

Not Just for Disputes! Mediation Techniques in Negotiations and Deal Making



*By L. Michael
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In contemporary American society, we think of using mediation and mediation techniques rather narrowly – primarily as a tool to resolve conflicts and disputes. Instead, we should think more broadly and use mediation techniques, including where possible, formal mediation, much more widely in the negotiations and deal making phases of business transactions, well before formal disputes arise, and in various private and public sector settings.

Let me offer a bit of perspective on my experience, and thus, my viewpoint. For 32 years, I worked for The Port Authority of New York and New Jersey. A large part of my career there involved complex, multifaceted negotiations, typically with multiple public and private entities at the table. My position, General Manager, Regional and Economic Development, required an intense, longterm focus on deals that would lead to self-supporting regional

and economic development projects and groups of projects comprising developments. These deals often consisted of multiple agreements and associated arrangements that would have to survive over decades and meet a myriad of competing interests. Often, the Port Authority itself had internally competing interests that were difficult to reconcile. Sometimes, crafting a deal that met the agency's various requirements proved more challenging than meeting the many needs of the affected parties.

Many of the negotiators who represented the constituencies affected by the projects and developments were what I might call "old school negotiators." They expected that "a deal will not close until each party leaves the room equally unhappy." They figured "you would win some and lose some," so they did not consider "win-win" options, and given that they also thought that "you should never negotiate against yourself," they were often uncertain as to whether to make concessions off of their (often overreaching) initial offers. Gestures of accommodation were constrained

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since they were perceived as conveying weakness. Thus, arriving at solutions that met enough parties' legitimate interests to consummate deals was often a protracted process. In such situations, a "mediator" or "deal counselor" would have been quite helpful, facilitating gestures of accommodation without having a party appear weak.

Some readers may recall the Port Authority's work in the redevelopment of the region's underdeveloped assets, particularly "on the waterfront" in Hoboken, NJ and Queens, NY. It took 25 years for these developments to move from concept to significant actual development. Individuals and entities involved worked together over decade-long timeframes through changing business cycles and political leaderships. Thus, persistence, patience and sensitivity to negotiating a myriad of issues so as to maintain and nurture long-term relationships were a prerequisite to agreements and actual project development.

While my role was not as a formal mediator, I came to understand the value of utilizing mediation techniques to gain the trust of other parties in negotiations to reach agreements. My negotiating style over time increasingly relied heavily on a mediation mindset. I usually was looked to by other parties as someone who would understand each party's interests, including the Port Authority's, but could be counted on to suggest creative alternatives to meet each party's respective interests in a way that was fair to all concerned in the spirit of accomplishing the deal. I recognized that the root of one's ability and credibility to function this way is to be trustworthy in statements, actions and reactions, that is, to act like a mediator.

To help convey how you might employ mediation techniques in your complex (or not so complex) transactions (as I and some of my colleagues did in ours), identified below are 10 stages of negotiations and deal making involving two or more parties (private or public) that would benefit from the skilled use of mediation techniques. These stages represent a chronology of activities, starting with initial contacts and

relationships relating to a deal, and concluding with the termination of such contacts and relationships. Among the 10, only three (Stages 6, 7, 8 below) are where mediation techniques are now commonly considered and employed. I will not spend much time there, but will instead concentrate the majority of my comments on the other seven Stages where mediation is not now as commonly employed, but where I feel it and mediation techniques should be more proactively considered and utilized.

STAGE 1



Establishing initial business contacts and relationships among two or more parties. Stage 1 offers each party to a potential deal the opportunity to imbue the prospective relationship associated with the nascent deal with a mediation mindset framework of behavior—open communications within a context of confidentiality, actions and words to build trust among the parties, and a frank assessment of options that will make a prospective deal desirable and workable for each party. Here too, a third party, even if not a true neutral, at least trusted by the parties to the deal, can have a productive role – as a deal counselor who can help maintain the desired mediation mindset framework as discussions and negotiations proceed. Friendly mergers are sometimes facilitated by outside third parties who serve in effect as "deal counselors," including, for example, investment advisors, attorneys, or accountants. In family business situations, perhaps a trusted relative could be tapped to assist as a deal counselor or facilitator. Even hostile takeovers could be turned friendlier through mediation techniques facilitated by a deal counselor. Also, very importantly, it is at this early stage that a determination not to proceed with a particular party or deal is best made with less cost and fewer adverse consequences than later on. Better to find out earlier than later, for example, that the chemistry among the parties will be difficult to overcome to close a

reasonable deal or to carry it out. Contrast this with the incorrect assumption of hard bargaining tacticians that each side's early intransigence can be later overcome by creating a real or perceived power imbalance between or among one or more of the parties. Even if one party ends up making a short term great deal that is not good for the other(s), that party has sowed the seeds for serious challenges in implementing what may be agreed to – likely guaranteeing deal disputes and breakdowns. It is good to remember that at this early stage, each party is likely to be on their best behavior and to have their most optimistic forecasts of the future. Thus, spending time to allow each side to assess real behavior as arrangements relating to the proposed deal are discussed and evaluated is critically important at Stage 1.

STAGE



2

The Stage 1 contacts and relationships may generate, or evolve, to include, initial understandings, which may or may not be codified in "Letters of Intent," "Memoranda of Understanding" or "Principles of Agreement." These are usually intended not to be legally binding. However, any of them would help frame and focus anticipated discussions and negotiations to follow. (Of note, to foster an early team spirit among the parties, I sometimes would suggest adding the word "Joint" in the title of these documents – thus, for example, "Joint Statement," or "Joint Letter of Intent"). At this point, parties involved have invested more time in the direction of making a deal. But, it is likely still relatively early in the process and parties are gauging the pluses and minuses of proceeding and the merits of the deal for themselves, as well as the behavior of the other parties, including fairness, trustworthiness of each party, and openness of communications. This Stage 2 therefore still offers the opportunity for assessing in the preparation, content and responses to Letters of Intent (or other codification of current understandings of the direction of the deal) if you

want to proceed with the deal in the making. Power imbalances (that may be real) may show up in proposed Letters of Intent, or drafts thereof. Each party can assess if hard bargaining (positional) tactics are being used – which tends to undermine the needed reservoir of goodwill usually required for an effective deal to be made and last. For example, if one side prepares a Letter of Intent and sends it after a meeting or series of meetings, without consultation with the other side before sending it, the other parties should evaluate if this is behavior they want to encounter throughout the rest of the negotiations and after, if a deal is made. Here too, if a deal counselor or trusted adviser were already involved, such usually counterproductive unilateral behavior would be less likely to occur, since that individual would be encouraging a more collaborative, joint approach in developing and wording such statements of intent, understanding(s) or agreement(s).

STAGE



3

Following those written codifications of common intent in Stage 2, subsequent discussions or negotiations may then lead to formal legal arrangements. These arrangements should include provisions and mechanisms to address the interests of participating parties, under changing conditions. As conditions change, differences occur between the parties. For contract terms involving a number, dollar figure, financial calculation, or a valuation, it is usually advisable to provide in the formal legal agreement for referral to an outside expert agreeable to all parties, such as an accountant or C.P.A., or perhaps an appraiser, and for a procedure to involve and select such an individual. If additional broader issues arise that seem to be leading the parties toward litigation, a deal counselor or trusted advisor could be sought, even if one had not been utilized before, or not provided for as a dispute resolution option in the agreement. As we all know, such differences are likely to arise in implementing most formal legal arrange-

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ments. If not dealt with effectively, such differences may lead to litigation with all its costs and perils to long term, mutually beneficial relationships.

STAGE



The efforts occurring in Stage 3 aimed at resolving differences within the context of the existing legal arrangements may reveal that for the legal arrangements to continue to be responsive to the interests of the affected parties, formal amendments to these arrangements are required to permit the relationship to proceed forward in a positive way – versus moving to formal disputes and potential litigation. Use of a trusted outside advisor or deal counselor would be beneficial here as well to help the parties maintain that mediator mindset. This is particularly important at a stage like this where things are “unexpectedly” being changed. Here, the need for encouraging and maintaining mutual trust, issue focus, issue definition and open communications is critically important to enhance mutual “option” development and to thereby forestall a tendency to focus on fault finding and finger pointing – which can too quickly lead to impasse.

STAGE



Impasse may arise when the discussions or negotiations of Stage 4 do not result in a mutually agreeable resolution of one or more issues. Such impasses may well ripen into one or more formal disputes. Hopefully, the formal legal arrangements have included provisions to provide a structure for registering and dealing with such formal disputes, including triggering events and timeframes for action. For example, increasingly, lawyers are suggesting including a “Progressive Dispute Resolution Procedure” in agreements they help negotiate and execute. The major components suggested can include: 1. Good

faith negotiations, preferably if possible, including involvement of a mutually trusted third party, or parties, as “Deal Counselor(s)” to help guide and manage the process; 2. Use of Deal Counselor(s), or trusted third party(ies), if not yet used as part of prior “good faith negotiations;” 3. Formal Mediation; 4. Arbitration; and, 5. Going to an appropriate Court. (Of note, many lawyers no longer favor inclusion of Arbitration in this procedure for reasons mentioned below in Stage 6).

STAGE



Utilization of dispute resolution methods that formal legal arrangements may **(should!)** provide for, as outlined above in Stage 5. Note that while arbitration is often specified for dispute resolution in legal arrangements, I do not think it as well suited to fostering party participation in resolving disputes as is mediation. With the increasing pressure by client companies to make arbitration more like litigation, I believe arbitration is an increasingly less desirable form of alternative dispute resolution (ADR) than is mediation. Some attorneys and clients argue that arbitration lacks the protections of the litigation process, so some prefer litigation to arbitration. In all circumstances, I favor a consensual method as a relationship preserving option over an adjudicative method. Using mediation techniques engenders the greatest likelihood of fostering improved long term relationships following resolution of a conflict or dispute.

STAGE



Despite all attempts above, disputes remain unresolved and litigation ensues, including possibly litigation over whether litigation is even “allowed,” depending upon provisions in the formal legal ar-

rangements. (See, for example, *JAMS Dispute Resolution Alert* Summer 2008 Edition for discussion of *Hall Street Associates v. Mattel*, 128 S.Ct. 644 (Mar. 25, 2008)).

STAGE



Litigation proceeds and perhaps there is a court ordered form of “ADR” or there may be a settlement arrived at before trial determination of the dispute.

STAGE



All alternatives to litigation fail; trials, contested hearings, motions, and appeals proceed. Years go by before the dispute is resolved. At the Port Authority, despite efforts to minimize circumstances leading to litigation, we had our share of exhaustive, protracted litigation, but unfortunately it was sometimes viewed by the parties involved as “business as usual,” particularly in larger scale developments. Even at this later Stage 9, after much money, time and emotional investment in the litigation process, it is not necessarily too late to consider using mediation techniques to try re-focusing on issues and to generate new options to resolve semi-hardened differences. Sometimes, when the parties involved recognize that the litigation process has taken on a life of its own that is not serving their interests, they are prone to consider mediator or deal counselor involvement. In government settings, sometimes a change in elected or appointed leadership may allow new faces to take a fresh look at what best meets the interests of the entities they represent. Similarly, in the private sector, executive changes can allow a fresh look leading to a renewed preference for deal making over continued litigation. As in prior Stages, here too use of a deal counselor or trusted third party would be helpful to refocus on arriving at a resolution involving the parties’ direct participation versus waiting for a court to make a decision on a set of facts and law that may

no longer be relevant, the same or compelling for one or more parties.

STAGE



The resolution of the dispute(s) results in a termination or alteration of individual agreements while the business contacts and relationships and other agreements may continue. To foster preserving and nourishing these continuing arrangements that could be at risk in these circumstances, use of mediation techniques, mediation, or involvement of a deal counselor may be particularly well advised to forestall a total breakdown. With wider and more proactive reliance and use of mediation techniques and mediation in the prior nine Stages as indicated above, and here in Stage 10 too, hopefully one can avoid or at least minimize those situations resulting in total failure – when all agreements, contacts and relationships, by litigation or otherwise between the parties cease.

As outlined above, although not readily recognized in many cases, mediation and mediation techniques are and can be productively used at each stage of the above “negotiations and deal making continuum.” If so used, hopefully “Dispute Resolution” – Stages 6, 7, 8 and 9 above – which now receives the largest focused use of mediation, would diminish in size as many problems would have been dealt with proactively.

Such increased use of mediation and mediation techniques in the earlier stages of the continuum may diminish the number of conflicts and disputes that result in a need to resort to arbitration or litigation as the means to resolve them. I would expect this to occur because decisions and agreements arising from a mediation environment evolve with a maximum opportunity for party involvement, and collaboration in shaping the outcomes, versus in position-based negotiations, arbitration and litigation. Further, in my view as mentioned earlier, use of mediation techniques engenders the greatest likelihood of

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CALIFORNIA ALLOWS PARTIES TO CONTRACT FOR JUDICIAL REVIEW OF ARBITRAL FINDINGS AND CONCLUSIONS DESPITE CONTRARY U.S. SUPREME COURT RULING IN *HALL STREET* CASE

Cable Connection, Inc. v. DirecTV, Inc.
Cal. Sup. Ct., August 25, 2008

DirecTV (DTV) was sued in a class action lawsuit by dealers from four states alleging that DTV withheld commissions and imposed improper charges. The parties went to arbitration where two of the three arbitrators found that the agreement contemplated class action arbitration.

On DTV's motion, the trial court vacated the award, ruling that the arbitrators had improperly applied the law.

On appeal, the California Court of Appeal held that the trial court acted improperly in reviewing the arbitrators' findings.

On further appeal, the California Supreme Court framed the argument as follows: "This case presents two questions regarding arbitration agreements. (1) May the parties structure their agreement to allow for judicial review of legal error in the arbitration award? (2) Is classwide arbitration available under an agreement that is silent on the matter?"

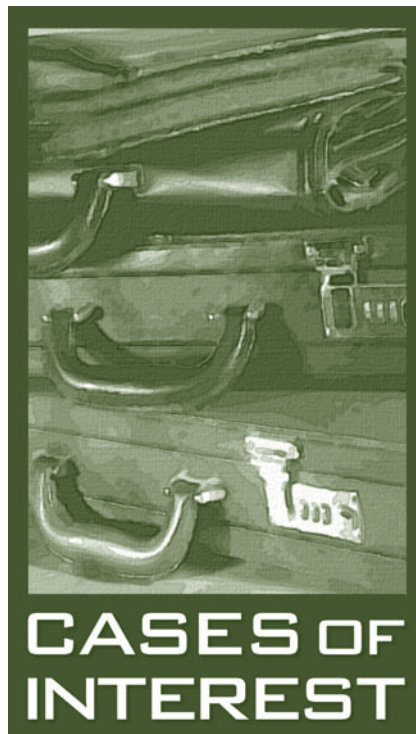
On the first question, the Court noted that the United States Supreme Court in the *Hall Street* case ruled that no expanded review could be had under federal law, but the states were free to interpret their own laws differently. Despite the fact that the Court of Appeal ruled that *Hall Street* precluded expanded review, the Supreme Court held that "the parties agreed that [t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error. This contract provision is enforceable under state

law" and the Court reversed the contrary ruling of the Court of Appeal.

The Court held that the FAA didn't preempt the California Arbitration Act on this matter, and that *Hall Street* left the door open to interpretations under other grounds than the FAA – e.g., state law.

The Court's ruling was that prior California law – the *Moncharsh* case in particular – allowed parties to contract for review of arbitral findings of fact or conclusions of law and that *Hall Street* changed none of that.

As to the classwide arbitration question, the Court referred the matter back to the arbitrators with direction to follow their direction regarding interpretation of California law (namely, that arbitrators have authority to make that determination, where the arbitrators had earlier ruled that they lacked that power).



CLAIM OF DISCRIMINATION BASED ON MILITARY SERVICE ARBITRABLE

Landis v. Pinnacle Eye Care, LLC
C.A.6 (Ky.) August 11, 2008

Dr. Timothy Landis, an optometrist, signed an employment agreement with Pinnacle Eye Care. His agreement included an arbitration clause.

Some nine years later, Dr. Landis was called to serve in Afghanistan as a member of the National Guard. He discussed with his employer certain terms relating to his employment agreement regarding the maintenance of his practice while overseas. While Landis claimed these terms were agreed to, upon his return he found that the terms had not been honored. Moreover, he was demoted and told that further military service would jeopardize his career.

Landis filed suit alleging discrimination based on military status, age discrimination and a claim that Pinnacle was operating unlawfully in employing unlicensed optometrists. Pinnacle filed a motion to compel arbitration, which Landis opposed and which the district court granted.

On appeal, the Sixth Circuit held that the matters were all within the scope of Landis' employment agreement, that Uniformed Services Employment and Reemployment Rights Act of 1994 claims are presumptively arbitrable and that nothing in the history of the law suggests congressional will to preclude arbitration, and that the unlicensed practice claim was not properly before the district court as it was a purely state law claim.

EXCEPTION TO MEDIATION CONFIDENTIALITY MUST BE LEGISLATIVE, NOT COURT-CREATED

***Simmons v. Ghaderi* Cal. Sup. Ct., July 21, 2008**

Michelle Simmons, acting as guardian of the surviving minor children of a deceased patient, sued Dr. Lida Ghaderi for medical malpractice. The parties agreed to mediate. During the mediation, the mediator requested that Ghaderi sign a standard consent-to-settle form which allowed the insurer to settle the case on defendant's behalf for any amount under \$125,000. The consent to settle could be revoked only in writing.

The mediation continued with defendant in a separate room from the insurer. The insurer asked the mediator to tender an offer to settle the case for \$125,000. Plaintiffs accepted. The mediator placed the essential terms into a document for the parties to sign, and when the insurer presented the document to the defendant, Dr. Ghaderi stated that she would not sign and that she revoked her consent to settle.

The next day, plaintiff's attorney and the insurer sought out the advice of the trial court, and they revealed the entire proceedings. The court sug-

gested that there may be an enforceable agreement to settle, and a date was set to show cause why the case should not be dismissed.

Shortly thereafter, Ghaderi sent a formal letter withdrawing consent to settle.

At the dismissal hearing, the court suggested that plaintiffs move to enforce the oral settlement, which they did. Plaintiffs supported their motion with a copy of defendant's signed consent to settle, the written settlement agreement prepared by the mediator and signed only by plaintiffs and their counsel, and declarations from plaintiffs' attorney and the mediator setting forth the events at the mediation.

The court found that the lack of a signed agreement meant that the California Code of Civil Procedure was unsatisfied, but that the parties should amend their complaint to include a count seeking to enforce the oral contract.

After this amendment, litigation proceeded for more than 15 months, during which time both parties made several official references to events that occurred during mediation. However, after that 15 months, Ghaderi argued in her trial brief that California's mediation privilege required exclusion of all evidence of the oral contract.

The trial judge concluded that the defendant had entered into a valid consent to settle agreement and that the parties had indeed settled. He entered judgment for \$125,000. On appeal to the Second District Court of Appeal, the verdict was upheld in a 2-1 decision. That court held that the defendant had estopped herself from asserting the mediation privilege by presenting evidence from the mediation during pretrial motions and hearings.

On further appeal, the defendant contended that the Court of Appeal had impermissibly created a judicial exception to the California mediation privilege. The Supreme Court reviewed past case law and additional testimony from the California Law Commission and the Evidence Code and concluded that the legislature intended the mediation privilege to be very broad, and that "mediation confidentiality now clearly applies to prohibit admissibility of evi-

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Cases of Interest *Continued from Page 7*

dence of settlement terms made for the purpose of, in the course of, or pursuant to a mediation unless the agreement falls within express statutory exceptions." The parties did not follow the legislative rules embodied in the Code of Civil Procedure to allow the court to admit evidence of the settlement, and no other legislatively approved route existed for admission.

The Court discussed past cases in which the lower courts created implied exceptions to the privilege, and it made clear that in each instance, the lower courts were overturned. The Court also discussed the doctrines of estoppel and implicit waiver in the context of the mediation privilege, and found that the clear and unmistakable intent of the legislature was to create a broad privilege that could not be pierced except by specific exception. In the case at bar, there was no admissible evidence of an oral contract and the court of appeal was reversed and the case remanded.

EVIDENCE FROM SETTLEMENT DISCUSSIONS ADMITTED TO SHOW PATTERN OF BEHAVIOR

***Orr v. City of Albuquerque* C.A.10 (N.M.), July 08, 2008**

In a dispute about whether female police officers were discriminated against based on pregnancy, the plaintiffs wished to introduce evidence about settlement discussions concerning the city and a police officer who was not part of the suit at bar. These discussions preceded the case at bar by nearly a decade. The trial court excluded the evidence, and the plaintiffs appealed. The Court of Appeal for the Tenth Circuit held that the statements showed that the alleged improprieties were "simply an isolated mistake or, rather, part of a series of incidents that might illustrate outrageous conduct on the part of [the defendant].... And that is exactly what plaintiffs properly seek to show in this case—namely, that [defendant's] treatment of Officers Orr and Paiz was

not a random accident, as defendants claim, but part of a larger and deliberate pattern of treating pregnant women differently from other employees seeking FMLA leave." Thus, the evidence of the settlement discussions from the prior case was admissible. The case was remanded for a trial, consistent with the Court's evidentiary ruling.

UNILATERAL WITHDRAWAL OF REQUEST FOR TRIAL DE NOVO AFTER MANDATORY ARBITRATION HONORED EVEN AFTER TRIAL COMPLETED AND APPEALED

Hudson v. Hapner

Wash.App. Div. 2, July 08, 2008

Hapner hit Hudson with his car. After a court mandated arbitration awarded a bit more than \$14,000, Hapner requested trial de novo pursuant to state law. Hudson won nearly \$300,000 from a jury. Hapner appealed and a new trial was ordered.

While the trial was pending, Hapner filed a notice of withdrawal of his request for a new trial and to have the arbitration award reinstated. Hudson opposed the motion and moved to strike the withdrawal. The trial court granted Hudson's motion and Hapner appealed.

The Washington Court of Appeal held that Hapner retained the right to unilaterally withdraw, that his request for trial had not acted as a waiver of his right to withdraw, and that the legislative intent behind the statute allowing for voluntary withdrawal was furthered by allowing the withdrawal to proceed.

As to whether Hudson was inconvenienced by the withdrawal, the Court noted that she was in no worse position than before, as the first trial has been reversed, and thus there was no argument that she was forced to bear costs that she might otherwise not have borne. Rather, she was relieved of the expense and risk of an additional trial. The Court ruled similarly on several other equitable arguments.

Hudson also requested attorney fees and sanctions. The Court denied both because Hudson was not a prevailing party in the appeal.

ARBITRAL CONFIDENTIALITY CLAUSE SURVIVES "FRAUD IN THE INDUCEMENT" CLAIM

***ITT Educational Services Inc. v. Arce*
C.A.5 (Tex.), June 27, 2008**

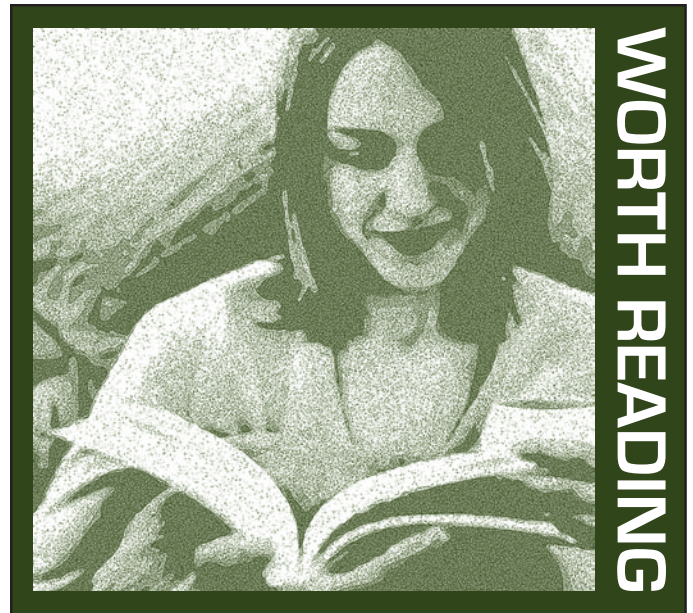
A group of former students brought a class arbitration action against ITT, a provider of technology education services. The arbitrator granted an award in favor of the students and ITT paid the debt in full. One student, Joel Rodriguez, opted out of the class arbitration, choosing to pursue an individual arbitration action.

Rodriguez' counsel let ITT know that she intended to use evidence from the prior arbitration hearing at the Rodriguez arbitration. ITT filed a motion for declaratory relief, arguing that confidentiality provisions in the class arbitration ("All aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential. The parties will have the right to seek relief in the appropriate court to prevent any actual or threatened breach of this provision") entitled it to a permanent injunction against anyone who sought to use any information from the arbitration as evidence in any subsequent proceeding. The trial court granted the injunction and this appeal was filed.

Appellants argued that the arbitrator's findings constituted a finding of fraudulent inducement. Therefore, the entire arbitration agreement – including the confidentiality provision – is void under Texas law, and Appellants may disclose the results of the Arce arbitration. ITT disputed that the arbitrator made a finding of fraudulent inducement. ITT also argued that even if the arbitrator made such a finding, the district court nonetheless properly found that the confidentiality provision is part of the arbitration clause and, thereby, severable and enforceable under the separability doctrine of *Prima Paint* and its progeny.

The Court of Appeal for the Fifth Circuit agreed with ITT that the matter of the validity of the arbitration clause was separable from the question of fraud in the inducement of the original contract, and

given that the confidentiality provision was part and parcel of the arbitration clause, it was severable and enforceable regardless of any findings that the arbitrator may have made. The Court found the district court's grant of the injunction to be a matter within that court's discretion and it affirmed the grant of a permanent injunction.



YES! 50 Scientifically Proven Ways to Be Persuasive

by Noah J. Goldstein, Steve J. Martin and
Robert B. Cialdini (Free Press 2008)

Reviewed by Richard Birke

Regular readers of "Worth Reading" have long known my penchant for bringing the world of dispute resolution closer to the worlds of cognitive and behavioral psychology. In past editions of this column, I've reviewed Richard Restak's *Mozart's Brain and the Fighter Pilot*, Daniel Gilbert's *Stumbling on Happiness*, Drew Westen's *The Political Brain*, and David Linden's *The Accidental Mind*, just to name a few.

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Worth Reading *Continued from Page 9*

It's not just that I like psychology books, it's that I think they are full of critically important insights. Psychology and neuroscience help inform us about how the mind works, how we make decisions, how we react to risk and uncertainty, how we value losses and gains, and how we assimilate new information. Psychology reveals our systematic biases and teaches us how we might learn to debias ourselves.

And it's not just that these critically important insights are important to the daily lives of everyone with a human brain (although they are), they are especially important for readers of this newsletter and everyone else interested in the efficient resolution of conflict. In particular, psychology helps us understand two subjects of critical importance to everyone who negotiates, mediates, arbitrates, advocates or procrastinates (this last is a form of alternative dispute resolution, just not a very good one). These two areas are the psychology of evaluation and the psychology of persuasion.

Evaluation usually comes first, and that's where our initial biases take root. Most people are quite biased in the way they form initial estimates of the value of a thing – be that thing a coffee cup, a used car, the strength of an argument, an opponent's promise or recommendation, or the amount they would accept (or pay) to settle a lawsuit or other conflict. People assume that their preferences are shared by others and that leads them to assume that most negotiations are zero-sum. They look for information that corroborates pre-existing hypotheses (like "I've got a good case") and when they analyze the information they find, they overvalue information that confirms what

they want to believe ("this fact not only supports my views, it's an objectively important fact") and they undervalue information that disconfirms those beliefs ("that fact might seem to undermine my case, but it is easily distinguishable from the circumstances at hand"). There are literally hundreds of biases that involve evaluation and there are dozens of prominent researchers studying these biases.

Once a party to a dispute or transaction puts a (biased) evaluation on the value of the thing – let's call it a lawsuit – the next task is to persuade the opposing negotiator to accept our evaluation. Needless to say, there is a robust psychology of persuasion, just as there is a robust psychology of evaluation. However, where there are dozens of notable authors and professors in the world of evaluation, there is a single pre-eminent one in the world of persuasion, and that person is Professor Robert B. Cialdini.

Professor Cialdini's claim to fame is not just that he is a highly regarded psychology professor at Arizona State University, but that he is the author of *Influence: The Psychology of Persuasion* and according to Wikipedia, the most cited social psychologist on the subjects of influence and persuasion. *Influence* is justifiably one of the best-selling books in the negotiation literature and

a must-read for anyone who takes seriously the role of salesmanship in the settlement of disputes.

Cialdini illustrates six principles in *Influence*. These are reciprocity (people feel obliged to reciprocate for acts of goodwill, even if the act produces no value and was not requested or wanted), authority (perceived authority causes changes in decision making



even when the authority is more apparent than real), scarcity and deadlines (fleeting offers or disappearing commodities seem more valuable than if they were plentiful or available on request), social proof (we use the “wisdom of crowds” as a surrogate or substitute for our own wisdom), liking (we accept deals more readily from people who are nice even if the deal isn’t valuable), and commitment and consistency (foolish hobgoblins, but we are more willing to say yes to an outrageous request if we’ve already said yes to a small one, and we are more likely to reject a good deal if we’ve rejected it already in the past). These six principles organize the messy world of the psychology of persuasion into a manageable set of categories that can be memorized and retained – a mental reference guide that you can carry with you into every negotiation.

Despite the success of *Influence*, apparently, six principles weren’t enough for most people. Where six would do, wouldn’t 50 be better? And apparently, the accessible style of *Influence* wasn’t folksy enough for people (even though it’s one of the most easily read books on psychology I’ve ever read). So, apparently, there was a need for a newer, bigger, better (?) version and Cialdini teamed up with a business school professor (psychologist Noah Goldstein) and a marketer (Steve J. Martin – not that other Steve Martin) to co-author *YES!: 50 Scientifically Proven Ways to Be Persuasive*.

Here are titles of the chapters (with summaries of the contents in parentheses) of a few of my favorites of the 50:

- “How Can Inconveniencing Your Audience Increase Your Persuasiveness?” (If you are always “on the phone” or “at a meeting” they will believe you to be more desirable.)
- “How Can A New Superior Product Mean More Sales of an Inferior One?” (If the new one is very expensive, the older sort-of-expensive model seems reasonably priced in comparison.)
- “What Office Item Can Make Your Influence Stick?” (A personalized Post-It note goes further than you would imagine.)

- “Which Single Word Will Strengthen Your Persuasion Attempts?” (Hey, I can’t give it all away! You’ll have to read the book to find out.)

YES! resembles a new version of *Influence* with some significant differences. It is similar to *Influence* in that Cialdini’s six principles form the substrate for the bulk of the book. It is different in two important ways. First, it adds the techniques associated with other psychologists’ work (e.g., work on loss aversion done by Nobel Prize Winner Danny Kahnemann and his deceased colleague Amos Tversky is included). In so doing, the book is a broader compendium on persuasion than is *Influence*. More importantly, in expanding from six principles to 50 ways, the authors turned each principle into a folksy example of the principle in action. I see this structure of 50 short chapter-ettes as the book’s greatest strength, and simultaneously, as its greatest weakness. On the one hand, the simple illustrations make each principle vivid, and the writing is punchy, so reading the book is as entertaining as it is educational. Each of the 50 ways takes up about four to six pages, so you can read a bit, put the book down, and pick it back up without having lost your place. But on the other hand, if you try to read the book continuously, 50 chapters are a bit too many to read without feeling flooded. With the lack of a clear superstructure, one’s head can reel (mine did anyway and I had to put the book down several times to regain a sense of what I read). I might use *YES!* as a sort of reference guide – having read it, I might be able to look up a principle and refresh my memory. I don’t think I could assign it to a negotiation class as a text, nor could I recommend it as a book to sit down and read. Rather, it’s a book to keep around and to pick up when you have a few minutes and want to add a little to your skill set. The pages with the chapter titles are entertaining by themselves, and there’s no need to read the book in order.

In sum, if you have the right expectations, *YES!* is well worth reading. And if you haven’t read *Influence*, get it at once. If *YES!* is worth reading, *Influence* is WORTH READING.

Mediation Techniques in Negotiations

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preserving longer term relationships – often critical in business activities – following the resolution of a conflict or dispute.

I will share a story about a \$200 million “deal closing” after years of negotiation to illustrate that signing the document(s) is only part of the continuum. At the closing, one of the principals called in from overseas to try to “adjust” some terms. His call was literally coincident with execution of pre-prepared final documents. At the time, we joked that he was such a good negotiator, he continued to negotiate the deal “until the ink dried on his signature.”

He understood that the signed contract was not really the end. It really was only the beginning of a new phase of the business relationship among the parties involved. The signed contract was a big thick set of documents to guide the parties’ relationship, but without the concerted commitment by the involved parties to follow through, the contract really is just a pile of paper. (By the way, the project was built and is now viewed as a great success!)

In conclusion, astute deal negotiators and deal makers understand that the deal itself becomes a party to the transaction, with the other participating parties understanding at some level that consummating a deal that is not reasonably sensitive to the interests of each party to the deal is doomed to result in formal disputes and ultimate failure. Over the years, I found using mediation techniques to be far superior to hard negotiating tactics. Granted many of my experiences have been with larger, more complex transactions, but use of mediation techniques is possible in smaller deals too, even if using a formal mediator, or deal counselor, is thought not to be practical from a cost standpoint.

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