasure. Part of the discipline in not reacting is to know that there is a difference between having a feeling, thought, or even conviction, and acting on it. Knowing oneself is a first step in keeping the ego under control.

SKILL ACQUISITION: As with other functions in the practice of law, such as interviewing, client counseling, research, drafting, analytic thinking, and trial advocacy, effective negotiation requires the honing of particular

³The phrase "disciplined self consciousness," coined by John Ross Carter, Professor of Philosophy and Religion; Robert Hung-Ngai Ho Professor of Asian Studies, Colgate University, for use in connection with the comparative study of religion, has wide applicability in the context of negotiation as well.

skills.

Try Mindfulness Meditation.

How do we develop and increase the type of self-knowledge that optimizes our negotiation efforts? There are a range of activities and even exercises that enhance cultivation of self-awareness and promote self-knowledge. For nearly a decade, Professor Len Riskin⁴ has been promoting mindfulness meditation as a way not only of reducing stress but also of increasing awareness of one's inner processes on the theory that this improves capacity as a negotiator or mediator. Sitting quietly, following the breath, being aware of bodily sensations, noticing and then letting go of thoughts and emotions as they arise—again, sensing the freedom of awareness without compulsive action—and, with bare attention, gaining a greater sense of presence and the richness of just being are all part of this type of exercise.

Catalogue Interests.

Reflective cataloguing of one's needs and interests in advance of a negotiation, and reconsidering needs and interests throughout the course of the negotiation, puts in the forefront of one's consciousness matters that should be addressed or that might enable one to seize opportunities for gain in the bargaining process.

Observe the Mirror of Others.

Beyond awareness of one's impulses, feelings, thoughts, judgments and interests, there is another type of self-understanding, all too often elusive, as expressed by the poet Robert Burns: "O would some power the giftie gie us to see ourselves as others see us."⁵

Particularly where one is engaged in negotiation, it is important to observe not only one's inner workings, sense of self, and recognition of one's own interests, but also the impact one is making on the other. How do they see us?

Catch Cultural Differences.

⁴See, e.g., Leonard Riskin (C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) "The Contemplative Lawyer: On the Potential Relevance of Mindfulness Meditation to Law Students, Lawyers, and their Clients," *Harvard Negotiation Law Review* (May 2002). This was the centerpiece of a symposium entitled *Mindfulness in Law and Dispute Resolution*. Professor Riskin has provided training in mindfulness in law and dispute resolution at a wide range of venues including the Harvard Negotiation Insight Initiative, Harvard Law School, Straus Institute for Dispute Resolution, Pepperdine University School of Law, and Benjamin N. Cardozo School of Law.

⁵(O would some power the gift to give us to see ourselves as others see us.) Robert Burns, Poem "To a Louse," verse 8. In this poem, Burns, who was the Scottish national poet (1759 - 1796), paints a scene of a haughty beauty at Church, unaware of the louse on her bonnet and of others' awareness of same.

Understanding the perspective of, and our impact on, others becomes even more critical in negotiations between members of different cultures. Scholars like Professor Hal Abramson, who speak or write on cross-cultural understanding in the mediation context, identify unexpected differences between cultures in the most basic interpersonal expectations – such as eye contact. In certain South American cultures, e.g., eye contact is seen as rude; yet for us, failure to make eye contact might be read as dishonesty, disrespect or a lack of self-confidence.

Be Alert to Conflict Handling Styles.

Even without major cross-cultural differences, there can be a substantial discrepancy between the way one believes one is behaving and the way others perceive it. Classic examples are disconnects between people with different styles of handling conflict. These often are classified in five groups: competitors, compromisers, collaborators, accommodators, and avoiders. Being aware of our conflict resolution "style" can alert us to reflexive responses and free us to try out different approaches. Understanding these modes leads to a better understanding of the negotiating counterparty, and also to an appreciation of how that party might perceive us.

SKILL ACQUISITION:

Test Drive the Thomas-Kilmann Conflict Mode Instrument.

The Thomas-Kilmann Conflict Mode Instrument⁶ is a series of questions that reveals one's preferred style of handling conflict. The basic premise is that people vary in the degree to which they seek to assert their own interests even at the expense of others (compete), or to cooperate and promote the interests of others (accommodate). Some prefer to avoid conflict altogether, neither asserting their own interest in the particular dispute, nor satisfying the other's. Some seek a moderated satisfaction of their own interests and those of the other, through the shared sacrifice of compromise. Yet others maximize the promotion of both their own interests and those of the other through collaboration. Despite the apparent preference of negotiation theorists for collaboration – as the way to reach the Pareto optimum—the TKCMI advises that each of these modes of handling conflict has its own utility and drawbacks. It is a fascinating study, worth investigating.

For our purposes, in addition to the knowledge of self and other gained through familiarity with the TKCMI and its principles, there is an added insight into the way people of different mode preferences interact and understand each other. A classic example is the competitor matched with

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⁶Thomas-Kilmann Conflict Mode Instrument—also known as the TKI (Mountain View, CA: CPP, Inc., 1974–2009), by Kenneth W. Thomas and Ralph H. Kilmann; see, kilmann.com/conflict.html.

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an avoider. Competitors like to seal deals. Avoiders prefer to take time. The result can often be an odd mix where competitors offer up a series of increasing offers, just to be frustrated by further delays by hesitant avoiders. Judgments can be added to the mix, with competitors thinking avoiders are not trying or not appreciating their efforts and avoiders thinking competitors are pushy and self-interested.

Try Being Proactive—Understand One’s Impact

Awareness of differences in styles and preferences can help with self-understanding, as well. Beyond this, there are a host of behaviors and expressions that can have an impact on others and lead them to perceive us in manner different from the way we perceive ourselves. To the extent we are seeking to accomplish the goal of building an agreement that maximizes everyone’s interests, we need to encourage the other to feel safe making disclosures about their interests, and to feel it is in their own interest to maximize ours.

NOSCE ALIUS (KNOW THE OTHER)

The dance of negotiation by its nature involves partners. The advice given for self-knowledge above, applies across the board to ones counterparties as well. Both to prepare for negotiation and throughout the course of negotiations, it is helpful to be alert to what is going on for the party across the table. What are their interests? How are they feeling? What is important to them? What are their cultural assumptions? What is their conflict style? What is their context? What is their sense of self, their hopes, dreams, and aspirations?

Only by understanding the interests of the counterparty can a negotiator work to develop options that can meet everyone’s needs. One can learn these interests indirectly, through the application of logic, but even better through direct communication. The best way to learn of the other’s interests is from what they say and do. The degree of disclosure by the other party will be influenced by the tone at the bargaining table.

SKILL ACQUISITION:

Set a Tone Conducive to Candid Disclosure; Be Effective as an Active Listener.

Active listening is a buzzword in ADR circles for good reason. Targeted questioning calls for answers to questions we already have, to promote our pre-existing goals. Active listening, by contrast, is more open-ended. The other party can drive that conversation.

With active listening, we use open-ended questions, show recognition of the other party’s feelings, values and perspectives, and acknowledge their worth. A classic formulation is VECS: validate, empathize, clarify and summarize.

By this approach, the other party feels less alone and more willing to open up. This is the royal way to learning their interests. With that information, one can look for ways to create value in a deal—ways to satisfy the other party’s interests and achieve satisfaction of ones own.

Communication is Key.

Even First Amendment case law recognizes that communication occurs not only with words and speech but also in nonverbal ways. The effective negotiator is alert to, and uses, all forms of communication to advantage. Body language—the handshake, eye contact, posture, tone of voice—all communicate messages or attitudes. It is fundamental to communicate in a manner that builds trust and rapport.

Build Relationship & Trust.

Understanding that it takes two to tango in deal making and that we must learn what will satisfy the other in order for the other to meet our own needs, nothing goes so far as a relationship of trust to foster disclosure. To enhance relationship, people from various cultures give gifts or serve food prior to commencing talks, to signal good will and create a common bond. Shell, in *Bargaining for Advantage*, tells of an executive who gave his counterparty a gold watch prior to initiating merger talks.⁷ This signaled a valuing of the other and, to paraphrase Claude Rains at the end of *Casablanca*, “the beginning of a beautiful relationship.”

Watch for Dynamics of Escalation and De-escalation.

We have all seen it happen. An even toned conversation suddenly goes out of control. Tempers flare, people leave the room. Often these scenarios can be altered if the participants are aware of the factors escalating tensions as they arise. Points are made, counterpoints asserted, one-upmanship takes place, voice tone changes, expressions change, the pace of speech accelerates. If one sees this happening, there is no loss in taking a break, changing tone, slowing things down. Much can be said for the pause that refreshes. Silence is a gift.

Control the Spigot of Disclosure.

At the heart of communications in negotiation is the flow of information. This can range from communicating ones own interests, eliciting and confirming the interest of the other, learning about context, developing principles for fair resolutions, exchanging offers, discussing alternatives, assessing and evaluating legal options and even possible litigation outcomes.

There is a balance in disclosure. Social scientists have observed that disclosure by one party encourages disclosure by the other; and the opposite is true as well. It pays to be clear in advance of what are one’s confidential facts, interests, concerns and analyses, and also of what one would like to learn from the other. These views should be revisited throughout the negotiation.

Disclosure Choices are Informed by Competitive or Cooperative Strategy and Behavior.

⁷G. Richard Shell, *Bargaining for Advantage—Negotiation Strategies for Reasonable People*.

In short, be artful in striking the delicate balance in disclosure. Share where possible, both to encourage sharing and also to enable one's counterparty to help think of options that might meet one's own needs. But be judicious as well, on disclosure of one's own weak points, points that give the other party leverage, feelings that might provoke, and arguments that might lead to escalation or corrective action shoring up the other party's position.

The fundamental difficulty entangled in the preceding consideration is the question of whether to engage in strategic behavior that is competitive or cooperative. Current negotiation theory has shown the greater advantages that can be gained by cooperative behavior. Only cooperation can enable both parties to learn and work together to meet the interests of all, and to maximize gain. A legitimate cause for hesitation in proceeding down the cooperative path is the view that one's counterparty is motivated by a purely competitive strategy or driven by ill will. The bind implicit in this assessment is that ill will or competitive approaches might change if one takes a risk and extends the olive branch. It takes courage and the ability to take a short term loss to make this long term advance.

There is no ultimate solution to this problem. In each instance one uses one's best judgment. But it pays to be aware of this set of choices and of the way the exercise by one party of choices to follow a competitive or cooperative strategy can itself be transformative for all parties.

Maintain Credibility.

Nothing can destroy trust and good will like the discovery that one has been lying or that one is operating with less than candor. Counterparties will clam up and be more inclined to resort to competitive approaches in self-defense if they perceive a negotiator to be dishonest or insincere. Crafty conduct can not only hurt one in the instant negotiation but also can wreak havoc on one's reputation in the long run.

Assess Commitment Levels & Risk Tolerance.

A classic image is the game of chicken. Imagine teenagers racing at each other in hot rods in some LA viaduct. Who will swerve out of the way? If I were driving, I know the answer. I tend to be highly risk averse. It is fascinating to watch commitment levels at play in negotiations. There is great strength in posing a credible threat. To the extent one is able to gage the counterparty's commitment to a certain course of action or deal element, one will understand whether a concession need be made. The capacity to understand the nature of one's own and the other's level of commitment, and also tendency to avoid risk in general and on the particular point at issue comes not only from understanding the person, but also from understanding their context. What happens to them if they give on a particular point? What interest is affected? What in the larger picture do they win or lose? This analysis should be applied for understanding of both self and others.

NOSCE MUNDUS (KNOW THE WORLD)

None of us lives in isolation. As indicated above, to understand ourselves, we must understand our context. This is true for understanding the other as well. An effective negotiator is sensitive to the context in which every party is suspended, recognizing the impact of context and using it as a strength.

Behold the Business Context.

Litigators in particular can be reminded to think beyond the case. Why did this case originate? What is driving the parties?

If one is negotiating a real estate deal, it certainly pays to understand the current real estate market, and even the broader economic climate as that affects property and resale values, demand for space, capacity to build, the ability to obtain loans, interest rates, and related issues.

More specifically, knowing a market enables the negotiator to arrive at more compelling standards for use when setting values. The uses of mutually acceptable standards is routinely recommended by proponents of principled negotiation. Once recognized, they give direction to a negotiation and support fair and doable deals.

Heed the Hierarchy.

The nationally recognized employment lawyer, Wayne Outten, when thinking about strategies for negotiating on behalf of employees, considers where those employees stand within the framework of their employer. Do they have political allies, "Rabbis," people willing to go to bat for them? Do they have "political capital," credibility with certain supervisors or others in management? Have they earned loyalty; would harm to the employee engender a sense of guilt?

Conversely, knowing where the opposing negotiator fits can be helpful. Is he or she trying to cover for their own mistake? Is he responsible for the P&L that is affected by this deal or litigation? Who in the chain of authority must be brought in to achieve closure? Is the negotiator at a level where he or she is trying to impress a superior, or trying to prove a point to a subordinate?

Assess Alternatives.

Any post-modern piece sketching the contours of the Leviathan of Negotiation would leave a lacuna larger than that great beast's blowhole if it omitted mention of the BATNA coined and popularized by Fisher and Ury. BATNA—the best alternative to a negotiated agreement—as well as its variants, all other alternatives, good, bad and ugly, can be used by negotiators to test whether a deal on the table is worth taking. If the likely, tangible alternative to that deal is superior, the rational negotiator keeps bargaining for something better or walks away.

The simplest example is of a currently employed party testing a proposal from a prospective new employer. If the job offer is for lower pay, at a shakier institution, doing less exciting work, with worse prospects for advancement, in a

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less convenient location, with nastier colleagues, and a less impressive title than one's current employer, no rational worker will take that bait. When these and other similar factors begin to equal and exceed the appeal of those at the current job, then the new offer begins to seem worth taking. Of course, returning to self-knowledge, one still needs to be aware of one's risk tolerance. Even if the offer is better than one's BATNA, is one willing to move from the known to the unknown?

Analyze Risk.

Beyond the subjective condition of risk tolerance, in the context of pending or potential litigation, understanding alternatives to a deal requires an understanding of the probable consequence of litigation. This includes not only the like outcome after trial and appeal, but also the direct and indirect costs incurred along the way. These are often described as risk analysis and transaction cost analysis.⁸ Careful counsel spend hours assessing the strengths and weaknesses of their case to guide clients in assessing the amount of payment that makes sense to put that matter to bed.

SKILL ACQUISITION:

Man Learns from Machine—Try the TreeAge Decision Tree Program.

As a general tool in decision making, it is helpful to identify areas of uncertainty and choice points that affect outcomes along the path of a predictable process. For example, in a case, there might be uncertainty on whether discovery will develop favorable or unfavorable information on a set of points; on whether the law characterizes a particular action or arrangement as legal or illegal; on whether one will win or lose on motions to dismiss and for summary judgment; on the range of damages that might be awarded under different standards at trial; and on likelihood of victory on appeal. Added to this mix, can be the litigation transaction costs—fees for attorneys and experts, transcripts, photocopying, preparation of exhibits and the like. These costs can be factored in along the way.

We all can rough out these factors and do our own math. If there is a 50/50 chance that we will win \$1,000,000 after trial, we can loosely give that case a \$500,000 value. Understanding it will cost the client \$250,000 in fees to get

⁸For helpful articles on decision trees and risk analysis, see, Douglas C. Allen, *Analytical Tools and Techniques: Decision Analysis Using Decision Tree Modeling*; Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 Neg. J. 123 (1995); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 Bus. Law 617 (1984-1985); Jeffrey M. Senger, *Decision Analysis in Negotiation*, 87 *Marquette Law Rev.* 723 (2004); David B. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 *Harv. Neg. Law Rev.* 113 (1996).

there, we might reduce that value to \$250,000 if that sum of cash were sitting on the barrelhead for the taking to end the suit.

When the factors get complex, we might explore a program that does the math on the factors of uncertainty and choices taken along the way—TreeAge. This software, available online at treeage.com, helps develop and test outcome through complex decision tree analysis.

Gather Information.

Across the board, information is the medium of negotiation. Information helps us identify our own and the other's interests. It is the basis of our understanding of the business, legal, or other risk context for assessing a deal. It is the *prima materia* with which we make any assessment of risk or value. Only with information can we discover and assess our leverage.

Assess Leverage; Engage in Logrolling.

Much has been written on leverage. When one controls the counterparty's access to a means of satisfying that counterparty's need, or if one can impede the satisfaction of that need, one has bargaining power. It is important to be clear on what those levers are on both sides of the table. It is further helpful to see if there are alternative means of satisfying, or jeopardizing, the need or interest in question; this liberates one from being hung up on a particular risk or issue.

There are a good number of times when it can cost one party little to satisfy a significant need of the other party. If each party can offer something of low value to the offeror and high value to the other party, this presents a wonderful opportunity for trading that will generate higher overall value in the deal. This type of trading, known as logrolling, can be a source of great satisfaction.

Crunch Numbers.

The risk analysis discussion above should already suggest that a good negotiator should not shy away from numbers. In deals there are often many moving parts, each with its potential economic value. It pays to try to price values, to calculate risks, to test principles and assumptions by working out their math.

Develop Principles and Standards.

At the heart of the Fisher-Ury model of negotiation—in addition to putting the parties into a cooperative frame of mind, focusing on the problem, identifying the issues, discovering underlying interests, and developing options to meet those interests, producing a deal that is superior to the BATNA—is the recognition that developing workable options and deals often depends upon arriving at principles which all parties can adopt. This fits into our “mundus” sec-

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TIPS *continued from page 12*

tion, because they are an effort at transforming the subjective into the realm of objectivity. Whether it is fair, doable, wise, legal, efficient, considerate, reciprocal, due—whatever the standard, it pays consciously to work to develop standards that can be discussed with and adopted by one's counterparty in order to address distributive issues or generally to work out a deal.

This can include finding an objective basis for assessments by turning to authorities in recognized texts—like the Kelley Blue Book for used car values—to experts, like appraisers or accountants, or to broader custom and usage in a particular industry or trade. The net result is bringing the discussion into an objective realm susceptible to shared, open analysis, and away from the subjective realm governed by the assertion of wills.

OPENING TO THE GREAT WAY

Having embraced the chiliocosm, framing out content and approaches through the vast domains of self, other, and the world, a comprehensive presentation on Negotiation Skills must finally recognize that we are dealing with what is fundamentally a process.

We recognize that there is a wide range of styles and approaches in negotiation that can differ and yet be both effective and legitimate. Having said that, I still might make a few recommendations. Since we engage in negotiation in all areas of life, there is something to be said for being bigger than the topic. Sometimes living with dignity and genuineness trumps a minor strategic gain. Moreover, with principled, joint mutual gains approaches, it is possible to hold one's own, and indeed improve the deal outcome, while still acting with decency and in a manner consistent with one's own values.

As we engage in this process, we can negotiate the process itself. If we find ourselves in a mode of interacting that seems inappropriate or unproductive, we can discuss our approaches with the counterparty. We are all too familiar with the frustration of negotiating the size and location of the table. Yet, while we do not wish to be hung up and frozen in our interactions, it can also be liberating—and good strategy—to be alert to process choices that might enhance relationships, information gathering, or the deal.

Negotiators should cultivate creativity, openness, and flexibility. We are participating in something greater than ourselves. Richer possibilities may emerge from a deal than we could have at first realistically have imagined. This attitude of openness makes us not only more humane and appreciative of others, it also opens us to reality and enables us to see and seize upon opportunities.

Along these lines, let a lively silence be your baseline. This helps in decision making on disclosure flow, preserves candor through eliminating impulsive misrepresentations, controls the expression of unhelpful emotional reactions, prevents reactive behavior overall, and encourages listening to others. It gives one a chance to consider before com-

mitting. Yet, this approach should not be at the expense of wholesome spontaneity and warm sharing.

Finally, negotiation, at its core, recognizes of the freedom and dignity of all participants. We all can take it or leave it, talk or walk. For this reason, it is a beautiful way indeed.

Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), is chair of the FBA's Alternative Dispute Resolution Section. He has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's \$ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005–2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.

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