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COMBATING NEGOTIATION FATIGUE:
The Focus Movement

Consider the missing Malaysian airplane, which filled our news and lit up social media for about a month until Donald Sterling made a recorded racist remark that launched our attention into issues of racism, property rights, privacy rights and basketball playoffs. Yes, it is obvious that American journalists guide the American public into distraction.

It is clear to see how the easily accessible world of emails, texts, twitter and Facebook can thwart productivity in the workplace. In the midst of a mediation, where there may be long periods spent alone or with your client, these insidious, productivity-sapping maladies can also lead to a condition known as "cognitive overload." Cognitive overload, in turn, can cause poor decision-making, based more upon impulse than reason.

Unfortunately, while you and your clients are proudly engaged in what you view as "multitasking," you actually may be playing a role in the squandering hundreds of billions of dollars a year in lost productivity.

Gloria Mark, a professor of informatics at UC Irvine, says a worker who is distracted by a new text or web search may take up to 25 minutes to return to the task at hand. In a mediation, when the lawyer or client have distracted themselves with other pending business, the urgency and immediacy of the present negotiation can be forgotten, causing wasted time and backwards movement.

In a recent mediation where clients had come in from a different time zone and were eager to resolve the matter before 2:00 p.m. PST so that they could attend to their own business before the workday ended at 6:00 p.m. EST, the distraction of the East Coast business kept them from tuning into the most important information and keys to successful negotiation of the case on the West Coast. The case ended in an apparent impasse, though neither side had fully evaluated the other side's position, nor reached their "bottom line." The consequence was that the parties had to continue to negotiate through the mediator for weeks, causing precious hours and resources as each side had to explain each new move to their client, without the benefit of the neutral's insight into or guidance towards the best way to get the case fully resolved.

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Flexible, yet focused: surprises in mediation
By Jan Frankel Schau

On April 15, 2013, two Chechen brothers dropped a couple of pressure cooker bombs near the finish line of the Boston Marathon. They killed three runners and injured 264 that day. The story unfolded live on the CNN feed in the lobby of our conference center that day as I was mediating a dispute arising out of a failure to provide adequate meal and rest breaks to a restaurant worker who had sued for back wages and penalties.

We have all encountered the element of surprise that may distract the lawyers, mediators or their clients from the task at hand during mediation. The response to those extraneous factors may mean the difference between impasse and resolution.

The Lawyer-Whisperer

Consider the sexual harassment case in which one of the plaintiff's two lawyers is in her early stage of pregnancy. She arrives at the mediation and asks that their be no joint session, as she is just beginning to "show," and also because her doctor has advised her to keep her feet up and eat a steady stream of saltine crackers as needed for early pregnancy nausea.

Although she expects to return to work after a very brief maternity leave, her due date happens to coincide with the court-imposed trial date and she does not want to reveal that the trial may need to be continued if they are unable to settle the case. For purposes of "keeping the pressure on," she asks the mediator to keep her pregnancy strictly confidential and avoid meeting with opposing counsel or their clients throughout the day.

Without revealing the secret of the lawyer, the mediator will have the dilemma of holding back a critical factor in the calculus of whether and when to settle and risk compromising her neutrality by maintaining a secret that may affect the outcome of the mediation or litigation if the mediation fails.

In order to accommodate the need for secrecy, one option is to keep the parties separate and wherever possible, continue all negotiation via telephone or in separate meetings. In that way, there would be no hint of the pregnancy and defendants would not

The Mediator's Proposal: A Dirty Secret or a Dirty Trick?

By Jan Frankel Schau

There is a dirty secret trending throughout Southern California litigation: instead of exercising the necessary patience, client care and evaluation of the merits and risks of litigation, litigators are increasingly turning to the Mediator to offer a Mediator's Proposal to settle the case. This holds the benefit for the lawyers of hiding behind a well-reasoned analysis by advising their clients and the opposing party that this was the mediator's idea, not theirs. The mediator's proposal also offers the advantage of avoiding hours or weeks of more formal discovery and negotiation by pegging the bargaining at a determined number or range for future discussion if the proposal is rejected. In short, lawyers are increasingly urging mediator's to offer a proposal without completing the negotiation process more traditionally adopted in mediation hearings.

In conflict, there are several predictable opportunities to settle the controversy. Preliminarily, many disputes are resolved between the disputants directly: either one makes a claim and the other agrees, as is typically the case in a rear-ender motor vehicle accident where liability is not in question and damages are modest, or one decides not to pursue the claims after hearing the other side of the story.

Next, if there is a significant dispute as to either liability or the damages claimed (or both), the disputants may choose to hire lawyers to represent them. Again, before a lawsuit is filed, there is almost invariably a demand letter and some exchange of correspondence between counsel in an effort to resolve the dispute.

Typically, the lawsuit is only filed after both parties see that an informal and early resolution of the dispute is impossible. Yet even after the lawsuit is filed, and perhaps after some preliminary discovery is conducted, there is often another attempt to settle the matter through informal means: a letter will be sent with a renewed demand (often at a higher amount than pre-litigation) or some telephonic or email exchange between the lawyers will suggest that one or the other party is ready to discuss settling the conflict. It is only after at least three attempts to settle the conflict have failed that a formal mediation is necessary. No wonder it's so challenging to settle a case in a single day!

What is a Mediator's Proposal?

According to Victoria Pynchon's, "Success as a Mediator for Dummies", "When the parties reach impasse because of exaggerated offers and nothing you do helps them see past their extreme positions, one option is to present a mediator's proposal—your professional, unbiased opinion of what you think both parties would likely accept to settle the case."

In my cases, the lawyers often ask me to do a Mediator's Proposal not when they are still in the stratosphere of negotiation, but significantly before all efforts have been exhausted, and the negotiation is preparing to stall. I am always careful to explain that the proposal does NOT reflect my valuation of the case, but rather a number that I think

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SETTLEMENT STRATEGIES FOR LAWYERS: TWELVE TECHNIQUES YOU DIDN'T LEARN IN LAW SCHOOL

I learned a lot from a former real estate broker and well-known Mediator, Lee Jay Berman, about how to "close a deal". Sales people, it turns out, have a number of tried and true techniques that can be used effectively by lawyers and mediators in negotiation. Although lawyers typically spend a much greater percentage of their time negotiating than trying cases, these skills are seldom emphasized or taught in any way in law skills outside of a single class in dispute resolution, which is virtually never a required course.

Law Schools still base their education on teaching through the Socratic method and he or she who comes up with the "right" logical interpretation of the case is rewarded with grades and admiration from peers and faculty. Young lawyers are trained to be competitive through trial advocacy classes and moot court competitions. The notion of a win/win resolution or collaborative thinking is all but anathema to many.

Here are twelve techniques which I have used effectively to end lawsuits or "close the deal" brought before me. It takes a bag full of them, in my experience, to utilize the appropriate tool in the right dispute at the right time on the right people, but I find that having these tools in my "mediator's tool chest" can be an invaluable resource.

LESSON 1: "THE ASSUMPTIVE CLOSE"

The assumptive close requires that you act confidently as though the deal has already been struck even before the monetary damages have been agreed upon. Especially in employment cases, where the employer and employee have been unable to reach an agreement after many hours of negotiation on the damages issue, if you can divert the attention to terms like payment dates, tax consequences, confidentiality protections and treatment of personnel records, you may find that the parties are incentivized to make a deal on the ultimate issue of damages since they are now "invested" in the rest of the terms.

Questions like: "how will you spend the money?" and "how soon can we get this lawsuit off our books?" can serve as powerful tools to get both sides to see past the conflict to a future without this litigation. As a bonus, once the parties have committed to agreeing to some of the minor terms, they may become wedded to the idea of settlement on that day. Finally, this gets everyone feeling confident that the parties can agree on some things when they have arrived very often at a stalemate—unable to agree to anything at all.

LESSON 2: "THE ABRAHAM LINCOLN CLOSE: USING A BALANCE SHEET"

Abraham Lincoln was a lawyer who classically advocated for compromise over litigation. I've heard it said that he employed a balance sheet technique in which he would quantify and list the pros and cons of moving forward with a particular dispute or critical situation.

In mediation, the method can be employed to engage the parties in a critical analysis of the benefits and burdens of this litigation. In order to accomplish that, it's critical that

A New Strategy for Decision-Making: Fast and Roughly Right

By Jan Frankel Schau

It is July, and your client has urged you to get through with the pending litigation as quickly and efficiently as possible. You call the Court to schedule a hearing on a Motion for Summary Judgment and the first available date is next May. You delicately broach the subject of ADR with your opposing counsel, select a busy mediator who can fit you in sometime in late August and you and your client arrive for a full day's mediation hearing at 10:00 AM with great expectations. By 3:00 PM, there have been no monetary offers or demands made and your client is getting frustrated with you, the process, the mediator and the entire judicial system.

There is great news coming out of business schools and corporate America about strategic negotiation. If the predictions made by Professor Rita Gunther McGrath of Columbia University's Business School are accurate, "fast and roughly right" decision making will soon replace deliberations that are "precise and slow". This new way of decision-making has extended beyond business to international banks, consultants and real estate professionals who all recognize that an ever-changing global economy demands new and innovative ways to stay ahead of the curve in order to maintain even a transient competitive advantage. In the time it takes to deliberate about a pending deal, all potential profit could be lost and the opportunity missed. Lawyers and mediators would be well served to adopt the same strategy as it applies to settling cases.

How does the "Fast and Roughly Right" Decision-Making Process Work?

Nick Tasler, a human behaviorist and writer for the Harvard Business Review, suggests a simple, flexible, "Know-Think-Do" framework to enable business leaders to immediately start making these "fast and roughly right" decisions. He paraphrases Albert Einstein, saying "the framework should be as simple as possible, but not simpler."

The Know-Think-Do framework comes down to three distinct steps in every decision. First, the decision-maker must know the strategic objective. In terms of a lawsuit, that might translate as: "get out of the lawsuit before any further disruption to our business occurs at the least expensive amount by year end" or perhaps "get the case settled at a level where I can pay my lawyers and cover my expenses for another year until I can find another job". In simplifying the strategic objectives, the decision-maker will have to eliminate some objectives in favor of the best or most salient one or two. This means the discussion should center upon which of the multiple objectives will have the biggest positive impact and will adversely affect the fewest possible stakeholders. Remember, there is no such thing as a perfect choice.

The next step is to think rationally about all of the possible options that may satisfy the primary strategic objective. This process is best done through what Tasler refers to as an "Anti-You". Let an objective third party (as in a neutral) shine a light on the potential options and help you and your client see which one aligns best with your

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PERSPECTIVE

Perfection: not all it's cracked up to be

By Jan Frankel Schau

A funny thing happens to professionals who are natural born perfectionists: Confronted by an endless array of options, the perfectionist is so worried about making a suboptimal choice that even when they have agonized, evaluated, negotiated and finally acted, they are often left feeling regretful. Indeed, it is a challenge to live up to perfection in every decision. As a decision-maker, perfectionists can also be seen as "maximizers." Lawyers and their clients who are insistent upon getting the absolute win in litigation are typical representatives of this decision-making style.

There is another option that fewer lawyers or litigants may have considered: satisficing decision making. Defined as "a process through which an individual decides when an alternative approach or solution is sufficient to meet the individual's desired goals rather than pursue the perfect approach," the term was coined by Nobel laureate economist Henry Simon in 1971.

By way of example, consider the house hunting project that my daughter and son-in-law recently undertook. My daughter, an educational psychologist, made a list of all of her needs: three bedrooms and an office, in a good school district, with a new or modern kitchen and in a neighborhood that is primarily comprised of single family homes. A classic satisficer, she was ready to put an offer on the first (and second and third) home that met her criteria. Finding the "perfect home" was not her objective.

My son-in-law, however, holds an MBA and is the classic maximizer. Before he made any offers, he needed to see every house on the market between Westlake and Long Beach, run comparable values for every neighborhood, consult with architects and lenders about loan-to-value and costs of upgrades, and assure himself that the investment he was about to make was absolutely optimal. (Of course, by the time the excel spread sheet was printed, the homes had sometimes been sold.)

In the new book, "Wonder Women: Sex, Power and the Quest for Perfection," by Debora Spar, president of Barnard College, the author candidly admits that "my generation made a mistake." Those of us who came of age after the feminist movement of the 1970s mistakenly believed we (women) could have it all and do it all. As Spar says in a recent interview in the New York Times, "we took the struggles and victories of feminism and interpreted them somehow as a pathway to personal perfection."

In her role as head of one of the most elite all women's universities in the country, Spar offers the alternative of "satisficing" as a means to achieve happiness, balance and still make significant contributions to intellectual thought in business, law and the sciences. She suggests that going for "good enough" may be the best option. (For lawyers, I see this as giving you the green light to order take-out for your next family gathering or celebration and to decline that particular PTA committee appointment this year).

In mediation, the maximizers are easy to spot: They are the men and women who take a "strategic walk out" at the end of the day rather than accepting an offer that is sub-optimal. The maximizer needs to be certain that there are no better options if they wait, prevail on a risky motion, take that last deposition, etc.

In the case of a recently mediated alleged wrongful termination from employment case based upon a failed security clearance check, the maximizer demanded $1 million and then walked away when the employer refused to pay less than two years of plaintiff's lost salary in damages (the optimal result of the negotiation or strike point) plus an adequate compensation to cover attorney fees, amounting to another 40 percent on top.

The satisficer, after hearing all of the employer's defenses, may have accepted an offer as a "second best" offer, even though there was a chance he could do better over the next few months. The offer of one year of salary may have been acceptable as the best available option, though not quite optimal. Where the former employer agreed to seal the personnel records and convert the termination to a voluntary resignation, the second option becomes "very good," though still suboptimal. While the satisficer could see that, the maximizer would turn down such an offer as insulting and consider it a loss, not merely second best.

To the satisficer, the offer, simply stated, would have been "good enough" and the client could have had the funds to get an apartment, retrain for another position and get back on his feet instead of continuing to stay with relatives and apply for jobs which included being compelled to admit he had been terminated from his last position for failure to pass a security test.

In other words, the satisficer in a mediation carefully evaluates the best option "on the table" against the risks and expenses and delays of rejecting that offer and proceeding with further negotiation after the mediation. In those instances where there is an option that is "good enough," the satisficer will accept the last and best offer, even if it may not have been the perfect choice or outcome. Ad studies have shown that typically the satisficer is more satisfied with his choices than the maximizer, who can't escape doubting himself and wondering whether he could have done still better.

Here lies the paradox of perfection: It's hard to be absolutely certain that you have achieved the optimal outcome, and because you are a perfectionist you will beat yourself up over it and second guess yourself even after a good decision is made.

Before making your next decision, consider your general approach to decision making and whether choosing the option that meets your goals, satisfies your Client's objectives and perhaps even pleases the person with whom you share joint tenancy is ultimately a better option, even if not the perfect one. It may put you on the road to both professional success and personal happiness.

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