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SHERNOFF LAW

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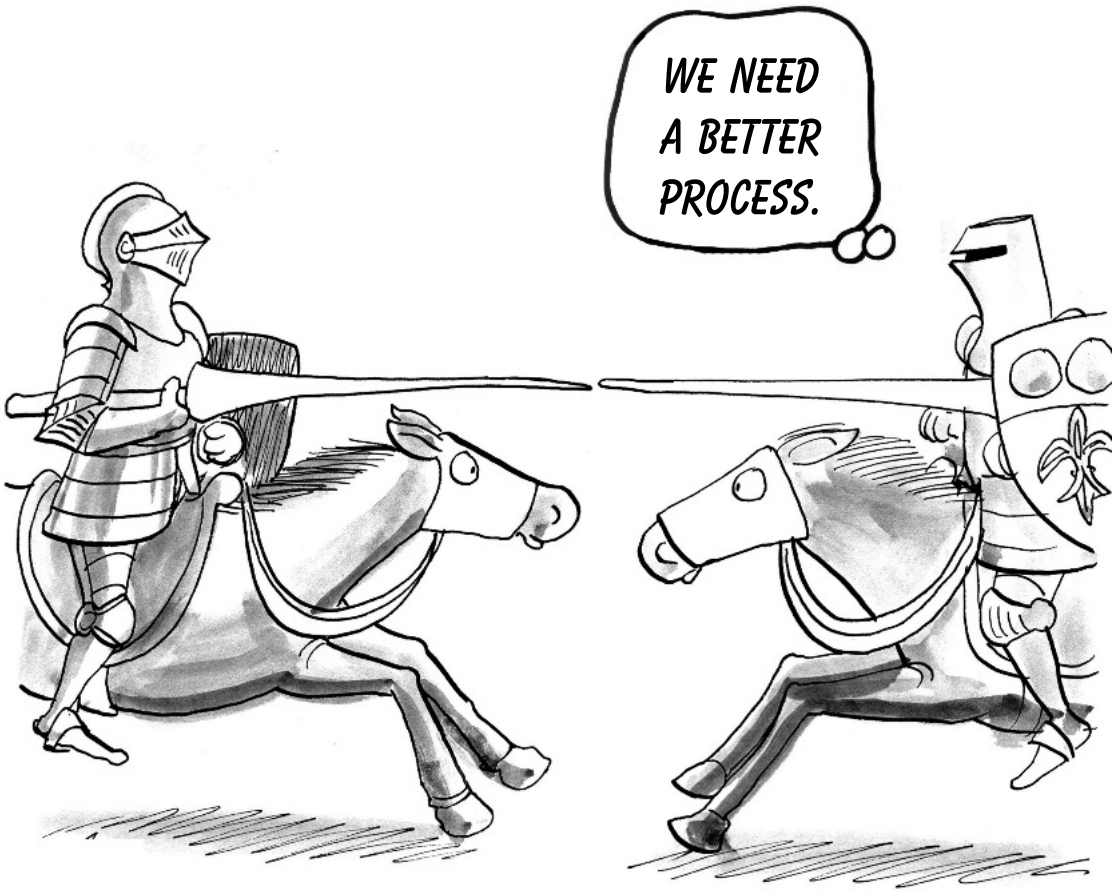

If you can't beat the system, join it

WHO SETTLED THAT CASE? APPLYING THE ANALYSIS OF SYSTEMS THEORY TO MEDIATION BEGETS "LIMITLESS POSSIBILITIES"

It was my first big-league mediation. At a well-known mediation center with a crystalline view of an iconic bay and bridge. You probably know the place. The day was beginning. Attorneys bustled about, topping up coffee cups and hoarding cookies. In the foyer a few trial lawyers had congregated to catch up and swap stories. Amidst them stood a renowned neutral. Conversation livened as the topic turned to a contentious litigation that everyone seemed to know. The neutral waited patiently – as only one in his profession can – picked his moment and announced, "Know what – I settled that case last week!" A hubbub of exclamations and laughter ensued.

Having overheard the exchange, I said to myself, "That guy's got a lot of nerve, claiming that *he* settled the case." I expected someone in the group to call him out on his boast. To the contrary, his audience was congratulating him. Then one of the advocates began recounting a case that *he* had just settled. "Wait a minute," I thought, "who settles the cases in this racket anyway, lawyers or mediators?"

When I got home that night, my wife asked me how it went. My case had settled, and I had put in a grueling day handling a touchy client and dealing with a cold-blooded defense team. And I had spent a lot of time on the mediation brief. Still, I couldn't summon the swagger to proclaim that I settled the case. "We settled," was all I said, thinking the remark sufficiently humble and ambiguous.

Falling asleep that night, I wondered if my client had gone home and told his family that *he* settled the case. He probably had. I didn't have to even wonder about our mediator. I knew exactly what she had reported to her case manager.

Role with it

I'm not trying to set up a dichotomy – or rather, trichotomy – to fight out who should take credit for settling cases.

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That would be entertaining, but it doesn't lead anywhere. Besides, everyone owns a rightful claim.

Take the client. He devotes his time, bears his soul, gives his consent to settle and signs the term sheet. Or the attorney. He litigates the matter, positions it for mediation, completes the briefing and participates in the session as an advocate, negotiator and advisor. And of course the mighty neutral, who plays ringleader, puppetmaster and passer of the proverbial peace pipe. With a store of tricks up her sleeve, she sprinkles fairy dust and pulls deals out of her hat just when everyone is heading for the exits.

It doesn't boil down to who plays the most important role. They are all indispensible. That is the point.

Now to sharpen it. Those roles are also interconnected, interdependent and form a self-contained, ever-fluctuating system that is more determinative as a whole than as a mere collection of unrelated parts. When understood on this level, mediation takes on a different dimension and offers limitless possibilities. To reach that level of understanding, we can turn to general systems theory. Below is an introduction to that theory followed by some applications to modern mediation.

Nonlinear interactions, baby, yeah!

Textbooks define a system along the lines of "an organized entity with interrelated and interdependent parts, defined by its boundaries yet more than the sum of its parts." A biologist named Ludwig von Bertalanffy takes credit for minting the concept of general systems theory back in the early twentieth century. His way of looking at systems opened doors of perception by challenging Descartes's *cogito ergo sum* as the underlying framework. In other words, it rejected the notion of unchangeable individual components participating in a system that could be defined by merely adding up the components in linear fashion. Bertalanffy believed that a system is characterized by the *interactions* of its components and the *nonlinearity* of those interactions.

A more famous Ludwig – the philosopher Wittgenstein – also challenged the implications of Cartesian linearity when he posited the notion of a "private language." If "I think, therefore I am" holds true, then so would "I speak, therefore I am." But we cannot acquire and use language on our own. Language works only because the community of speakers using it agree on its signs and meanings. As Westerners, it's hard for us to concede that our most basic behaviors, such as using language, are not self-sustaining but rather inextricably dependent on our fellow citizens, the other components of the system in which we live. And as Americans, we fiercely defend our independence and individuality, and we regard their opposites, interdependence and collectivity, with suspicion.

But imagine a culture, such as an 18th century Native American tribe, that evolved impervious to Western philosophical thought and whose conception of selfhood developed out of an appreciation for social systems. It could result in the absence of a self as a singular entity and hence individuality as sacrosanct. For example, when describing a conversation I had with a friend yesterday by the fire, I wouldn't say "I spoke with my friend Isi yesterday by the fire," but rather "Yesterday by the fire occurred Howard–Isi speak." No one component claims greater responsibility for the ultimate result; without any one, including the fire, the event would have played out differently, and its significance, changed completely.

From German intellectuals we move to that international man of mystery, Austin Powers. The suave secret agent once propositioned a female consort with the opener, "Allow myself… to introduce… myself." It's funny because of the grammar mistake. But the gag is clever also for calling attention to the irreconcilable splitting of our selfhood in two, often by virtue of the very language we use on a daily basis. Some days we are not ourselves. If behaving erratically, we may have taken leave of ourselves. Our friends get surprised if we act unlike our normal selves. We might counsel a colleague with stage fright to "just be yourself!" As opposed to…?

What does it all mean?

What does this all mean in the context of a system composed of people, such as a mediation? Simply put, it means that you check your ego at the door. The system's components – lawyers, clients, mediator – are not behavioral products of the supposition "I think, therefore I am." Rather, the components shed their singularity and contribute to ever-changing interactions. The interactions – not the individual personalities – lend the mediation its meaning, create its myriad possibilities and produce its ultimate result.

If the concept sounds derivative of Eastern philosophy or socialist ideology, that's because it is. And what is wrong with that? I recently came across the following remark by this issue's guest co-editor Mariam Zadeh, herself an adherent of Buddhism, made during an interview for this magazine a few years ago. Not surprising that she described effective advocates in the mediation setting with eloquent language reminiscent of systems-theory lexicon:

> Accomplished negotiators are adept at improvising and adapting without harboring attachment to the positions they hold. These skills allow for fluidity. And fluidity is a necessary component of a successful mediation since the process must be given the freedom to evolve organically. Fluidity requires the ability to actively listen, problem-solve, quickly assimilate data and recalibrate. And also to powerfully articulate one's position, have it challenged and be able to respond without becoming emotional or letting issues get personal.

Zadeh went on to qualify that while these traits are valuable at mediation, they may not be helpful in trial. Indeed legendary trial lawyers seem to permit themselves a very emotional and personal attachment to their cause. And critically, they know when – and when not – to put that passion on display. But that is a

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different system, the description of which is best left for another column.

If the hat fits...

A systems-theory approach to mediation entails checking at the door not only your ego but your hat – so that you can try on and wear other hats. Several years ago I took part in a mediation that illustrates the point. To say, as litigators are fond of saying, that this particular mediation involved "a lot of moving parts" represents classic understatement.

My clients were a wealthy family of humble origins from outside the U.S. Each family member had individual claims, based on fraud, and varying versions of the facts. They also had been slapped with counter claims from the defendants, which included four of the biggest insurance companies on the planet and an insurance broker and his insurance carrier. Several trusts and a pair of re-insurers were also involved. The money at issue amounted to many millions of dollars.

Even if you are lucky enough, as I was, to have Bill Shernoff as your co-counsel and the esteemed neutral whom I mentioned at the outset as your mediator, the chances for resolution looked literally impossible. The sheer numbers seemed unmanageable: six causes of action, four counter claims, five mediation briefs, two experts, nine lawyers and eight clients, not counting additional insurance adjusters and some in-house counsel calling in by phone. Indeed we spent the first few hours of the session mediating what seemed to be the paramount issue: how to get a second and third session on calendar given our large cast and the hopelessness of our predicament. Resolving even that much ultimately proved too challenging. So we were left with our lot and our measly afternoon.

Our neutral grasped that while on one hand we composed an unruly outsized band of forceful personalities with competing agendas, on the other hand we made up a system whose very complexity held unfathomable potential. He therefore did the unthinkable. In the midst of our little crisis, he declared that, by the way, he couldn't stay late. With a wry smile he added that he would have to be on his way even before five o'clock, considering traffic to the airport.

Either intuitively or subconsciously, the components, that is, the participants, suddenly ceased pushing against one another to advance their independent aims and began working together to bring about the success of the system – as unlikely as we believed that success to be. At one point I was asked to join lead counsel for each of the four main defendants in a private caucus to explain why they were legally liable for so much money. To my amazement, when I walked into the breakout room, they were seated in semi-circle holding pens and notebooks. I got it. They wanted me to help them help their clients understand my position. And they were willing, as was I, to forego the usual time-consuming bluffing and bluster.

That is but one instance of the many varying and shifting roles we all played that afternoon in creating a highly dynamic system. People put on hats they usually don't wear. And they acted – this really is the best word – unusually. The result? You guessed it. The case settled as to all parties and all claims, and our neutral made his plane. And no one person, as far as I know, had the chutzpah to profess that he settled the case.

No system, no deal

When we conceive of mediations as systems we're not just spinning our intellectual wheels. We are examining how to optimize the experience. Because as plaintiffs' lawyers, we want the experience to function optimally. Notice the difference between that goal – optimal system dynamics – and the more conventional "trying to get the most out of it" for us and our clients. It is counterintuitive, for we aspire to the money being controlled by our "opponents," but that aspiration finds maximum fulfillment when we work with our perceived adversaries rather than against them.

As an example, contrast the complex mediation session I described above with another one I attended some time ago. In this one, I participated as the referring attorney and had been asked to monitor the proceedings. Plaintiff's counsel, whom I'll call Pete, arrived late, looking disheveled. Our neutral, whom I'll call Judge, therefore had encamped with defense to start off the session. Pete took a seat next to me and began bragging about his rapport with Judge. He said Judge was so damn good that all he, Pete, had to do was give Judge a bottom-line number and then just sit back and wait till Judge got it. This arrangement was great, Pete said, because it freed him to work on his other cases during the session. I asked Pete where our client was. He shook his head cockily. "No need," he said. "The client approved the number, and Judge is *that* good."

That session not only failed, it adjourned early. A total waste of time and money. Defense counsel took umbrage at the plaintiff's absence, and Pete showed them the high hat, huffing, "what's the big deal," he had full authority and so forth. Judge, who indeed enjoyed a reputation as an excellent mediator, could do only so much as he was rendered an isolated, singular force within a dysfunctional system, or perhaps even outside the system. Whatever the case – no system, no deal.

Again, you, as the plaintiffs' lawyer aspiring to optimal terms for your client, want the system to fire on all cylinders. And it can be helpful to understand that defense counsel also strives for optimal terms and likewise needs a smoothly running system. Under that state of affairs, your obligations run in a different direction than if the system comprised, say, a jury trial.

You are not trying to fluster an opponent by means of superior tactics but rather accommodate a counterpart through attentive consideration. So write the best, and most concise, mediation brief you can, and get it to the party you are suing at least two weeks before the mediation. (Don't worry about the neutral – she won't have time to read it until the night before the session anyway.) This represents your one and only

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chance during the entire litigation to speak directly to the client on the other side, the person holding the purse strings. Don't waste it by keeping your brief confidential. At the session, be prepared, as Zadeh says, "to actively listen, problem-solve, quickly assimilate data and recalibrate." And for Pete's sake, bring your client.

It's the little differences

Let us conclude with chaos. Systems theory, being multidisciplinary, subsumes chaos theory. The term chaos in this context lends itself to a delightful definition: "When the present determines the future, but the approximate present does not approximately determine the future." The reason the approximate present, e.g., a system called mediation, cannot approximately determine the future, i.e., the result of the mediation, is that, according to chaos theory, "small differences in initial conditions yield widely diverging outcomes."

Returning once more to the surprisingly successful mediation described earlier, the initial conditions composing the system appeared set to determine the outcome: doom. When our neutral threw his gilded monkey wrench into the mix and imposed an outrageous deadline, he sparked chaos. The chaos, in turn, opened up a space in which the unthinkable could occur and created the opportunity for an outcome divergent from the apparently predestined one. If you saw the 1998 movie *Sliding Doors,* you were served an entertaining pop-culture slice of this rather abstruse theory.

Although I started out by calling mediation a system composed of people, it comprises more than that. In my hypothetical Native American chat with Isi by the fire, the system that produced that exchange included the fire. All kinds of factors that we think of as external are actually internal and determinative. This is one reason mediators should take care to serve excellent food at the session. Everyone knows that folks with full, happy bellies behave better than those gnawed at by hunger or tormented by heartburn. As with your colon, a happy system is a healthy system.

Finally, the environment plays an integral role in any system. Atmospheric conditions constitute a common component of chaos theory because they are unpredictable and their influence is undeniable. Put litigants in an uncomfortably hot room and you'll get a different system, with a different outcome, than if you put them in an uncomfortably cold room. It is possible that cases settle easier on sunny days than on rainy days. Or vice-versa. I haven't looked into it. But I am guessing that those elite mediators who live in exotic locations and make the litigants travel to them boast incredible success rates.

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