



Heartland Mediators Association

Newsletter for Midwest Mediators

April 2011 Vol XI, No. 3
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2011 Heartland Mediators Association

A Message from HMA President

My final President's Column will continue to share ideas from the national mediation community and social science research to help encourage better mediation and a bigger "tool box."

Mediation proposes that decision-making is a rational process. Many times this is true, but when the rational model fails, additional insights and skills are necessary. In addition to the personality barriers discussed in the last column, there are some very common psychological obstacles to settlement. A recently published study of over 4,000 cases across a 44-year span found that 61 percent of the Plaintiffs and 24 percent of the Defendants had outcomes at trial that were less favorable than settlement offers they rejected. The authors of the study attribute this large number to psychological issues which cause mis-assessment of future outcomes.

Optimistic overconfidence is the most common psychological obstacle. This natural human trait causes most people to be overconfident when predicting outcomes of litigation. A good remedy for this bias is to provide additional information, use "what if" questioning, and talk about gaps in knowledge to weaken confidence. Using a "shoe on the other foot" approach can be helpful by asking the person to talk about the weaknesses of their case, how others might see problems in their case, or how they would challenge the goals and objectives if they were on the other side.

Risk tolerance and loss aversion affect how we perceive our satisfaction with a proposed outcome. Even though the statistical likelihood of gain or loss may be the same, research shows that generally, individuals are more likely to accept less for a possibility of gain ("bird in the hand") than to discount value for the same possibility of loss ("hope springs eternal"). They are more willing to take their chances on the worst alternative to a negotiated settlement where they are being asked to give up something (i.e., pay money, change behaviors, etc.). A mediation strategy to address this is to reframe change from the standpoint of gain. Avoiding court costs, having happier children, or getting out of a lawsuit are typical reframes used to see settling as a gain. Parties are more willing to com-

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Conference Offers Look at Workplace Mediation

Whether its workplace conflicts, family group conferencing or mortgage mediation the day of HMA's Spring Conference will expand any mediator's look at the universe.

The one-day training is Friday April 8 at Macelli's, 1031 New Hampshire, in Lawrence. Cost is \$50 for members and \$85 for non members with special rates for students.

Titled "EXPANDING THE UNIVERSE: The Sky's the Limit for Your Mediation Practice." The day begins with Mortgage Negotiation by Michael Thompson after registration at 8 a.m.

Thompson will outline the mortgage negotiation program currently being practiced in Iowa, as well as explore the differences between man-

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promise when they perceive that their action results in a gain, even though the statistical outcome is the same.

Reactive devaluation occurs when limitations on freedom of action trigger a response. It increases the value of something which is unavailable. Likewise, something offered tends to be valued less. "The grass is always greener on the other side" goes a

step further, nothing that the same grass on our side of the fence doesn't seem quite so green. This may be caused by the assumption that a thing of value is offered because the other side knows something about it that lessens its apparent value. Other times, value is suspect because it is proposed by someone who is disliked or distrusted. An effective strategy involves a commitment to goals before the concession is offered. This fixes the value in the mind of

the person seeking the concession and makes it more difficult to change that value later. Sometimes a "mediator's solution" can help avoid this problem since the concession or offer is made by the neutral, not the distrusted other.

A more complex cognitive bias arises from "naïve realism." That is the natural human tendency to perceive our own behavior as motivated by honest perceptions of reality. The goals and attitudes of those with whom we disagree are seen as based on biased and dishonest understandings. This causes distrust or perceptions that obstruct resolution. Those who fail to share our view, are perceived as uninformed (best case), evil (worst case), or somewhere in between. This results in perceiving the problem as caused by the other person's intentions or character rather than on external circumstances. Hostility, anger and suspicion are the frequent result because it is perceived that the other person is trying to cause us harm, rather than just a result of external forces beyond control. While the harm may be the same, the reaction is completely different.

This process can be countered by attempting to work together to show the offended party that the position is not as perceived. Wherever possible, restrictions on actions or refusal to agree can be framed as based on external circumstances. Rather than "I won't," it can be phrased as "I just can't" with supporting reasons. This is a difficult bias to overcome because the response may be perceived as simply more bad behavior.

Finally, equity seeking is a deeper manifestation of naïve realism. It is a sense that conflicts are due to wrongs, not disagreements. This can sidetrack bargaining altogether because a party seeks "justice." This manifests

Regional set May 5-6

2011 Heartland Regional Conference of Mediators: Mediation in the Age of Connectivity will be Thursday, May 5, and Friday, May 6, 2011 at the Scott Conference Center at Ankeny, Iowa. CME's have been applied for in Iowa, Kansas, Missouri, and Nebraska.

The conference will begin at 9:30 a.m. Thursday and end about 2:30 p.m. Friday after more than a dozen hours of mediation training with James Melamed. Those attending may register for Thursday or Friday.

Jim Melamed founded The Oregon Mediation Center in Eugene in 1983 and has been mediating ever since. Jim is currently CEO of Mediate.com (1996-present) and teaches mediation and online dispute resolution at Pepperdine School of Law and the University of Oregon.

Mediate.com recently received the American Bar Association (ABA) Institutional Problem Solver of the Year Award for 2010.

Melamed is former Executive Director of the Academy of Family Mediators and former Chair of the Oregon Dispute Resolution Commission. He was also the founding President and Executive Director of the Oregon Mediation Association. During the conference he will consider the modern history of mediation (how we got where we are), concerns regarding the current state of mediation, and a few suggestions for elevating the use of mediation services and creating mediation excellence in the future.

Melamed will later discuss the use of electronic communication in mediation and the most capable integration of face-to-face and online communication. Jim suggests that "we are all online mediators" and that mediation is becoming more a "choreography of communication" than a discrete physical event.

Specific modalities of communication will be considered along with such issues as confidentiality and security, asynchrony, digital accountability, the digital divide and "emissary mediation."

Heartland Mediators Association, Association of Missouri Mediators and Nebraska Mediation Association are co-partners in the conference.

For more information, which will be coming in the next newsletter, contact Iowa Association of Mediators, Heartland Regional Conference of Mediators, c/o Iowa Mediation Service, 1025 Ashworth Road, Suite 504, West Des Moines IA 50265.

Mediator's Perspective on Egypt

Last September, I spent two weeks on a tour to Egypt. We began the tour in the city of Cairo, home to nearly 23 million Egyptians. Our hotel was located about a block away from "Freedom" Square, the epicenter of the revolutionary protests against Mubarak.

It was shocking in January to view the televised throngs of protestors and exchanges of violence in a square that is still bustling with everyday life in our tourist snapshots.

I say shocking, but I was not really surprised when the Egyptian people voiced their dissent.

Our Egyptian tour guide had honestly told our group that conflict was imminent. Mubarak was preparing his son to succeed him as president and the Egyptian people were not prepared to accept that transition. The economy of the country was stagnant. Although the population is highly

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itself in individuals who refuse offers well in excess of their BATNA and want to pursue the conflict nevertheless. They often require the other party to make much greater concessions than they are willing to make, in large measure because they are unaware or unwilling to examine the weaknesses in their own case. They want justice or equity, and anything less is unacceptable. If both sides share this view, the conflict is intractable and must be resolved through third party power. A healthy dose of skepticism from the mediator about the strength of the party's position may be useful when it becomes obvious that the chances of settlement are small. Examples from other cases where parties refused good outcomes only to do poorly in Court may be effective, although the role of "naïve realism" addressed above, when coupled with optimistic overconfidence, makes it difficult.

This summary is a brief introduction to a fascinating and complex topic. For further reading, the author recommends the seminal work, Mnookin and Ross, Strategic, Psychological and Institutional Barriers; an Introduction to Barriers in Conflict Resolution, editors, 1995, an excellent collection of essays on these issues. For a more complete bibliography, please e-mail the author at pnichols@adrmidwest.com.

Patrick Nichols is 2010 President of Heartland Mediators Association.

educated, few citizens could get work within the country.

Our guide's own two sons were engineers that relocated to Saudi Arabia to find work. Owning a home had become impossible for the average Egyptian and corruption and graft frustrated businessmen, craftsmen, and farmers alike. The atmosphere was ripe for change.

As a mediator, I tend to see all conflicts in terms of possible resolution. Was there a time when violence and rage could have been prevented in this event? Possibly. Certainly there were people who tried to intervene and offer practical advice to the government.

The United States and other parties were willing to act as mediators in the conflict. Unfortunately, one of the tenets of mediation is that both parties have to come to the table.

Another is that the parties must show respect for each other. When one party feels that it holds the position of power, it rarely wants to engage in a process designed to make both parties feel whole.

In this case, Mubarak thought he held all of the cards. Supporting that position were his decades in power without any meaningful opposition, the layers of protection provided by officials in his government and in the military, and his international supporters, including the United States.

A good mediator, during a caucus session, could have told him that times were changing. The people of his country had reached the point when change was inevitable. Had he listened, he might have saved his legacy. But he would not come to the table. The situation escalated and the chance for alternative dispute resolution was lost.

Now the transition of Egypt is in the hands of a coalition of disparate interests. They seemingly have come to the table together, to hear input from all parties, and with the objective of forming a new government that will endeavor to meet the needs of all of the Egyptian people. They might have use for a good mediator yet.

Aline Barrett, Topeka, is an attorney mediator and volunteers for KCSL's Mediation Program.

The Sky's the Limit:

Join us for HMAs Annual Meeting

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datory farm mediation and the residential mortgage program.

The presenters will detail the challenges and successes that Iowa Mediation Service has experienced in the last 1 1/2 years of working with home mortgages, as well as analyze how this program has benefited both borrowers and lenders. Opportunities for mediation professionals in this process will also be addressed.

Thompson is the Executive Director of the Iowa Mediation Service, Inc. and has been since 1985. An experienced professional in the field he has worked in dispute resolution for 28 years.

He has mediated disputes in an array of areas including: farmer creditors disputes, family issues, public policy cases, truancy, victim offender cases, business cases, labor relations, and school disputes.

Besides mediating Mike has significant experience as a trainer in the field of dispute resolution, and he is also known as an arbitrator and fact-finder. He has a Masters Degree in Public Administration and a BA Political Science.

Kathy Perkins, President-Elect of Heartland Mediators Association, will present the morning's second session "Avoiding Black Holes: Special Issues in Resolving Workplace Conflict." She is Kathy Perkins LLC Workplace Law & Mediation. She shares that the workplace is the archetypal melting pot.

People of different cultures, ages, socio-economic backgrounds, races, national origin, religion, gender, physical and mental disabilities, personalities (and personality disorders) spend more waking hours together than most people spend with their family and friends.

Workplace conflicts - whether a dispute between two coworkers as part of an ADR program or a litigated claim of discrimination, harassment, or retaliation - have unique characteristics that require special mediation skills. Perkins will provide an overview of common employment conflicts and claims and insight into some strategies for resolution.

A graduate of Kansas State University and Harvard Law School, Kathy is a frequent speaker and a published author on employment law, ediscovery and mediation. She serves as an executive committee member of the Management Labor & Employment Roundtable and is on the boards of the Heart-

land Mediators Association, Kansas Bar Association ADR Section, Jayhawk Chapter of the Society for Human Resource Management, Jayhawk Breakfast Rotary and is Board President for the Willow Domestic Violence Center.

Kathy has served on the faculty for national programs including Jury Trial Litigation of Employment Claims and LEAP – Labor & Employment Advanced Practices Symposium. She is admitted to practice in Missouri, Kansas, District of Columbia.

The period from 11:45 a.m. to 1 p.m. will be HMA's annual meeting with introduction of new officers over lunch. The annual HMA Awards will also be given.

"Within Your Galaxy: Family Group Conferencing" begins at 1:15 pm with Roxanne Emmert-Davis. Family group conferences have application in child welfare and in juvenile justice settings (often linked to restorative justice programs/victim-offender mediation).

This workshop will provide an overview of family group conferencing, including: brief history; use as a collaborative decision-making process; traditional structure of the process; typical role of coordinator/facilitator. Case examples will be provided, along with time for discussion of the strengths and challenges of family group conferences.

Roxanne Emmert-Davis has more than 20 years experience as a mediator and mediator trainer, focusing primarily on parent-adolescent and child welfare issues. She has experience in Family Group Decision-Making (FGDM) and has provided FGDM training to Kansas child welfare practitioners through the University of Kansas School of Social Welfare. Roxanne maintains a private practice of mediation, facilitation and child welfare education in Topeka, KS.

The final session on Developing a Successful Mediation Practice includes Patrick Nichols, moderator; Ann Zimmerman, Ronnie Beach. This panel of successful mediators will discuss their observations, experiences, strategies and recommendations for building a sustaining mediation practice.

The entrepreneurial panel members have diverse backgrounds, locations and mediation practice areas. Join them for a lively debate about what works and what doesn't.