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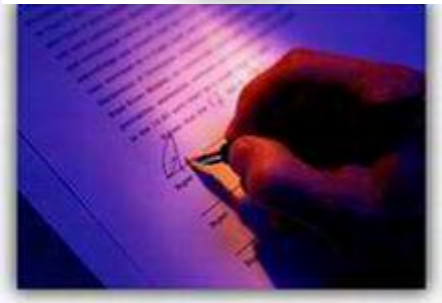

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EDITOR'S NOTE

I was greatly impressed by the catchphrase IBG/YBG formulated by Thomas Friedman in his book, "Hot, Flat & Crowded". It postulates the need for taking the initiative and responsibility of your actions. Friedman attributes IBG/YBG the main reason for the US financial recession. It means – do whatever you like now, because "I'll be gone" or "You'll be gone" when it becomes due. The same logic and reason would be applicable for communal harmony also, if we do not take the responsibility of transforming it. IIAM is planning to celebrate the year 2011 as "Community Mediation Year". It is intended to empower people in the prevention and early intervention of conflicts as an alternative to institutional mechanisms. As Mahatma Gandhi has said, "You must be the change you wish to see in the world".

Wishing you all a merry Christmas and a very happy New Year.

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2020 Vision – Where in the world will mediation be in 10 years? (Part-1)

: MICHAEL LEATHES

The mediation movement is described as an emerging profession. It meets some of the basic criteria in some places, and none in others, but in only a few places does it meet all the criteria. For those who act as mediators, few have begun their careers in this role. Most moved to mediation from other professions, and it remains largely an "occupation" for most mediators today. Mediation needs to develop from an occupation where anyone can claim to be a mediator, into a true profession. That transition is readily achievable within 10 years, and in the following pages the author offer thoughts on the components that can make it happen.

Yogi Berra made his name not only by winning the 1968 World Series as coach of the New York Mets but with malapropisms like half the lies they tell about me aren't true and always go to other people's funerals, otherwise they won't come to yours. But his remark that the future ain't what it used to be was more profound. Change happens faster now. The near certainties of the past look more like unconvincing theories. Ways of leading, educating, negotiating, daring, innovating and succeeding are being reinvented. The future arrives more quickly; a 10-year forecast is now more challenging.

Yet accurate predictions remain vital to social and economic progress. Major companies still predict decades ahead, adapting their assumptions as time goes by, refining the scenarios. For example, the focus of the World Business Council for Sustainable Development, an association of 200 international companies, is what the world will look like in 2050 and convenes chief executives across all sectors worldwide to collaborate in ways that will enable society to be sustainable in 40 years time.

So, what about the mediation field – or, should I say, movement? Are its stakeholders doing anything similar? Setting aside the obvious role that effective dispute avoidance and prevention can play in achieving a sustainable society and economy, the immediate question is whether the main players in mediation are taking steps to drive, grow and sustain the field itself. Where could mediation be in 10 years time? Can stakeholders realistically exert a significant positive influence on the field's future progression?

When you cut into the present, the future leaks out observed the novelist William S. Burroughs. Once the current state of mediation has been laid out and dissected, the pointers to the future, if we look for them, will reveal themselves so they can be analysed and applied to the advantage of everyone. Those indicators must be shared, appreciated and leveraged skillfully and collaboratively or we ignore at our peril the clear advice of Mahatma Gandhi: *YOU must be the future you wish to see in*

the world. None of us knows the future, but we all try to predict it. Not being a soothsayer, my humble way for trying to forecast mediation is quite prosaic: to appreciate the history, assess the status quo, then focus on two key issues: how mediation is learned, practiced and presented to its market, plus how user needs are changing. Then cut into each with a constructively critical eye, see what leaks out, and combine the results to try and map out a likely or achievable future. This may enable us to assess whether, and if so how, we can all exert a meaningful and positive influence on the development of mediation.

The Past - history in a nutshell

In the Lunyu, or Analects, it is recorded that Zi-gong asked: *Master, is there a single word which may serve as a rule of practice for all one's life?* to which Confucius replied: *Is not Reciprocity such a word?* Mediation's roots lie at the heart of Confucianism, which later civilizations, like the Roman Empire, also applied extensively.

In process terms, modern mediation crystallised when United States Chief Justice Warren Burger invited Professor Frank E. A. Sander of Harvard Law School to present a paper at the Roscoe Pound Conference of 1976 in St Paul, Minnesota. This historic gathering of legal scholars and jurists discussed ways to address dissatisfaction with the American legal system and to reform the administration and delivery of justice. Professor Sander's paper *Perspectives on Justice in the Future* urged a widespread adoption of non-litigious forms of dispute resolution, not least of which is mediation.

US State legislatures then focused on mediation, and law and business schools began research. In 1979, CPR Institute was founded, backed by companies and professional firms, and began to explain the idea of mediation. *Getting To Yes* by Harvard Law School Professors Roger Fisher and William Ury was published in 1981. In 1983, Harvard Law School, MIT and Tufts together founded the Program on Negotiation, followed three years later by the formation of Pepperdine's Straus Institute for Dispute Resolution. The "new" field attracted skilled, inspirational and pioneering educators who began defining the skills and processes needed for successful mediations. By the late 1980s, those early techniques had spawned training, educational and service initiatives in many parts of the US, and professional interest groups like the Association for Conflict Resolution and the ABA Section of Dispute Resolution were established. Mediation germinated elsewhere with the formation in 1988 of LEADR in Australia and (what is now) the ADR Institute of Canada, then ADR Group and CEDR in the UK in 1990. Others followed in Singapore, Hong Kong, Continental Europe and Latin America.

The early development of mediation was meteoric, but by the new Millennium the growth curve had slowed. Governments tried to provide stimulus through the Uniform Mediation Act 2001, the UNCITRAL Model Law on International Commercial Conciliation in 2002 and the European Mediation Directive in 2008 by attempting to inject clarity into issues that might otherwise hold back the progress of mediation.

However, supply of people holding themselves out as mediators was outpacing demand. As mediation matured, limitations surfaced. Mediation was too heavily presented as a solution to the failures of common law litigation; the field was largely populated by lawyers who unthinkingly called it Alternative Dispute Resolution and included arbitration under that term; mediation was seen in many civil law countries as an Anglo-Americanism; lay people – the users – largely failed to grasp its potential beyond the context of courtroom processes; some panels offered both arbitrators and mediators, causing some confusion; and mediation's application as an innovative branch of negotiation, conflict prevention and avoidance all got rather lost. Nonetheless, by the turn of the Century, mediation had arrived and, skilfully handled, was poised to develop.

Ten Years after the Millenium, has mediation become a free-standing profession?

In *The Professionalization of Everyone?* in 1964, Harold Wilensky, Professor Emeritus of Political Science at the University of California, Berkeley, suggested five stages in the professionalization of an occupation: (1) a substantial number of people doing full time an activity that has a market; (2) the establishment of training facilities; (3) the creation of a professional association; (4) the association acting to protect its practitioners; and (5) a code of ethics being in force. Professor Wilensky continued: *Any occupation wishing to exercise authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training and convince the public that its services are uniquely trustworthy and tied to a set of professional norms.*

The mediation movement is described as an emerging profession. It meets some of the basic criteria in some places, and none in others, but in only a few places does it meet all the criteria. More accurately, mediation is a vicarious profession; its practitioners tend to rely heavily on their status elsewhere when asserting professionalism as mediators.

The Litmus Test of whether an occupation has developed into a true profession depends on whether its market perceives it as a profession. Ute Joas-Quinn is Associate General Counsel of Shell International's Upstream International Functions. She is a prominent advocate of the use of mediation, but wants to see it develop properly. She recently made the following pithy assessment of the status quo:

For those who act as mediators, few have begun their careers in this role. Most moved to mediation from other professions, and it remains largely an "occupation" for most mediators today. There is a current absence of user recognition of an "exclusive jurisdiction" for mediation, i.e., there are no consistent high standards of training, no governing professional bodies, few qualifications, and no universally-accepted professional norms. As a result, the quality of mediators across the board is highly variable, there are few systematic processes to assess or measure a mediator's quality and competency, and high standards are neither visible nor credible. Due to inadequate promotion, there is poor understanding of what mediation is and/or what benefits it can bring to facilitate the early resolution of conflicts. Poor understanding has resulted in limited acceptance of the concept, largely in the business world, but often by the legal profession as well. Those who are acquainted with mediation may often discover that finding the right mediator is a problem – word of mouth is unpredictable and subjective.

These remarks were offered as an international assessment of how mediation is today. All generalizations have exceptions. Some providers and trainers do set very high standards and achieve outstanding results, and Australia, Austria and the Netherlands have made more progress than most, but it is the absence of consistent across-the-board quality and transparency that is currently depriving mediation of its true professional status.

Mediation needs to develop from an occupation where anyone can claim to be a mediator, into a true profession. That transition is readily achievable within 10 years, and in the following pages I offer thoughts on the components that can make it happen.

Learning – Acquiring mediation knowledge

Outcomes Based Education (OBE) has gained momentum around the world in most areas of learning. It assesses students not just on their technical knowledge of inputs like textbooks, but on whether they are able

to achieve whatever outcome is required. Legal education has lagged behind accountancy and other professions in this regard. Fuelling this drive towards OBE in US legal education, two reports[1] in 2007 by the Carnegie Foundation for the Advancement of Teaching and by a team under Professor Roy Stuckey, urged law schools in the US to broaden the range of lessons they teach; integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses; and give greater attention to instruction in professionalism.

The Program on Negotiation was innovative, inspiring and unique when introduced in 1983 but since then other centers of learning, especially business and law schools, have built on the wealth of knowledge, teaching and skills generated in the negotiation field. Others are now incorporating them into core curricula. Over the next few years, demand for these skills will increase considerably as businesses and professional firms seek to minimize costly post-qualification training, and as graduates strive to maximize their employability. By 2020, educational institutions, including business and law schools, will systematically incorporate mediation and negotiation skills into their standard mandatory curricula, driven by OBE. Adventure Learning[2] – getting these skills played out in real environments – will become common, and mediators will be enlisted to offer experience generation opportunities to students through assistantships. Many schools will be teaching basic dispute avoidance and resolution skills as part of regular curricula.

Companies have long been focused on outcomes, but no more so than now when austerity and certainty drive share values. GE, Nestlé, AkzoNobel and many other international companies have led the way in demonstrating how mediation and other principled negotiation courses for staff instill an outcome orientation, leading to earlier results and risk avoidance. Litigation will increasingly be classified as a project, to be managed systematically and proactively, and brought to closure, like any other.

For those not aspiring to practice as mediators, training institutions will provide more focused courses meeting different needs – such as understanding the application and value of mediation, representing clients in a mediation, dispute avoidance techniques, diplomacy, inter-cultural mediation and negotiation, deal mediation and outcome navigation, collaborative law, post-deal execution and relationship-building.

The next generation is being primarily wired to achieve outcomes, not perpetuate process, a switch in attitudes and skills that will turbo-charge demand for mediation well within the next 10 years.

(Footnotes)

[1] http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law and http://law.sc.edu/faculty/stuckey/best_practices/best_practices-cover.pdf

[2] See: Venturing Beyond The Classroom, edited by Chris Honeyman, Jim Coben and Giuseppe De Palo, 2010

Interested to contribute Articles?

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Learning – Acquiring mediation skills

Like leaders, entrepreneurs, artists, teachers and musicians, mediators are born, not made – though, of course, not entirely. While knowledge and technical skills are needed in mediation as in other vocations, mediation is essentially practice and personality-based. The ability, instinctively, to win the trust of opposing and often hostile parties is a vital characteristic of a successful mediator, and not everyone has or can acquire it. Two advanced skills trainers, Jane Gunn and David Richbell of MATA, have emphasised the need for mediators to be highly biphasic, building trust through the capacity to behave in opposite ways depending on circumstances. In their words: *to be both proud and humble, sensitive and tough, strong and gentle, humorous and serious, trusting and cautious, optimistic and pessimistic….* The ability to achieve that degree of instinctive adaptability can be learned, but mostly is mainly rooted in personality and aptitude.

Despite this, many practitioners stumbled into mediation, some naturally suited to it, others not. Few are long-term career mediators. A high proportion are attorneys – ex-litigators, retired judges and arbitrators, or former politicians and diplomats. This is probably attributable to the history of modern mediation, that misnomer ADR, and its service-driven, not user-driven, origins. Despite what some lawyers say, the truth is that legal knowledge and advocacy have little bearing on the ability to mediate – *few disputes are ever about what they're about*. At their roots the majority of disputes are rarely about the legal technicalities they inevitably become consumed by. Dr Friedrich Glasl elegantly expresses it another way: *Do we have a conflict? Or does the conflict have us?*[3]

Many of today's practicing mediators have never been comprehensively trained, but rather learned on the job. A great number have only attended a one-week training. Some, but not all, had their skills independently assessed at the end, and only a few followed up with advanced skills courses or became teachers. Trainees include those who aspire to practise as mediators, and others who have no intention of practising but seek to sharpen their principled negotiation techniques, or wish to know how and why mediation works, or to represent clients more effectively in mediation. Very eclectic.

Within 10 years, users will expect recent mediators to have undertaken a comprehensive training program and have successfully passed an assessment – with assessors who are independent of the training faculty. The assessors will be experienced in skills evaluation and will apply transparent criteria. Testing will be conducted through roleplays, oral and written examinations and will cover aptitudes, skills, competencies and substantive knowledge of negotiation theories, ethics, hybrids, laws and evolving issues in the field. All practicing mediators successfully passing these courses will be "qualified" one way or another, and expected to attend regular advanced courses and best practice skills sessions as a structured, output-orientated continuing professional development program.

If trainers fail to collaborate in setting consistent, transparent and convincing criteria for their programs meeting high standards, I expect governments to do it for them.

Delivery – Changing mediation practice

As users become more familiar with mediation, they will become more adventurous. The demand-side will drive the use of hybrids and the growth curve of complementary evaluative mediation (conciliation) may increase, partly influenced by lawyer-mediators. Collaborative law and transformative mediation will be widely accepted; mediators will increasingly be used in conflict avoidance, such as establishing regulatory frameworks.

Mediators will accept responsibility to help those starting in the field to gain experience through assistantships, and see that they have much to learn from the younger generation.

New technologies will have an impact both on the growth of mediation and on how it is practiced.[4] Over 20 million people now have Skype switched on their desktops at any moment. Its video telephony capability

(Footnotes)

[3] Confronting Conflict – A first-aid kit for handling conflict by Friedrich Glasl & Petra Kopp, 1999

[4] See: The End of Lawyers? – Re-thinking the nature of legal services by Richard Susskind, OUP 2009

and those of similar systems have revolutionized communications with the same cost-free multiple-location video conferencing used by consumers as well as companies and governments. Skype seems to have been with us for decades, but only came into existence in August 2003, taking several years to catch fire as its stability and quality improved. Now, such systems are "old" technology.

Enter telepresence, a technological advance enabling participants to have an enhanced sense of being in the same room together. Telepresence is now embracing 3D, already available on consumer TV sets, replicating more closely the dynamics of a normal, physical meeting even though participants may be in different time zones. Soon, holographic meetings will enable people to be virtually "beamed" into our meeting rooms, and we into theirs, appearing to take a seat at each other's tables, creating a real sense of presence displaying verbal, paraverbal and body language aided by instantaneous language translation and other advances. The tools required will be built into computer and smartphone screens. By 2020, these communication platforms will have been in widespread usage for some years, and their stability will have been perfected. Mediators will use them extensively.

Apps will overtake websites as prime information sources. Smartphones, ePads and laptops will be able to download hundreds of mediation apps, enabling users to access information about mediators, providers and relevant topics worldwide with a finger tap. Online Dispute Resolution (ODR) will acquire a new significance, enabling mediations to be less dependent on logistics and participant ability to travel. Mediators will be able to use secure technological environments to ensure confidentiality, providing virtual caucus rooms that guarantee privacy. New technology will enable users to have the same confidence in the security of these systems as online banking – they are, in fact, safer than today's physical meeting rooms, which are vulnerable to eavesdropping devices.

Governments are already introducing performance assessments for the public sector. Soon, independent assessment will become the norm for all professionals, everywhere.

(to be continued....)

(Author: Michael Leathes, is a director of the International Mediation Institute (IMI) and a former in-house counsel with a number of international companies. The views offered here are the author's alone but he invites comments from all stakeholders in the mediation field to encourage debate on the progression of mediation towards an international profession. Michael can be reached via "Contact Us" at the IMI portal – www.IMImediation.org)

The Lighter Side

A man placed some flowers on the grave of his dearly departed mother and started back toward his car when his attention was diverted to another man kneeling at a grave. The man seemed to be praying with profound intensity and kept repeating, "Why did you have to die? Why did you have to die? Why did you have to die? Why did you have to die?"

The first man approached him and said, "Sir, I don't wish to interfere with your private grief, but this demonstration of pain is more than I've ever seen before. For whom do you mourn so deeply? A child? A parent?"

The mourner took a moment to collect himself, then replied... "My wife's first husband."

Article

Should Parties tell Mediators their Bottom Line?

: PETER CONTUZZI

As lawyers increasingly make mediation the forum of choice to attempt negotiating settlements for their cases, they also increasingly confront the issue of what to say when a mediator asks them what their bottom line is. A debate has developed over whether it is even appropriate for a mediator to ask the bottom line question. If that process has appropriate protections in place so that this can be done simply, safely and without risk of manipulation by the mediator, why not take advantage of the opportunity? The author looks at techniques to resolve the process of uncertainty problems surrounding bottom line information and to provide meaningful protections against manipulation by the mediator, and encourage candor from the negotiators.

As lawyers increasingly make mediation the forum of choice to attempt negotiating settlements for their cases, they also increasingly confront the thorny issue of what to say when a mediator asks them what their bottom line is. When a speaker at the 1999 American Bar Association Section of Dispute Resolution Annual Meeting in Boston was asked if he advised candor, his response was immediate and forceful: "*Don't do it! I tried it once and got burned by the mediator. All he used it for was to try to leverage me further. Never again!*" He was vigorously challenged by a mediator who lamented that if the parties hide their true positions not only from each other but also from the mediator, they dramatically lessen the chances of settlement.

The intensity of the sparks generated by this topic indicated a glaring need for better understanding between the two types of lawyers caught up in this dilemma - the mediator who finds the question useful, and the negotiator who believes an honest response to be dangerously risky. Before going any further, we should note that a debate has developed over whether it is even appropriate for a mediator to ask the bottom line question. In the typical civil litigation negotiation where money is the primary (if not only) issue, some negotiators may resent a question, even within the protected confines of a separate meeting, which so bluntly zeroes in on their ultimate piece of confidential information.

Others will share the above negotiator's concern about being manipulated by the mediator. And mediators, mindful that they cannot really know if the parties will be equally candid, may worry about having their process manipulated to the disadvantage of the party that is more honest in responding to the question.

These are legitimate concerns, but human nature and common sense can also provide some guidance here. In a money negotiation, each party normally wants an opportunity to explore how much (little) it can get (pay) in exchange for a settlement. The bottom line number of each, therefore, is usually considered nobody else's business. But the risks of a trial normally give a settlement its "bottom line" value to negotiators.

Assume that a mediation process is devised so that it allows negotiators to do that exploring and then, before concluding with a stalemate, provides them with an opportunity to find out if their bottom line (hopefully, arrived at after reflection on what was learned during the mediation) would be acceptable to the other side. If that process has appropriate protections in place so that this can be done simply, safely and without risk of manipulation by the mediator, why not take advantage of the opportunity? And if a mediator can lessen the risk of negotiator manipulation by providing incentives for candor, why not seek confidential disclosure of information that is so obviously useful in a money negotiation?

Surely, however, the negotiator quoted above has an understandable concern. What you tell a mediator should not come back to bite you. The negotiator apparently had different expectations than the mediator on how the bottom line information he disclosed would be used. He quickly became mistrustful of the mediator.

And we quickly arrive at the heart of a serious problem. Uncertainty about how particular information will be used, as well as uncertainty about the next procedural step, can lead to at least a failure to make full use of a mediation's potential. Worse, this "process uncertainty" can also lead to mistrust of the entire mediation process, encouraging dishonesty and deception even in confidential, private discussions with the mediator. That is an especially serious problem in a mediation, because it can rob the process of one of its major advantages over a conventional face-to-face negotiation. In every negotiation, there is information that is useful to putting an acceptable agreement together but too risky to discuss directly with other parties because it might be used by them to your disadvantage. Through mediation's powerful addition of the confidential separate meeting to the negotiating framework, negotiators can dramatically increase their control over the processing of information that is useful for agreement development but risky when disclosed to the other side.

Parties may be wary of winding up with an unwanted value opinion or a settlement proposal from the mediator that they suspect may be nothing more than a splitting of the difference between their confidential bottom line numbers. Since we work in the real world, we must recognize that in a money negotiation, parties often find it in their financial interest to deceive other parties, including at times the mediator. The challenge for those of us who use or practice mediation is to develop simple procedural steps and techniques to address the uncertainty problem and its related tendencies toward deception. If we want negotiators to be candid with the mediator during the separate meetings, we mediators must do more than explain confidential information protections or appeal to the more rigorous ethical obligations some argue should apply in mediations.[1] We must show them how being honest with the mediator serves their self-interest, and offer techniques that not only lessen the risks of candor, but perhaps even reward it.

First, a general comment about lessening uncertainty. By now, mediators are expected to provide a procedural overview of their process and clearly explain their role, the use of the joint meetings and separate meetings and the confidentiality protections. That obviously helps to lessen uncertainty. But an effective process must also be flexible, so there are limits on how specific a mediator can be at the outset without boxing himself in procedurally or burying the negotiators with information that could be more effectively presented later on. A simple solution is to present the most detailed explanation at the most appropriate time. Money negotiations being what they are, questions about what dollar amounts would be acceptable to a party are particularly sensitive and therefore should be preceded by a very specific explanation of how responses will be used.

Timing is obviously of paramount importance here, and effective mediators normally will not ask this type of question (as well as discourage "What do you think it's worth?" type questions from the negotiators) until the last phase of the negotiation. Keeping in mind the issues raised above, we are now ready to reframe the question posed in the title of this article: Are there mediation process techniques, to be employed at the end of a money negotiation that will otherwise conclude in a stalemate, which can allow a negotiating party to find out simply and without risk if its bottom line would be acceptable to the other side, and which also encourage candid responses?

(Footnotes)

[1] See, e.g., Kimberlee K. Kovach, Good Faith in Mediation: Requested, Recommended or Required? A New Ethic, 38 S. TEXAS L. REV, 575 (1997); Carrie Menkel-Meadow, Ethics in ADR Representation: A Road Map of Critical Issues, 4 DISPUTE RESOLUTION MAGAZINE 3 (Winter, 1997).

In a separate meeting, I can of course ask a party to disclose its bottom line to me and then ask the other party whether that number would be acceptable if it could be obtained. This garden variety "What if" technique offers at least some protection since the hypothetical language used does not constitute a formal settlement proposal. That can be a pretty thin veil, though, and some negotiators will speculate that the hypothetical number has already been approved by the other party. Alternatively, I can ask each party to tell me its bottom line and then advise them, for example, whether the numbers are the same or (without disclosing the actual numbers) whether they overlap, are near each other or far apart. While they have the virtue of simplicity, these common techniques lack both sufficient incentives for candor and protections against manipulation. They may also leave unclear what will happen next if they do not produce an agreement. For example, the parties may be wary of winding up with an unwanted value opinion or a settlement proposal from the mediator that they suspect may be nothing more than a splitting of the difference between their confidential bottom line numbers.

Given these risks and uncertainties, how candid can they afford to be?

Safety deposit box

To address these shortcomings, I have experimented for several years with a technique in money negotiations I call the Safety Deposit Box. Mine is a deadline-oriented process, and if the parties are not close to agreement as we approach the end of the allotted time, I sometimes convene a joint meeting to tell them that there is a final technique that is often effective at this point. I ask them to think of me as a Safety Deposit Box and explain that numbers go into the box but not out - they remain locked in the box. My explanation continues with words similar to the following:

"*I will separate you one last time in a few minutes and ask you to put your final bottom line number into the Safety Deposit Box. Please give careful thought to your number, because it will be used by me in several ways. These numbers will not be disclosed unless, as happens occasionally, they are the same. If they are the same, I will bring you together to sign a settlement agreement*". A few times in the past, these numbers have overlapped, i.e., the plaintiff's final number was lower than the defendant's. That is the one and only situation in which the midpoint between your final numbers will arbitrarily become the settlement amount.[2] If there is a gap of any significance between your final numbers, I will inform each party that a gap exists, without disclosing either number or the size of the gap. You may then choose among three options: 1) to keep your number confidential; 2) to disclose your number to the other side; or 3) to condition your disclosure on the other party's agreeing to disclose its number to you.

If this step does not lead to an agreement, the mediation will conclude with a brief joint meeting during which you will have an opportunity to decide if you wish to move on to the optional last stage of the process - a joint request for a final settlement proposal from the mediator. If you jointly request a settlement proposal from me, I will use the final numbers you put in the Safety Deposit Box in the following way:

(Footnotes)

[2] However, before doing that I would first encourage analysis of alternative allocations of the overlap amount that might benefit one party at no cost to the other.

Sometimes, I believe the final number of one party is significantly more fair than the other. Then I adopt that same number as my own number in my proposal. In fact, my preference is to do this in order to provide an extra incentive for you to be as candid as possible when putting your number in the Safety Deposit Box. I obviously do not indicate if my number is an adopted one, although if you have already chosen to disclose your final number, the other side will know that. Sometimes, however, I develop my own number. It is my strong policy not to propose the midpoint between your two numbers. My proposed number will always be closer to whichever of your numbers I consider more fair. You will have some time to consider the proposal and then respond confidentially to me with a simple "yes" or "no." If you say "yes," you are entitled to hear the other party's response, but your "yes" is not communicated by me to the other party unless it also said "yes." If you say "no," you are not entitled to hear the other party's response. The case either settles for the proposed terms or else nobody's position changes. Before I separate you again and ask you to spend a few minutes discussing what your final bottom line number will be for the Safety Deposit Box, are there any questions?"

In short order, I obtain their bottom lines. If their numbers are close, a little shuttling normally produces a mutually acceptable number. If their numbers are not close, I convene a final joint meeting and offer them the option of a final settlement proposal from the mediator (normally faxed to them the following day so I have some time to reflect). I explain that I will do my best to provide them with a proposal that reflects my opinion of the case's settlement value and meets my standard of fairness: reasonable to my mind as well as comfortable to my conscience.

I also advise them that in the past, there have been some cases in which I declined a request for a proposal because I could not develop one that met my standard of fairness. I make a proposal only if both parties jointly request it, and I wait outside the room while they decide. Thus, each party knows exactly how its Safety Deposit Box number will be used during these final steps. Each maintains complete control over disclosure of its number and each has veto power over the making of a settlement proposal by the mediator. If they jointly decide to request a proposal, it will not be a mindless one "splitting the difference." I am required to either adopt or at least be nearer to one party's number. My stated preference for the adoption alternative provides an incentive for honesty, but the ambiguity created by the other option (combined with my not saying which alternative applies) provides cover for a party which would like a proposal but does not want its final number revealed under any circumstances.

Taken together, then, these aspects of the Safety Deposit Box technique resolve the process uncertainty problems surrounding bottom line information, provide meaningful protections against manipulation by the mediator, and encourage candor from the negotiators. If the parties remain in a stalemate despite all that, they have an additional opportunity to reach agreement should they jointly request a settlement proposal. All of the scenarios capable of occurring in the Safety Deposit Box explanation have in fact occurred in my practice. When I use this technique, it is only when we are near our deadline and the parties remain substantially apart (normally after a full day of negotiating), so the overlap scenario is by far the rarest. However, in a significant minority of cases, the numbers placed in the Safety Deposit Box have either been the same or close enough so that some follow-up shuttling quickly produced agreement.

The most common result is for there to be a significant gap between the final numbers. The option most frequently chosen by the parties has been keeping their numbers confidential, but many have selected conditional disclosure.

Unilateral disclosure has occurred in only a few cases. More often than not, the parties jointly request a final settlement proposal, and a majority of these cases then settle. Even in the cases that do not settle, the parties often express procedural satisfaction with the control they maintain and with the clearly defined "end game." The limitations of this procedure should also be noted. It does not guarantee protection against all forms of manipulation, and there is no way to know if the parties are placing their actual bottom line numbers in the Safety Deposit Box. If the parties' views on the probable outcome of a trial remain significantly different even after digesting all the information generated during the mediation, this technique is unlikely to help them reach agreement. However, in money negotiations involving experienced attorneys, the parties' real opinions on ultimate case value are typically not so far apart as to make them unmanageable.

The Safety Deposit Box technique is but one example of mediation process solutions that can advance our more general goals of lessening uncertainty about what comes next and how information will be used, as well as encouraging honesty during private discussions with the mediator. The more we can do of that, the better our procedures will be.

(Author: Peter Contuzzi is a Mediator & Arbitrator from Northampton, Massachusetts, USA. More details are available in www.contuzzi.com)

Think ... Barracuda?

Scientists at the Woods Hole Oceanographic Institute did the following study:

It's a widely known fact that Barracuda love to eat mullet. Scientists put a barracuda into an aquarium, added a glass partition in the middle and then put a mullet in the other side. Not believing his good luck the barracuda circled a few times, gathered up speed and launched directly at his lunch - the poor unsuspecting mullet. Wham! Bam! Full throttle into the glass partition.

Unfazed at this, the barracuda did his preliminary circles and sped off again toward the mullet. Again, Wham! Bang! into the glass partition. Again and again and again he tried. Some weeks later, the scientists noticed the barracuda quit trying to eat the mullet, so they removed the glass partition.

Amazingly, the barracuda remained in his side of the aquarium, silently swimming in circles. In fact, the hapless barracuda slowly died of starvation while the lucky mullet swam about in safety just a few inches away!

Many of us are like that barracuda - hurt, bruised and wounded from many previous collisions with life. We've given up, our lives have become unproductive, lifeless, hopeless, without goal, purpose or meaning.

Around and around we go, going nowhere... silently, starving to death... while just a few millimeters away there is a prize to be collected, a blessing to be claimed, a job to be had, a relationship to begin, an education to be gained, earnings to be earned.

I took this advice seriously and let me tell you, the mullet is delicious!!!

~ Original storyline from the book, "Follow Your Heart," by Andrew Matthews ~

IIAM celebrating "Community Mediation Year 2011"

Indian Institute of Arbitration & Mediation (IIAM) will be celebrating 2011 as "Community Mediation Year" with the object of popularizing the concept of mediation as the primary mode of conflict resolution. IIAM Mediation Committees involving eminent and socially oriented people will be formed in all states of India and among the Indian communities abroad. "IIAM Community Mediation Service" with the motto; "Resolving conflicts; promoting harmony" was launched in the year 2009 by the Chief Justice of India. The program is also endorsed by the International Mediation Institute (IMI) at The Hague, Netherlands.

The mission is to bring justice to the doorsteps of the people by establishing Community Mediation Clinics, where conflicts would be managed by trained Community Mediators. The Mediation Committees will oversee the policy making, localisation, managing and delivery of the service. The committees will be headed by Hon. Ambassadors for IIAM Community Mediation Service. Please join us in this effort to create global peace and harmony. For more details log on to www.communitymediation.in

CIArb Launches Major Survey into Costs of International Arbitration

The Chartered Institute of Arbitrators (CIArb) is launching a major survey into the costs of international arbitration, which has become the preferred method of resolving cross-border commercial disputes. The 'Costs of Arbitration' survey will gather data to inform parties, legal representatives and arbitrators about the overall costs of international commercial arbitration and how these are incurred at each stage.The results will be analysed and presented at an international conference organised by CIArb on 27 - 28 September 2011 in London, aimed at uncovering ways in which costs might be reduced and the process streamlined to become more cost-effective and efficient.

International Mediation Conference on in-house dispute management

ICC's 2nd International Mediation Conference, set to take place in February 2011, will combine theory and practice to deliver results by means of an interactive user-to-user approach. Titled "Win-Win Strategies: Tools for corporate dispute management" the business-oriented conference will focus on the implementation of in-house dispute management systems for business to business conflicts and will bring ICC's Mediation Week 2011 to a close. The conference will take place at ICC headquarters in Paris on 10 February 2011.

It is a waste of energy to be angry with a man who behaves badly,
just as it is to be angry with a car that won't go.
~ Bertrand Russell ~

Church Feud – Explore Possibilities of Mediation: High Court

The High Court of Kerala, India asked the Malankara Orthodox Syrian Church and the Jacobite faction to explore possibilities to solve the decades old factional feud between each other through mediation.

Disputes between the factions within courtrooms have begun in 1890 and continued until the PMA Metropolitan case in the Supreme Court of India in 2001, but sustain even unto this day. Seventy cases exist in the First Additional District Court, Ernakulam, a special court established per Government orders, to settle litigations between these two warring factions. Seventy appeals are pending at the High Court. Various courts at Ernakulam, Trissur, and Idukki have another seventy more pending cases. More cases are possibly pending at other courts in the State of Kerala.

India opting for Sports Arbitration

Rajasthan Royals, King XI and Board of Cricket Control of India (BCCI) is seeking arbitration on the Indian Premier League (IPL) dispute. The parties have expressed their intention to arbitrate but also plan to go for mediation. The parties have consulted Justice BN Srikrishna, former Judge of the Supreme Court of India to conduct the mediation proceedings.

Chinese Judges told to use Mediation to settle Disputes

China's Supreme People's Court (SPC) has urged courts across the country to use mediation as their first step to settle disputes and promote social harmony.

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment. You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.For more details on CDM, mail to training@arbitrationindia.com

These are sayings on the wall of a karate dojo:

Winners don't complain; they are too busy getting ready for the next challenge.
An obstacle is what you see when you stop focusing on your goal.
Before you defeat anyone else, you must first learn to defeat yourself.
Martial arts is 99.9% mental and 1% physical.
We cry in the dojo so we can laugh on the battlefield.
Being good is an all the time thing.
Martial arts begins and ends with Respect.