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# The Mediation Group

## NEWSLETTER

MEDIATION • ARBITRATION  
ORGANIZATIONAL PRACTICE • TRAINING

## Dear Clients, Colleagues and Friends,

As I write this note, we are in the midst of hosting the three Chinese Law students from the winning teams in the English Language Negotiation Competition held last summer in Beijing. You may recall that as part of the celebration of our 25th year, we were one sponsor of that competition, offering the winning students a trip to the United States to tour Boston area legal institutions and ADR practices. You will hear more from us later this year, and from the students as well, on the results of our exchange. In the meantime, we have put together an issue of this newsletter that yields perspectives on both our practice and the field of mediation generally – some of the ways it has grown over those 25 years, sometimes in unexpected ways, and where there are still frustrations, again in some unexpected places.

In her debut article, Janet Grogan, a longtime member of our organizational practice, demonstrates the value of mediation skills in solving everyday problems in the workplace. Too often, she notes, mediation is defined and conceived of only in its most traditional form – two parties, a neutral, confidentiality. Yet she shows how many of its tenets and skills can be applied and adapted for constructive use on the job. Janet was trained in mediation well before she built a stellar career in human resources. Now she utilizes those skills in a variety of interventions, as well as offers training for organizations clever enough to recognize the utility of those skills for their employees.

On the flip side of mediation's wide applicability, Jane laments that too many times parties fail to think of mediation even when it seems to be such an obviously beneficial option; she then explores some of the barriers to its use. Providing us with his usual wit and sharp perspective, Judge Kass writes of lessons learned as he successfully launched his latest career as mediator and arbitrator. As always, Katie Cotugno brightens

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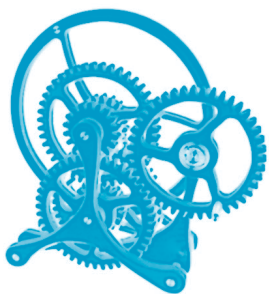
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up our pages, this time with her take on TV's take on mediation. David shows the very long reach of our field, as he reflects on his sabbatical, particularly his teaching gigs in China. His insights about Chinese students offer a preview of our next issue, and collaboration in a large context. And as one more sign of our continuing efforts to bring dispute resolution to underutilized areas, we introduce Amy Gay, the newest member of our organizational practice, focusing for now on our projects in health care institutions. — *Brad*

## ORGANIZATIONAL PRACTICE

### Mediation at Work

*by Janet Grogan*



I am neither a scholar nor a writer, so a foray into this type of writing is quite different for me, and a tad out of my comfort zone. I do believe, however, there is something quite interesting to say about the value of mediation and conflict resolution skills in the day-to-day, in any given work place.

I got my mediation training long before any time I care to put in print, and before I fell into my career in Human Resources. It dawned on me over time that I was using my training and experience as a mediator in more situations than I even realized, and that approaching my work with a “mediation” perspective is what has made me successful.

I found a kindred spirit in Valian Norris, Director of Human Resources for the Massachusetts Department of Elementary and Secondary Education (DESE). She, too, became interested in dispute resolution before she fell into her Human Resources career, and pursued many courses in our colleague David Matz’s graduate program in dispute resolution while she was completing her undergraduate degree at UMass Boston. She put her academic training to work almost immediately when she spent a number of years at the Office of Employee Relations, before moving on to other more traditional Human Resources positions. I got to know Valian as part of a conflict resolution training I conducted for her staff with Mette Kreutzman from the Mass. Office of Dispute Resolution. I admired Valian’s insistence that her staff acquire conflict management skills, and returned to her office recently to speak with her as I thought about this article.

Valian, like myself, finds application for mediation skills in her daily work. She has instituted a practice of “Mediated Conversations” in her organization (hence the training for her staff) with the goal of resolving a wide range of issues that come into her office. She has found that often what appears to be a blooming disciplinary problem can be sorted out and resolved through a Mediated Conversation (where disciplinary action is explicitly put aside to see if the people involved can come to terms); that in many investigations, there is a piece of the problem that is “mediable”, and that managers who can learn to see issues developing in their departments from multiple perspectives become better managers. Valian has participated in many conferences and trainings (such as MCLE’s civil mediation course last year) as part of her professional development. Too many people, we both believe, see mediation only as a formal

process which takes place outside of the work place once a problem is deemed irresolvable from the inside. Were it up to her, every single person in her entire state agency would receive mediation/conflict resolution training (perhaps in conjunction with diversity training, which she finds teaches the same key “open mindedness” skills), and would use their ability to find common ground and understand issues from other perspectives to create a more productive workplace.

I also spoke with Karen Smith, from the Employers Association of the Northeast. She provides investigation and mediation services for the Association’s members, and agrees that mediation has been under-utilized within organizations. She also finds that many of the investigations she conducts are not really about a legal issue, but rather about interpersonal conflict, and unfortunately just as often, failure on management’s part to problem solve effectively. Karen points out that by the time a member organization has asked her to mediate, the parties haven’t exactly come to the table voluntarily, so in that sense it is different from traditional mediation. Nonetheless, she provides neutral space, and neutral facilitation, and is able to give employees an opportunity to find their own way of solving a problem before management makes a decision for them. She has found that once an organization recognizes the value of bringing conflict resolution capacity in-house, they have embraced further training for employees.

At Valian’s urging, I went back to DESE to speak with a few of her staff who had been through the training Mette and I delivered over a year ago to talk about how they’ve used it in their daily work. Each spoke enthusiastically about the application of their mediation skills in their daily work. One person’s examples include negotiating with a new hire, resolving payroll issues, and structuring an exit strategy. He has found that the ability to think about the problem or issue from the other person’s perspec-

tive and to listen actively has made him much more effective. Employees feel like he is collaborating with them to get their needs met, and solutions tend to “stick”.

Another spoke of using his training as he conducts “shuttle diplomacy” between functions and units to address a broad range of problems including work/life balance tensions, tardiness, and performance issues.

One person is involved in the department’s on-boarding and retention practices, and also conducts informal investigations. She must

often help a busy supervisor (who perhaps has been less than clear) modify an employee’s expectations of the job, or help frame the issues when there appears to be a problem so that the involved parties can focus on solutions and create a comfort level for people to discuss options openly and honestly.

One of the big barriers Valian and her staff have found, as I also have, is that their constituents often hold a perception of the Human Resources Department as the “Management Police”. Their most frequent users are repeats – managers and employees who have (perhaps reluctantly initially) participated in the problem solving/mediation practice once, and realize what a valuable tool they have at their hands. Valian also notes that a mediation approach to resolving conflicts takes more time than many managers think they should take – it’s faster to make an executive decision. But what the repeat users have learned is that the executive decision often doesn’t stick if the real issues haven’t been aired and staff’s concerns taken into account to some degree in the solution.

My hope here is that I have convinced at least a few of our readers to think more broadly about how mediation and conflict resolution skills can be used to enhance our work life and create more problem solving capacity in-house. As Valian says, “Think about it – where in life DON’T you use these skills?” ■

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***Once an organization recognizes the value of bringing conflict resolution capacity in-house, they have embraced further training for employees.***

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### Mediation Makes Sense

by Jane Honoroff



It continues to surprise me how elusive referrals to mediation are, even from people who know first hand about mediation. This dynamic was initially brought to our attention in the early months of our incorporation when we “hired” a friend/colleague who had just completed an MBA program to give us advice on how to spread the word about our services. Her “pay” was a dinner accompanied by our charming company and some great Chinese food to sweeten the pot. We spent a number of hours describing what mediation is and how we hoped to practice it. She was intrigued and excited about such a sensible approach to conflict. It wasn’t until a month later that she called us, a little embarrassed, and said, “There I was learning all about mediation and getting so excited about it, and I didn’t even think about the fact that at very moment my extended family was in the middle of a painful battle over inherited property.”

Recently, 26 years later, a potential client told me a similar story. He had contacted two high profile attorneys about a family conflict, again about inherited property and neither of the attorneys suggested mediation until he specifically asked for a recommendation of a mediation firm with experience in adult sibling conflicts.

I do realize that despite the growth in the field of mediation and other conflict resolution mechanisms over the past 26 years, it is still a relatively new concept to many people, (although now there is even a TV show about mediation – but don’t get me started about that.) When you are sick you go to the doctor. When you are in conflict, you call an attorney. And yet, it just makes so much sense to try to resolve conflicts without all the costs (financial, and emotional) associated with more adversarial processes. This is especially true in those situations where long term relationships (family, business associated, neighbors) have existed and will continue to exist over time.

Amy Gordon, our director of administration, just returned from a vacation in London and brought back a fascinating article from the London Times. (“Divorcing couples will be steered towards mediation,” Frances Gibb, Legal Editor, *The Times of London*, 23 February, 2011.) It described a new program requiring all divorcing couples to attend a compulsory session on the benefits of mediation before being allowed access to a court. This initiative was drawn up by Sir Nicolas Wall, the most senior family judge in England and Wales.

Maybe this kind of push is what is needed for the field of mediation to get internalized as a viable option for people in conflict.

We, as an organization, have pondered this phenomenon for 26 years. We have come up with various explanations. Some people see it as a weakness to suggest mediation, either because they think they should be able to handle problems on their own, or because they don’t want to air their dirty laundry. Some people perhaps fear that their position (should they need to go to court) will be weakened by exposing to the other side in mediation the strengths and weakness of their case. Other barriers could be more logistical. If you are in conflict you can hire an attorney of your choosing and get zealous support for your position. In order to hire a mediator all parties who are

already in conflict have to first agree on mediation and then on a specific mediator, at a time when they are not predisposed to cooperation. They also then have to at least consider the possibility that there may be two (or more) sides to the conflict.

I'm sure there are many more explanations we have yet to understand for why mediation isn't always the first service considered by those in the midst of conflict. For me, at least, I continue to be frustrated by the fact that as yet it is not a universally accepted assumption that mediation just makes good sense. ■

## ANNOUNCING

We are delighted to announce that Amy Gay has joined the TMG Organizational Intervention team. Amy has a PhD in Social Science from Syracuse University, where she ran the Campus Mediation Center and coordinated the Conflict Resolution Consulting Group.

Most recently, Amy was a Trainer and Product Manager with Vantage Partners, an international conflict management training firm, where she specialized in enhancing the conflict resolution capacity of new managers with high-level technical skills. She also spent six years as the Assistant Director of the UMass/Boston Graduate Program in Conflict Resolution. At UMB she managed the Mediation Internship, taught mediation, supervised admissions and coordinated the International Conference for Conflict Resolution Graduate Students.

Amy is the mother of two little girls, ages 6 and 3. She's on the Maynard School Committee and likes to cook, do yoga, ride her bike, and work in her garden. When she's got more time, she plans to learn to raft white water rivers.

At TMG, Amy is involved with two different health care action research projects. ■



## KATIE'S CORNER

### Stay Tuned

by Katie Cotugno

Since the January debut of USA Network's quirky mediation dramedy *Fairly Legal*, which stars Sarah Shahi as a plucky young mediator who solves the world's problems in 44 minutes and a killer pair of Louboutin heels, I've spent a lot of time trying to figure out how The Mediation Group can possibly get in on the act. Who knows better than us, after all, how suited the drama of conflict resolution is to all kinds of entertainment: a graphic novel chronicling the exciting adventures of ADR Man, perhaps, or *TMG: The Musical*. Who wouldn't enjoy Nathan Lane and Patti Lupone step-ball-changing to the dulcet tones of such classic showtunes as "Shuttle Diplomacy Tango" and "Everything Said Here is Confidential"?

I rather like the idea of a TV show of our very own, as well, and recently called MTV to pitch *Jersey Shore: TMG Style*, in which members of our family panel encourage Ronnie and Sammy "Sweetheart" to come to a compromise acceptable to both parties rather than hurl one another's belongings from the second-story window of a ramshackle beach house in Seaside Heights. I'm also working on a screenplay for a period drama entitled *3 Harvard Ave*, which recounts TMG's dramatic founding, and have begun serious talks with Dame Judi Dench to play a small supporting role for which she will undoubtedly be nominated for an Academy Award.

In the meantime, we'll continue to tune in to *Fairly Legal*, alternately nodding in vague recognition and rolling our collective eyeballs. You're welcome to critique the dispute resolution; I'm only just watching for the shoes. ■

# The Learning Curve

by Rudy Kass

Starting in 2003, after a period of surveillance and coaching by Brad Honoroff and David Matz, mediating and arbitrating became my principal professional occupation. I still regard myself as a tyro, but some lessons have sunk in.

**1. The value of the pre-mediation telephone conference.** Apart from the obvious usefulness of finding out what the case is about, what documents I should see in advance, and who is coming to the mediation (see “the missing person” below), I learn something about how the lawyers were getting along with each other and what the anger temperature is among the principals.

**2. Judge not — at least not too much.** There is an ample supply of mediators around and if lawyers choose an ex-judge, like me, it’s a reasonable inference that the lawyers are angling for an opinion about how the case will play out in court. I learned it is best to resist the invitation— at least early in the game. Despite proclamation in the opening session to all participants in the mediation that I am *not* there to decide the case, a decisive expression of view about the merits, even in caucus, tends to cast a pall over the relation between the mediator and the party who thinks he got bad news and that the mediator is “against him.” Equivocation and dilating on the uncertainty of how evidence comes in and the certain uncertainty of litigation outcome is the prudent attitude of the mediator in the early stages of the process. After the mediator has had a chance to earn the trust of the parties and their counsel, a more candid evaluation may be appropriate.

Greed, dishonesty, bluster, over-reaching, obtuseness, lack of candor, and tone deafness are among the human qualities abundantly on display in the course of a mediation. The mediator, who, alas, is also human is then tempted to manifest vexation or, worse, disapproval. I have learned to fight the temptation because when I haven’t, it has invariably had an adverse effect.

**3. Being directive.** Parties and their counsel like to say to the mediator, “work your magic,” by which

they mean, of course, that *their* rabbit will come out of the hat. Yet it is not a wholly empty invocation. I have learned that I must propose formulae for resolving the controversy and attempt to persuade each party that it constitutes the least lousy solution. Brad Honoroff keeps warning me not to propose specific numbers. Too often I ignore the warning and learn that Brad was right. Ranges of numbers, o.k. but absolute numbers: trouble.

**4. Seeing the body.** In cases that involve the use of land or buildings, such as boundary disputes, construction defects, easements, rights of way, impairment of view, interpretation of deed restrictions, use of common driveways, and adverse possession, I have learned that going to the site with counsel and the parties is very useful, even if sometimes inconvenient. The mediator, on site, is able to encourage negotiation and to propose solutions with more conviction than is possible on the basis of documents and photographs. Those pictures are seldom the whole picture.

**5. Never on Friday.** Well, never say never, but Friday is an awkward day for a mediation because people have evening plans. The rhythm of a mediation is several hours of theater, followed by statement of extreme position, followed by negotiation that gradually zeros in on resolution, and then, ah, working on the details, and getting a writing signed or initialed. As the mediation gets to 6:30 p.m. or 7 p.m., participants need to be elsewhere. It’s the *weekend*. Pressure develops for people to say, “We’ve made progress. Counsel can hammer together an agreement next week. If need be we can have another session.” If the mediation is a bilateral one, this can pan out. If it is a multi-party affair, as in a condominium unit owners association fighting with a general contractor and seven sub-contractors, what each party has agreed to is likely not to be understood with specificity. The lesson learned is that if the parties have gotten close, it is best to keep the mediation going until there is a rough cut written agreement that will pin down memory and discourage morning after revisionism about what had been agreed.

**6. The Missing Person.** It much diminishes the prospect for a successful mediation if the “decider” for a party is not present in the room. It is too easy for the absent “decider” to hang back from an apparently sensible resolution, if that person has not been in the room, not felt the flow of negotiation, not faced the opposition. As Sir Francis Bacon observed 500 years ago: “To deal in person is good...where a man’s eye, upon the countenance of him with whom he speaketh, may give him a direction how far to go.”

**7. Risk.** It is obvious, but still should not be left unsaid, that it is the mediator’s job to discuss in detail, most often in separate caucus, the financial toll, the emotional toll, and the dimension of full defeat in the event the parties do not design their own

resolution of their conflict and opt, instead, for The High Noon solution.

**8. Tribal considerations.** I had occasion to conduct a mediation between parties who were singularly poisonous with one another, quite out of proportion to the underlying quarrel which was one that rational adversaries, I thought, would have worked out without anyone’s intercession. When I expressed puzzlement to the less virulent of the two, he asked me: “Where did you grow up?” Answer: in suburban New York, on Long Island.

“Well, I’m from Dorchester and he’s from Charlestown.”

Oh. There are some things you learn that don’t do you much good. ■

## What I Did Last Summer

by David Matz

**A**sabbatical leave is a great gift. It can be used to open new doors for academic research; it can be used to explore without a clear idea for research implications, or any idea at all; it can be used to teach in new settings; and it can be used, unofficially, for great fun. All of these were true for the sabbatical I completed in January, but I want in this note to focus only on the work I did with Chinese law students.

My leave began in June, 2010. I am the co-chair of the Annual Chinese Law Student English Language Negotiation Competition. Deb and I flew to Beijing for the second of those competitions where I and my TMG partners judged the work of some extraordinary Chinese law students. Their skill and poise negotiating in a second language while under the scrutiny of foreign experts was astonishing and delightful. Their aggressive zeal to learn was equally rewarding.

We then flew to Changchun, a city of four and a half million people in the north of China; it is a city developed by the Japanese in the 1930’s intending to use it as their capital when conquering China. It is now the home of the Jilin Law Faculty where I taught Negotiation. This subject had not been taught there before, nor had the students participated in an inter-

active or role-play-oriented class. Contrary to predictions, within minutes and they were fully engaged and quite proficient, in English.

In addition, I gave several lectures focused on US government policy toward human rights in China. Student questions ranged from the academically polite (“How does the US government make its foreign policy?”), to the clearly curious (“Has race relations changed in the US since Obama became president?”), to the overtly aggressive (“Does the US attack Chinese human rights as a way to compete with China in international commerce?”).

Perhaps the strongest impression from our time in Changchun (almost three weeks) was the concern that students and faculty showed for our welfare. Our hostess, Professor Xiaohong Zhu, spent an afternoon teaching us the art of making dumplings. It’s not so easy: good dumplings have to be constructed so they will stand up after being fried, boiled, (or XXX.) For a less challenging evening, some students took us to a ping-pong competition. 1,500 or so fans paid high prices to cheer wildly for each volley. As with any foreign ritual, we learned enough to know that this is a game of awesome subtlety. On another occasion,

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one student commandeered his parents to spend a day driving us around the city, showing us the sights and teaching us how to use chop-sticks to eat soup containing very long noodles. And, finally, at lunch after class each day the students made sure that we had plenty to eat and, with deft use of the lazy susan, arranged that we steered clear of what they determined would be outside our comfort zone.

It was in those after-class lunches that we got the most insight into life in China. Jilin ranks fifth in quality among Chinese law schools. (There are many law schools in China, though many different numbers appear in different places.) But it is a provincial city and the gap between it and Beijing or Shanghai is considerable. In Jilin students think of traveling to Thailand; in Beijing they think of traveling to Europe or the US; in Jilin they are most concerned for jobs providing security; in Beijing they focus more on professional ambition and financial rewards; in Jilin, there was little acknowledged use of the foreign press on-line; in Beijing students do read the New York Times or The Guardian. These are generalizations, of

course, but they are reinforced by rules making it difficult for students to move legally to a different city.

The pushes of dissent and repression that we read about today in Chinese cities was foreshadowed in our visit. On the one hand students were wonderfully candid about many personal and political things, but on the Three T's (Tibet, Tiannamen, Taiwan) they tended to clichés and the party line. We did hear minority views, but only quietly, in one on one conversations. The students we met are tightly tied to commitments about their careers, commitments their parents have sacrificed much for. They are thoughtful about who might overhear them or be aware of their internet behavior. And they do not display the anti-authority allergies that we have seen in students elsewhere. So, putting those characteristics together with the Chinese government's zeal at controlling dissent and co-opting leaders, it would surprise me if any demonstrations there got out of hand. (Someone must have written a note just like this about Egypt, perhaps three months ago.) ■



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