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PERSPECTIVE

Tell your story, but to a mediator

By Greg Derin

On July 1, Rabbi David Wolpe retired from his pulpit. Reflecting on the value of community, he wrote in the *New York Times*: "We, who do not know ourselves, believe we understand others. We must always be reminded that each person is a world, and that the caricatures we see of others on social media and in the news are just that — a small slice of the vastness within each human being."

I have served as a mediator of complex business disputes for more than 20 years. I do not use the term "complex" casually; the cases with which I am involved embrace antitrust, fraud, copyright, trademark, commercial contracts, real estate, entertainment, partnership, employment and more. None of the cases entrusted to me are viewed as naturally lending themselves to easy, feel-good resolution. Mediators are warned to disclaim the view that holding hands and singing Kumbaya will lead to resolution. But there is a fallacy lurking beneath such cynicism.

As Rabbi Wolpe observed, we are all engaged in very human struggles, to know ourselves, let alone understand the motivations and actions of others. The philosopher Philo advised "[b]e kind, for everyone you meet is fighting a great battle."

It is the rare business dispute that does not involve an underlying human drama and frequently strong emotions. Against this reality, why does the myth persist that commercial disputes are clinical experiences? If these cases could be resolved robotically, as we enter an era of advanced artificial intelligence, counsel and mediators could step aside as principals input data and generate an optimal solution.

But that is not on the horizon, precisely due to the human element of conflict resolution. In an intellectual property dispute, what may seem to be purely legal issues, necessarily implicate business decisions. Who selected a design or logo? Who determined that a use was sufficiently transformative to constitute a fair use? How was the decision made that expression in a screenplay was not substantially similar to another property to which a party arguably had access? How much of a sample could be used in a new musical composition? In each instance, one or more human beings have a stake in justifying their acts or omissions. If that person is the party representative in a negotiation, the filter to upper management in resolving the controversy is necessarily distorted.

The same problems arise in antitrust, crypto-currency, partnership and all other commercial disputes. Humans not only acted or failed to act, leading to controversy, but they will succumb to the natural tendency to recall facts to be consistent with their favored outcomes and filter out adverse facts and interpretations. As a dispute inches through increasingly costly litigation toward a trial by judges and jurors equally susceptible to cognitive biases, what can mediators do?

Can a successful mediation take a clinical, business-oriented approach to problem-solving and deny the emotional elements?

In previous articles, I have introduced readers to the two systems of thinking evaluated by Nobel Laureate Daniel Kahneman in his book "*Thinking, Fast and Slow*," Farrar, Straus and Giroux 2011. Beginning with a seminal article in 1974 with his longtime collaborator, Amos Tversky, Kahneman established that people do not necessarily act rationally, and that emotions play a role in decision-making. Kahneman and Tversky challenged the long-held assumptions that the human mind was rational and logical, but instead was susceptible to a number of biases.

Kahneman persuasively argued that people utilize two systems for processing information. System One is fast, intuitive thinking based on experience. This is the default mode for making decisions. System Two is a slower, "effortful" process when intuitive results are not available.

Mediators can help parties to engage their rational thought processes and move beyond purely emotional and impulsive reactions. Intuitive mediators who recognize the problem can utilize two approaches if they have the ability. First, in appropriate cases, parties should speak directly with one another. There is increasing discomfort among counsel with allowing such conversations. Opening joint sessions that resemble opening statements to a judge or jury are rarely of value. Counsel can feel compelled to show strength to their clients, who infrequently speak candidly with their counterparts in such large groups. Moreover, although counter-intuitive, lawyers are often conflict averse and prefer not to be in joint sessions where emotions may run high.

It is more productive for a mediator to work through processes to determine the right time and format for discussion. I always conduct separate pre-mediation conferences with each counsel before the day of mediation. This allows me to obtain information not disclosed in briefs and to understand special requirements. On the day of mediation, I will meet with each group separately, usually multiple times, to determine relevant facts beyond what has been disclosed. This process narrows issues and starts to bring the heart of a controversy into focus. It also builds trust with the parties and counsel. If it appears that a meeting among parties or counsel would be beneficial, the stage is set for a more candid and productive exchange than earlier in the morning. All of this tends to move parties toward System Two thinking and away from purely impulsive reactions.

Second, at appropriate stages, the use of decision trees or other cost-benefit tools focuses parties on essential elements that engage their analytical processes. Even those sitting in a personally defensive position, having drafted a disputed clause, or made a litigated decision, can shift from the emotional defense of that position to the realities created by litigating the results. Once System Two is triggered, parties tend to open themselves to creative solutions and the quest for win-win resolutions rather than purely zero-sum distributive bargains.

Recognizing humanity in one's own acts, and those of an adversary, helps parties confront the potential decisions that a trier of fact may be called upon to make. Outcomes in a courtroom are not sterile; they are the result of human beings assessing the motivations and actions of others. Mediation should be no less genuine in permitting parties to see each other as would a judge or jury.

Maya Angelou said that "[t]here is no greater agony than bearing an untold story inside you." Tell your story. Mediators are there to help.

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