

HEARTS AND MINDS WILL FOLLOW: AN ESSAY ON MEDIATION

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I suspect most mediators have been accused, in one way or another, right in the midst of a heated discussion late in the day, of not having either a *mind* or a *heart*! The former charge usually precedes the latter. (I believe psychiatrists call this transference!)

Once the lawyer making the allegation realizes the mediator is not buying his carefully crafted rationale, the appeal usually moves from logic and reason to emotion. You know the old saw: “If you have the law, argue the law, and if you don’t, argue the equities.” Arbitrators and mediators are people, and, as such, respond to appeals both to the mind and to the heart, logic and emotion. So if the lawyer suspects the mediator is unconvinced by his Socratic argument, and then the plea that follows, it should tell him something about his case. The mediator is simply holding up the mirror of reality to that advocate.

Mediation is a demanding, multi-faceted challenge that simultaneously engages the mind and the heart in a social dynamic.

At first, the challenge is intellectual. That is, there is an absolute requirement in every case that before starting the session, the mediator must have as good an understanding as is possible at that point of

- the facts of the case as alleged by each party,
- the key issues,
- the various positions of the parties, and
- the law.

But to do that, mediators have to sort through the “facts” while dealing with insufficient information, posturing, and sometimes half-truths and emotions, to get to what *probably* happened. The exercise may be mental at the start, but it comes wrapped in a social

setting at the mediation, with the parties, counsel and perhaps experts, all with somewhat different agendas, jockeying for position. Mediations are usually encumbered by strong emotions all around, compounded by a certain amount of advocacy, as lawyers and experts want to be seen defending their client's interests with vigor and feeling.

After sorting through the issues, the group dynamics, and the emotions, settlement often depends on the trust and respect the mediator is able to develop, one-on-one, with the decision makers, after figuring out who they are. This is because, at the end of the day (often literally), they have to *want* to get it done.

The mediation is a living, very human, complex exercise, which challenges the hearts and minds of all the participants.

The "facts," of course, present a challenge in themselves, because what happened is surely subject to interpretation. Recollections differ, and people remember what their psyches permit them to recall, with all the shadings and circumstances that their egos require. We may never know what *actually* happened (what is "truth" the philosophers ask).

I usually tell the parties in my opening that what happened really doesn't matter because the only thing that does matter, ultimately, is what the arbitrators think happened. They will base their decision on that perception. The arbitrators (and the mediator) will develop a construct about what happened based on the evidence - oral and written - and that construct may or may not have any relationship to what really happened.

Consequently, I ask the parties to look at the evidence the way the arbitrators and the mediator will, as objectively as possible, with their minds, and not with their hearts, because that is how they can best decide on the course that is in their best interest.

To want vindication, to try to teach the other side a lesson, or to get revenge, while understandable, are usually not very helpful objectives in a mediation. There are no winners in a successful mediation, just as there are no losers.

The mediator has to move the parties - and often counsel - off those feelings of the heart and get them to focus on a cold-blooded assessment of what the risks are in arbitration with the particular panel of arbitrators assigned, and whether they are better served with a risk-controlled deal in mediation than they are pressing on with an arbitration hearing.

There is a definite logic to mediation and it's the reason for a success rate of 80% in voluntary securities mediations. With knowledgeable counsel on both sides (and if not knowledgeable, at least counsel who will listen) and with a mediator who knows the law as well as the predilections of arbitrators, it's usually the case, assuming general agreement on the issues, that *directed discussion* by an experienced mediator will get the parties looking at the same evidence generally in the same way.

Let look at how these principles can apply to actual situations. In many tech wreck cases, for example, claimants insisted brokers caused them to lose substantial amounts of money by not getting them out of "high risk" stocks in 2000 and 2001. In some of these cases, however, the investment patterns and circumstances of the claimant didn't change from 1998 to 2001, but the market surely did.

Let's assume in one such case there is evidence also showing a claimant of reasonable means, with an advanced education, and a responsible white collar position, together with phone and computer records showing the customer looked at account statements and talked with the broker regularly. Absent other facts helpful to the claimant, it is highly unlikely a panel would find liability by the broker or firm in such a case.

I submit this is so even if the claimant truly didn't understand what was going on in his account – was educated in anthropology, for example - and had little comprehension of or interest in financial matters; trusted his broker implicitly to protect him, and did everything the broker told him to do without question; looked at his account just to check the monthly balance, and really didn't take the time to review much else, and probably would not have understand it if he had looked at it further.

Let's further assume he complained bitterly to his broker when the account started going down in 2000 and 2001, and told him to move to safer, less risky investments, but put nothing in writing, and always reluctantly stayed the course when the broker said he was sure things would get better and it absolutely was not the time to sell.

The broker will testify that the account was being run the way the client directed, that it was invested the same way for a number of years, and the client understood what was going on, never complained, made money through the end of 1999, and that they talked regularly. While he had no obligation to monitor the account, the broker will say he did, and pointed out the risks of staying invested as it was in late 2000 and 2001, and that it was the claimant who did not want to take the losses involved in selling out, and knowingly authorized all account activities.

What actually happened here really doesn't matter because the claimant cannot prove his case. He might make a compelling, even very believable witness, and may well be distraught over the loss of his nest egg, but I expect appeals to the hearts of the arbitrators, and the mediator, will be unsuccessful on these facts. In such a case the mediator and counsel have the difficult job of helping the claimant understand why he does not have a case he can win despite the righteousness of his claim, and why just about any amount offered in settlement will be better than his best alternative, going to trial with the risk of getting nothing, and prolonging the controversy and the sleepless nights even longer. It then becomes just a matter of negotiating tactics to maximize that payment.

Strong emotions on the part of this claimant are certainly understandable, and the mediator will have to deal with them and help the party focus on how the case will look to the arbitrators regardless of what actually happened, and the risks of going forward with a trial.

Why would a lawyer take such a case to start with? Probably the earnest appeals of his client, who was telling the truth after all, together with the big losses and a lack of hard evidence to the contrary at the start, pushed counsel toward representation. Then the natural inclination to identify with the client as the case is prepared, perhaps combined with a desire to get some of the money back because in truth the account was mishandled, pushed things forward. Matters of the heart affect lawyers too, sometimes to their disadvantage.

What if we tweaked the facts further, and said this broker had a CRD that showed a number of customer complaints and arbitrations (not enough to classify him as a “rogue” but a colorful history nonetheless), and a few cases with similar claims where substantial settlements had been made. Let’s say further that the claimant retired in late 1999, and there is no evidence of a new account form being filled out, and the objectives, which were principally growth, being changed or reviewed.

Moreover, let’s assume this broker had many other clients whose accounts mirrored this claimant’s account, regardless of their various ages, sophistication, or financial situation, that the former sales assistant of the broker, no longer employed in the business, is willing to support much of the testimony of the claimant, and the arbitration panel is chaired by a public interest lawyer who has presided over some significant awards to claimants in tech wreck cases? If all this information is available to the claimant, the case now takes on a very different perspective.

At some point here the pendulum has swung, and the broker and firm are going to have to up the ante substantially to get a settlement and avoid a trial. Moreover, any

emotional plea this believable claimant is going to make on the stand will be much more powerful, and will have, undoubtedly, much more of an impact. The defense will have to evaluate the probability of success of both the logical arguments based on the evidence and the emotional arguments based on this claimant's demeanor, into consideration. When before the appeals to the heart would have fallen on deaf ears because there was no credible proof to support them, now they will be much more compelling.

In a case where there are good arguments on each side, the mediator has to help both sort through the strengths and weaknesses, and will make sure each understands the risks of the case if they go forward. Framing a case so the parties can make an objective evaluation of their position is not possible if strong emotions are in the way, and the mediator has to defuse them if he can, to permit the good sense of a proposed settlement to shine through. Then the minds and hearts on both sides will follow, and the deal will be done.