

Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Neutrals

In Praise of Mediation Observers

BY DAVID A. HOFFMAN

Like many mediators, I am asked from time to time by mediators-in-training whether they might observe a mediation. I invariably say “yes,” and they sit in on one or two mediations from start to finish. I consistently hear from them that the experience is valuable, and some say invaluable.

But I am here to make a different point—namely, that having mediation observers is at least as valuable for me.

Before explaining the reasons why it's so helpful to be observed, the logistics of observation warrant some discussion.

First, of course, the parties and counsel must consent to having an observer present. I have found that in non-family cases (e.g., commercial, personal injury, construction, employment, etc.), the lawyers seldom object, and they seldom encounter reluctance from their clients. In family cases, however, the parties are much less receptive to having an observer present.

Second, I arrange for the observer to sign the mediation participation agreement. I add to the bottom of the agreement a signature line for the observer, and write above it: “As to confidentiality.” The observers thus agree not to disclose anything they hear in the mediation.

Third, I explain to the observer, the parties, and counsel, that the observer's role is not a speaking part. The observer is there solely to watch and listen (though, as described below, I sometimes make an exception to that rule). I arrange the seating in the mediation room so that the observer is in the back or off to the side.

Finally, I ask the lawyers in the case for permission to share with the observer the pre-mediation memos and other documents submitted to me. This will help the

observer follow what's going on in the mediation, freeing up bandwidth to focus on the nuances of the mediation process, instead of struggling to get up to speed on the facts, legal arguments, and bargaining positions.

So, how do observers add value in the mediation process?



The Hawthorne Effect

People behave differently when they are observed. No surprise there—and sociologists proved it in an experiment nearly 100 years ago.

The Hawthorne Effect was discovered when researchers experimented with the level of illumination at Western Electric Co.'s Hawthorne plant in Cicero, Ill. The researchers found that, when the factory was more brightly lit than the usual benchmark of illumination, the workers' productivity increased.

Then, because they were good scientists, they reversed the experiment and reduced the illumination well below the benchmark level, expecting that productivity would be lower than the benchmark, but the productivity was higher. They concluded that it was the presence of researchers that influenced the workers, not just the level of illumination.

When I have been observed in a mediation, I have noticed Hawthorne effects on my own performance, and also the behavior of

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The Master Mediator

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Some say active listening is the purest form of listening—a skill that is not easy to acquire first-hand but with practice can be perfected over time. In essence, it requires patience, having the mindset to understand what the speaker's intended message is trying to convey through expressed words and feelings without allowing one's mind to wander to a certain conclusion which the listener is trying to piece together from their perspective, rather than that of the person who is communicating the message. Some say active listening is the essential factor in understanding the behavior of parties to a conflict.

Christopher To concludes that “without a willingness to comprehend what is said and done, the chances of crafting a successful solution at the end of the day is a challenge.”

Master Mediator Dwight Golan, of Boston's Suffolk University School of Law, notes there are three things that are difficult for him about listening. The first is to avoid interrupting to ask “helpful” questions. The second, when they've finished speaking, is not to give a substantive response immediately.

Most important, he says “I need to *show* that I have listened, by summarizing what they've told me, in words and a tone that convince them I've ‘gotten’ it.” He says,

At some point I may also need to change the subject. People in commercial mediation don't want mediators just to listen; they're looking for someone to guide the process toward a goal. So I may

say, “You've told me your key goal today is to see if this dispute can be resolved. To get there, at some point we need to talk about how to get them to a place where you can say, ‘Yes, I find those terms acceptable.’ You've told me that's a priority, and I want to be sure we focus on it.”

Master Mediator Hing Fung Leung of Hong Kong believes that active listening is only a means to achieve important purposes. He comments,

When talking about active listening under the facilitative model, most textbooks emphasize the micro-skills like the kinds of questions to be used, the timing of the questions, being attentive, showing to the parties that you are listening by appropriate verbal responses and body languages, etc. However, one must not forget that active listening is only a means to achieve important purposes at different stages. From the parties' words, the mediator is always in search of their strong positions, interests, and concerns so that they could be appropriately dealt with, such as by doubt creation and reframing skills, to pave the way for the ultimate goal of generating options, without which the dispute can never be settled. The process is like turning a silkworm cocoon into different strands of silk, which requires attention and meticulousness, and the product is always valuable.

Effective listening is part and parcel of the resolution process.

* * *

The Master Mediator column will return in the September Alternatives with more on developing listening skills for mediation. Visit the Wiley Online Library Alternatives Master Mediator archive at <https://bit.ly/2ZZrWNC>.

ADR Neutrals

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the parties and counsel. As to my own performance, I can't prove it scientifically, but I think I am more focused when I am observed. A part of me probably wants to impress the observer.

In some cases, the observer may have been one of my students, and they are paying close attention to see whether I practice what I preach.

As to the parties and counsel, perhaps they want to impress the observer too. They might feel some responsibility for showing the observer what effective negotiation looks like. I have noticed a higher level of civility when an observer is present.

Of course, mediators themselves—even without an observer—create a Hawthorne Effect, but sometimes it's a negative Hawthorne Effect. In other words, the mediation

The Watchers

The mediation aide: Having an observer helps pave the settlement path.

How? Among other things, the parties and counsel see the observer present in order to learn to deploy best ethical practices. That reflects back to the mediator and enhances the neutral's effectiveness.

The initial disconnect: It's counterintuitive that bringing in an intern or trainee would help an experienced neutral mediate a settlement. But the veteran author-mediator explains here why it works well.


participants sometimes behave more unproductively—toward each other and/or the mediator—than they would otherwise because they have a mediator in the room to keep the peace. My impression is that this type of “acting out” occurs less frequently when there is an observer present.

Extra Eyes and Ears

When I have an observer in one of my mediations, I find it tremendously helpful to ask for their impressions when we are shuttling between caucus rooms, or just taking a break.

An attentive observer almost invariably notices things that I have missed: one of the parties rolled their eyes, or one of the lawyers made a telling choice of words. The observer's eyes and ears are particularly valuable because they are not distracted by the pressures of managing the discussion, reframing the parties'

Incoming Email: A Mediators' Survey

Mediator members of CPR's Panel of Distinguished Neutrals have been sent by email a questionnaire from CPR Dispute Resolution asking their practice approach on joint sessions and caucusing, and implicit bias. Boston Law Collaborative's David Hoffman, who authored the accompanying article, and Audrey J. Lee, who is Senior Mediator & Executive Director, are conducting the survey for research projects. A reminder will be sent later this month. If you are a member of the panel and would like the link re-sent, email Alternatives@cpradr.org. The survey will close in late July. 

positional statements, seeking out the parties' underlying interests, and helping to generate settlement options.

I can illustrate this point with an anecdote. A few years ago, a conflict-resolution gradu-

ate student asked for permission to observe a mediation as part of her research about mediation styles. During the mediation, I saw her taking notes and chalked it up to her being an avid student.

By the end of the day, the case had settled and the participants had gone, and I asked the student for her observations. She said that she had a confession: her research was not about mediation styles but rather the use of humor in mediations. "What humor?" I asked. "I can't think of a single funny thing that happened in the mediation—it was a pretty dry business dispute."


She consulted her notes, and then cited over a dozen amusing comments—some from me and some from the parties and counsel. I had failed to realize, while in the midst of the mediation, how much everyone uses humor occasionally as a solvent—one that works particularly well when the humor is self-deprecating. But the larger point is that observers are well situated to see things that mediators don't.

In addition, even after the mediation is over, I have found enormous value in debrief-

down. Each reminder was a reality check, loosening the parties' grip on an imagined victory and nudging them toward what they could live with.

I noted the technique and David's tone of voice, as he subtly encouraged the parties to broaden and balance their perspectives. David also provided quick running tallies of the offers and counteroffers, emphasizing the concessions made by both sides. Whenever the negotiation stalled, David had a technique to move it forward, such as summing up progress on difficult questions, then looking at a less-important issue that might yield a yes, because yes's have a cumulative effect.

The benefits of observing a skillful mediation are immense and complex. I'm grateful for David's thoughts in the accompanying article about how the observer may also improve the performance of the mediator and counsel, and increase the likelihood of settlement. Perhaps the observer's attention also augments the parties' experience of being seen and heard, without their day in court.

Even sitting in silence, an observer contributes their presence. 

ing the case with the observer—I learn as much from their questions as their observations.

Enhanced Mediator Credibility

In most non-family mediations, I spend the majority of my time shuttling between caucus rooms, interspersed with the occasional joint session or, more frequently, a meeting involving all of the lawyers together.

When I am in one of the caucus rooms, I am keenly aware that the parties and counsel in that room are sizing me up—trying to figure out how much they can trust my account of the negotiation dynamics in the case.

Part of my job, when shuttle diplomacy is called for, is to use "noisy translation"—a term coined by Jennifer Gerarda Brown and Ian Ayres in their excellent 1994 article on "Economic Rationales for Mediation"—to help the parties navigate toward a zone of possible agreement. In other words, while I am not permitted to disclose one side's confidential information to the other, I can give each side an approximation of where I think the other side is willing to go.

One of the mediator's challenges is to maintain credibility with the parties in each room, since they may be understandably skeptical about my account of the other side's views—perhaps wondering if the mediator is trying to manipulate them toward settlement.

A mediation observer can be helpful in two ways here. First, if we are in the late stages of a mediation, and I sense that the parties would welcome hearing from the observer, I will sometimes turn to the observer in the middle of a caucus and ask them if they agree with my account of the other side's views. In my experience, the observer almost invariably agrees.

Second, even if I don't invite comment from the observer, I believe their presence throughout the mediation enhances my credibility because of an unspoken assumption that I would not lie in the presence of the observer. From the standpoint of the parties and counsel, the observer is there to learn best practices. They probably infer from that premise that the mediator will strive for the highest level of ethical practice (which includes honesty, at a minimum) since the observer is looking to the mediator as a model.

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Comments from a Mediation Observer—No. 1

BY SUSAN HALEVI

If the mediator hoped to impress the observer, he succeeded. Watching David Hoffman work was like watching a maestro conduct a symphony—in the mediation I observed, a very long symphony—then sitting down with him to talk about it.

"DH keeps the ball in play, no matter what," I noted. I also took notes on a mediator's toolkit—phrases such as: "I'm curious about. ..." "I think we agree that. ..." "One small point. ..." "Tell me about. ..." "I'm sure you can imagine the counterargument. ..."

One comment touched the emotional subtext of a dispute, without probing too deeply: "Sounds like there's pain in your heart, I assume in his, too. ..."

Observing David with the parties in separate caucuses, I watched him remind one party that the market could go up, then remind the other party that it could go

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I have never done a precise calculation of whether my settlement rate is higher when observers are present, but I believe that to be the case.

Additional Factors

Here are two further reasons for having observers, and a caveat.

First, it's educational for both the mediator

and the observer. Mediation can be a lonely business at times. Observers create the opportunity to share the experience and learn from it together.

Second, mediation observers are good for business. Mediation is largely a word-of-mouth business, and observers can personally vouch for the effectiveness of the mediators who impress them. The value of such a recommendation is enhanced by the fact that mediation is typically private and confidential, and so there is a paucity of such first-hand information from disinterested sources.

And here's my caveat for mediators: Don't have an observer if it will cause you to feel self-

conscious. I remember the first few times that I was observed by a mediator-in-training—I recall my anxiety, my fear of embarrassment. Some call it “imposter syndrome”: What if we are not as competent as others think we are?

I think the best antidote for that fear is humility. I usually do both a pre-brief and a debrief with the observer. In the pre-brief, I tell the observer that I don't have all the answers, every mediation is a learning experience, and I welcome their input.

In the debrief, I ask for both the “plus”—What seemed to go well?—and the “delta”—What could I have done better?

* * *

Unlike some professions, including law and medicine, in which trainees spend much of their time watching seasoned practitioners handle actual cases, mediation training involves mostly simulations and roleplays.

The purpose of this article is to encourage mediators to offer mediators-in-training opportunities to observe, not just because it is helpful for the observers, but also because it is helpful for the mediator, parties, and counsel.

The presence of mediation observers often improves the quality of the mediation, as the participants (including the mediator!) strive to be on their best behavior. Also, the observer may notice (and share privately with the mediator) things that the mediator did not see or hear. And the presence of the observer may enhance the mediator's credibility.

I am grateful to all of the observers who have watched me mediate over the years—I know that my work has benefited from their presence.

Comments from a Mediation Observer—No. 2

BY MYLENE CHAN

I am a lawyer from Hong Kong who had the privilege of observing an employment discrimination case mediated by Prof. David Hoffman. For the initial hours, I was completely silent, noting how Prof. Hoffman choreographed the communication to create rapport with parties to get them to open up.

During the final distributive bargaining stage, the defendant's counsel queried whether the plaintiff's counsel understood that the offer Prof. Hoffman relayed in a

separate caucus represented “new money” on top of the dollar amount previously offered to the plaintiff.

Prof. Hoffman said he believed the plaintiff's counsel understood correctly. Suddenly, the defendant's counsel spoke with me directly for the first time, asking, “Mylene, do you have the same impression?” I responded, “I think so.”

Shortly after my confirmation, the defendant's counsel requested that Prof. Hoffman break the impasse with a mediator's proposal. And within 15 minutes, the case was settled.

I believe that a second opinion from me, an observer, enhanced the credibility of Prof. Hoffman's account of the other side's views, enabling the disputants to move forward with more confidence. I believe my presence helped accelerate the process toward the mediator's proposal that settled the dispute.

The author, who interned at *Alternatives'* publisher, CPR, in 2021, is currently a Founders Fellow with Mediators Beyond Borders International. She is working with *Alternatives'* Master Mediator columnist Robert A. Creo in her fellowship, and contributes to the column in this issue—see page 91.

Education ADR

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The 2020 Regulations are imperfect. Yet they address serious flaws in the previous regulations, such as denial of due process protections to accused students. And, importantly, the 2020 Regulations improved the application of Title IX in the university setting by expanding when and how universities can use informal dispute resolution mechanisms, like mediation, to resolve Title IX claims. “Title IX Rule Change Due Process Fairness,” *Pitts-*

burgh Post-Gazette (May 19, 2020) (available at <https://bit.ly/37izgaL>); Jeannie Suk Gersen, “How Concerning Are the Trump Administration's New Title IX Regulations?” *New Yorker* (May 16, 2020) (available at <https://bit.ly/3KJc6Zo>). The 2020 Regulations are available at <https://bit.ly/3uUwykM>.

As the Biden Administration focuses on revamping Title IX, it should consider how the increased use of informal dispute resolution mechanisms, especially mediation, might further Title IX's goals and promises. Samantha Harris & KC Johnson, “Campus Courts in Court: The Rise in Judicial Involvement in

Campus Sexual Misconduct Adjudications,” 22 *N.Y.U. J. Legis. & Pub. Pol'y* 49, 66 (2019) (available at <https://bit.ly/3y9xzHt>).

Informal Dispute Resolution

In 2011, the Department of Education's Office of Civil Rights (OCR) issued a Dear Colleague Letter (DCL) that transformed Title IX. See generally, Off. for C.R., U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence (2011) (available at <https://bit.ly/3jCzk7W>) [hereinafter DCL].

Title IX was first implemented in 1972 and stated that “no person in the United States