[OPINION]

CAPTAIN CALL, YOGI BERRA, AND OTHER PHILOSOPHERS

What their wise words can teach us about mediation.

WRITTEN BY **SCOTT BAKER**

"The wisdom of the wise, and the experience of ages, may be preserved by quotation." —Isaac Disraeli[1]

This article offers quotations from philosophers with diverse perspectives—from politics to warfare, from literature to industry, and from the saddle to behind home plate. Mediation as we know it and today's complex technologies did not exist when they spoke their words. Nonetheless, their sage advice can be applied to resolving modern disputes through mediation just as to battles, geopolitical tensions, thriving in business, or reacquiring horses. "By three methods we may learn wisdom: first, by reflection, which is the noblest; second, by imitation, which is the easiest; and third by experience, which is the bitterest."[2] Consider taking Confucius' less bitter routes to learning about mediation through the hard-earned wisdom of others.

On whether to mediate:

"Let us never negotiate out of fear. But let us never fear to negotiate." —President John F. Kennedy[3]

Parties may be reluctant to propose or engage in mediation early in a case, or at all, for fear that openness to compromise negotiations signals weakness. But participating in mediation means only that a party recognizes that there may be a negotiated resolution that would be better for it than the alternative—litigation, with its attendant cost, risk, anxiety, and uncertainty. Because nearly all lawsuits are resolved through negotiation rather than trial, that recognition is hardly revelatory.

Moreover, mediation's promise of self-determination ensures that negotiation need not be out of weakness or desperation. A mediator cannot require a party to settle or to make or accept any term of compromise. Instead, a party remains in control of the terms that it is willing to offer and accept and maintains its freedom to walk away from the negotiations if they are not productive. A party who thoughtfully analyzes the risks and rewards of litigation can strongly, confidently, and without fear use mediation to try to achieve an efficient resolution for her client.

On when to mediate:

"There is no instance of a country having benefited from prolonged warfare . . . In war, then, let your great object be victory, not lengthy campaigns." —Sun Tzu[4]

The sooner litigation ends, the sooner parties can get on with their businesses and lives. And, in general, the longer a dispute proceeds, the harder it can be to settle because the parties' positions will have hardened, and likely diverged, after they have fought and paid for them for so long. Therefore, waiting for a court-ordered deadline to mediate, which is typically very late in the dispute, may limit settlement opportunities. Consider opening a discussion as soon as the dispute is ripe for mediation because, as in war, the sooner a lawsuit is ended, the better for the combatants.

On negotiated resolutions being preferable to litigation:

"I was never ruined but twice: once when I lost a lawsuit and once when I won one." —Voltaire[5]

Similarly, President Abraham Lincoln cautioned that, in litigation, ". . . the nominal winner is often the real loser—in fees, expenses, and waste of time."[6] Voltaire and Lincoln recognized that the hard costs of litigation can lessen or eliminate any benefit of resolving conflict through the courts. And they didn't even know about the enormous cost of e-discovery of data measured in terabytes.

But it is the "waste of time," that is, the opportunity cost of litigation, that can in many cases render trial an inefficient way to resolve conflict. Litigation distracts a company from running and growing its business. The estimated return on investment of litigation, if any, needs to be weighed against the benefit of fulfilling an organization's mission with the time, energy, and resources that would be consumed by litigation. For individuals, litigation prevents them from living without the additional anxiety, distraction, worry, and risk that lawsuits cause. And investing more resources than the suit is worth or ending up with an uncollectible judgment, not uncommon results, are certainly wastes of time. Trial may be necessary in a select few cases, but for most disputes, "[a] lean compromise is better than a fat lawsuit."[7]

On the importance of preparation for mediation:

"Success depends upon previous preparation, and without such preparation there is sure to be failure." —Confucius[8]

For hearings, depositions, witness interviews, trial, and all other aspects of the litigation process, preparation is necessary for success. While mediation is a less formal process, preparation is still critical.

Whether to present an opening statement, who gives it, to

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whom to direct it, and what to accomplish with it are things to carefully consider before the mediation. A short and tight opening that hits its target can be very effective, but it requires time and effort. President Woodrow Wilson is one of many who recognized that the shorter the presentation, the longer the preparation. "If it is a ten-minute speech it takes me all of two weeks to prepare it; if it is a half-hour speech it takes me a week; if I can talk as long as I want to it requires no preparation at all. I am ready now."[9]

Carefully analyzing before mediation the best-case, worst-case, and reasonably anticipated litigation outcomes saves precious mediation time. Consider the various terms that would make a negotiated resolution better than those outcomes and strategies to get to those terms. "You got to be very careful if you don't know where you're going, because you might not get there."[10] Preparing clients to be receptive to revisiting its analyses based on information or input that it receives at mediation is another key for success at mediation.

Gathering important documents is a crucial part of mediation preparation. Having key contract provisions, emails, deposition excerpts, caselaw, and court rulings at the ready can be very helpful to a mediator and to a party's persuasiveness. A settlement agreement, drafted before the mediation, can serve as a reminder of key terms to negotiate at mediation and can save substantial time, expense, and disputes that accompany the negotiation and execution of the "more formal settlement agreement" that is often called for in an abbreviated mediation term sheet.[11] While it takes time to anticipate, compile, and prepare each important document, it is definitely "[b]etter to have it and not need it than to need it and not have it."[12]

On achieving your client's goals by understanding your opponent's needs:

"If there is any one secret of success, it lies in the ability to get the other person's point of view and see things from that person's angle as well as from your own." —Henry Ford[13]

Mediating parties may distrust and even dislike each other. Each often believes that the other's unreasonableness caused the litigation and is why it remains unresolved. But each party cannot obtain what it wants—peace through a negotiated resolution—without the other's cooperation and agreement. Therefore, a party can help itself by understanding what is important to his opponent. Atticus Finch, the fictional patron saint to many a lawyer, counseled that "[y]ou never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it."[14] To do that, lawyers and parties may ask themselves: How would I react or advise my client if I were they and received the offer that we are about to make? Could or would I accept the terms that we are offering? If I were on that side, what would I ask for and need from an agreement that would make it better than litigation? Does our offer give the other side anything to lose by proceeding with litigation? When your client understands its opponent's needs, it is better able to satisfy them.

This is not to suggest that a party should capitulate or sacrifice what it needs from an agreement. Rather, a party helps to achieve its self-interest—getting an agreement that is better for her than litigation—when it helps its opponent achieve the same thing.

On overreach in negotiations:

"Striving to better, oft we mar what's well." —Albany (William Shakespeare)[15]

In theory, a party will settle a lawsuit when the terms of an agreement are better than its estimation of litigation's return on investment. But even when a party has such a settlement within its grasp, it is natural to want to push for more to try to turn a beneficial deal into a great one. Tough negotiation is one thing. But parties squeezing so hard as to overreach and kill an advantageous resolution is another. In plain words, "pigs get fat and hogs get slaughtered."[16]

For mediation, as with most other things, "[e]xperience is the best teacher, but the tuition is high."[17] Many smart people over the centuries left us wise words. Here's to learning a thing or two from them about mediation. **TBJ**

NOTES

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