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Cover Page Footnote

The author wishes to acknowledge the excellent research assistance provided by Stephen McKenna who, at the time of his assistance, was a law student at Loyola University of Chicago School of Law, and who currently is an associate at the law firm of Pope, Cahill & Devine in Chicago, Illinois.

A CLASSICAL APPROACH TO MEDIATION — PART II: THE SOCRATIC METHOD AND CONFLICT REFRAMING IN MEDIATION

John W. Cooley*

I. INTRODUCTION

It is not a new discovery that conflict can be transformed during the resolution process and that a mediator can have a significant impact on the type and extent of this transformation.¹ What may be a new discovery, however, is the extent to which classical methods of dialectic and rhetoric can facilitate and enhance the effectiveness of conflict transformation in mediated problem solving.² At a fundamental level, the transformation of conflict involves a process of “rephrasing” — that is, some kind of *reframing* into a discourse.³ Reframing also signifies a change of mental constructs about a situation, or of perceptions, perspectives, or points of view, which might be referred to collectively as “mindframes.”⁴ A skillful mediator will accomplish a change in disputants’ mindframes without appearing to force a value choice.

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1. See Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, LAW & SOC'Y REV. 775 (1981); see also Robin Pinkley, *Dimensions of Conflict Frame: Disputant Interpretations of Conflict*, J APPLIED PSYCHOL. 117-26 (1990); see also Max H. Bazeman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in NEGOTIATING IN ORGANIZATIONS (Max H. Bazerman & Roy J. Lewicki eds., 1983); MAX H. BAZERMAN & JOHN S. CARROLL, *Negotiator Cognition*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 247-88 (L.L. Cummings & Barry M. Staw eds., 1987). See generally, John W. Cooley, *Mediation and Joke Design: Resolving the Incongruities*, 1992 MO. DIS RESOL. J. 249.

2. Mediation or mediated problem solving is a process in which a neutral third-party helps parties in conflict reach a voluntary settlement through an agreement defining their future behavior. See generally, NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW Ch. 2 (1987); NANCY H. ROGERS & CRAIG C. McEWEN, MEDIATION, LAW, POLICY. PRACTICE 1-2, 7-10 (1989); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 91-147 (1985); LEONARD L. RISKIN & JAMES W. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 196-249 (1987); John W. Cooley, *Arbitration vs. Mediation: Explaining the Differences*, 69 JUDICATURE 263, 266 (1986).

3. Mather & Yngvesson, *supra* note 1, at 775.

4. See generally Pinkley, *supra* note 1.

Rather, he or she will assist the disputants to see past and present circumstances, and future possibilities, in a way which allows previously indiscernible creative solutions to become obvious and inevitable.⁵ In this sense, the mediator's role in effecting changes in disputants' mindframes involves a form of persuasion.

Part I of this two-part article explained the mediator's application of classical rhetoric and persuasion techniques, developed by Aristotle, to achieve conflict reframing and creative solutions.⁶ Part I of this article focused primarily on the mediator's roles of "speaker" and "listener" in altering the parties' mindframes. Part II will concentrate on the mediator's role as "questioner" in the reframing of conflict. More specifically, Part II will examine: (1) the nature of creative problem solving; (2) six techniques of the Socratic Method and their application in conflict reframing; and (3) some general thoughts on the mediator's Socratic role.

II. THE NATURE OF CREATIVE PROBLEM SOLVING

Before a person can learn how to apply Socratic techniques to achieve creative solutions in mediation, he or she must first understand the nature of creative problem solving. Actually, creative problem solving has two aspects: designing the problem and designing the solution.⁷ Oftentimes, if a mediator influences enough creativity in the problem design stage, a creative solution will naturally follow. To understand this phenomenon, an individual must be familiar with the possible problems and types of possible solutions that arise in mediation.

A. Problem Design

The problems which mediators encounter are of two principal types: presented problems and discovered problems. Presented problems are those which have a known formulation, a routine process for solution (known by the individual problem solver and/or others), and a rec-

5. See generally Pinkley, *supra* note 1.

6. See generally John W. Cooley, *A Classical Approach to Mediation — Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83 (1993).

7. I view the essence of "problem solving" to be three separate decision making (or design) processes: (1) designing the problem, (2) designing the process for solving the problem (if none is known), and (3) designing the solution. There are two basic types of problem solving: adversarial (focusing on rights and duties) — which entails designing "biased" problems and "biased" solutions, and nonadversarial (collaborative) (focusing on needs and resources to satisfy them) — which entails designing "unbiased" problems and "unbiased" solutions. In any given dispute resolution context, including the mediation setting, either or both of these types of problem solving might be used by the parties, by the neutral, or both. See JOHN W. COOLEY, *THE APPELLATE ADVOCACY MANUAL* Ch. 2, 40-49 (1989) [hereinafter COOLEY, *THE APPELLATE ADVOCACY MANUAL*]; see also John W. Cooley, *Descartes' Analytic Method and the Art of Geometric Imagineering in Negotiation and Mediation*, 28 VAL. U. L. REV. 83 (1993).

ognized solution. Solving the simplest type of presented problem requires that a mediator follow established steps to meet the requirements of the situation. One sub-type of a presented problem would be finding the area of a rectangle whose unit width, "a," is 4 and whose unit height, "b," is 3. The routine process for solution of this problem is the formula: $\text{Area} = a \times b$. The solution is easily obtained by substituting 4 for "a" in the formula, 3 for "b," and multiplying 4×3 to yield 12 square units. The primary thought process used in solving this type of problem is memory or retrieval of the appropriate formula.⁸ Perception and reasoning also play important roles. This first type of presented problem requires reframing assistance if the designated problem solver retrieves the wrong formula (memory error), inserts the wrong givens (perception error), or miscalculates (reasoning error).⁹

A second, more difficult sub-type of presented problem, is where the problem is posed but no routine process for solving it is known by the problem solver (although a routine process is known by others). An example of such a presented problem would be the following question, posed to a person (perhaps a child) who knows nothing about geometry: "How would you go about finding the area of a rectangle?" The problem solver would have to use reasoning and rationality as a primary mode of thought to solve the problem, and then match his solution against that which is already known to others.¹⁰ If the designated problem solver reaches an impasse and cannot solve the presented problem, another person possessing the necessary reasoning skills can assist the designated problem solver by asking questions to help reframe the impasse and to facilitate his reasoning to reach the appropriate solution. This form of dialectic (or discourse) is commonly found in the technique of Socratic method called "recollection" and is examined in more depth *infra*.¹¹

The second principal type of problem, the discovered problem, is at the other extreme. An example of a discovered problem is: "Formulate a problem about a rectangle and solve it." Others would not know the method for solving the problem because they would not know what problem would be found. In this situation, the problem solver is initially a problem finder. The problems he could find (within the scope of the discovered problem) are infinite, ranging from "How is a rectangle like a circle?" to "Are certain dimensions of a rectangle more pleasing to the eye than other dimensions?" These problems, identifiable within

8. J. W. Getzels & M. Csikszentmihalyi, *From Problem Solving to Problem Finding*, in *I. Taylor and J. Getzels, Perspectives in Creativity* 90, 102 (I. Taylor & J. Getzels eds., 1975).

9. *Id.*

10. *Id.* at 102-03.

11. See *infra* notes 48-53 and accompanying text.

the scope of the discovered problem, are referred to as “found problems.” The solutions (found problems) reached by the problem solver (the problem finder) cannot be compared to a pre-determined standard of right or wrong. Rather, the solutions (found problems) can be rejected or accepted by the problem solver and others only on the basis of a critical, relativistic analysis.¹²

The generation of discovered problems and their progenies of found problems often lead to the identification of one or more presented problems for which there is a known, routine process for solution, or for which a solution process can be designed.¹³ The primary mode of thought required to find and solve a discovered problem is creative reframing.¹⁴ Identifying and solving discovered problems naturally involves the use and application of design skills—hence the origin of the expression “problem design.”

Any given mediation situation may involve the generation of many discovered problems and found problems. In some situations a discovered problem may itself be an appropriate “solution” or “resolution” for the dispute.¹⁵ In most situations, however, discovered problems may prompt the search for, and perception of, presented problems. These usually appear as hypotheses that can be tested by “known” routine, critical, and analytical mental processes, and occasionally require the “design” of a solution “process.” Assisting in the generation of discovered and found problems through creative reframing of disputants’ mental constructs may be the mediator’s most important skill. Mediators must also be able to identify disputants who possess this skill and to motivate their use of it in problem solving.

B. Solution Design

It is not enough for a mediator to know the types of problems endemic to a conflict setting; he or she must also be able to recognize the types of solutions achievable in the process and in the resolution.¹⁶ Professor Stuart Nagel of the University of Illinois, a nationally-recognized expert in computer-aided mediation, has suggested a taxonomy of mediated solutions: super-malimum, lose-lose, win-lose, pareto-malimum, win-win, pareto-optimum, and super-optimum.¹⁷ In Nagel’s taxonomy, the highest quality solution achievable in mediation is the

12. Getzels & Csikszentmihalyi, *supra* note 8, at 103.

13. Getzels & Csikszentmihalyi, *supra* note 8, at 103.

14. Getzels & Csikszentmihalyi, *supra* note 8, at 103.

15. See COOLEY, THE APPELLATE ADVOCACY MANUAL, *supra* note 7, Ch. 2, at 47.

16. Cooley, *supra* note 1, at 255-56.

17. See SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION xi-xii (Stuart S. Nagel & Miriam K. Mills eds., 1991) [hereinafter Nagel & Mills].

creative-integrative "super-optimum solution."¹⁸ Whereas an optimum solution is one that is best on a list of alternatives in achieving a set of goals, a super-optimum solution is one that is simultaneously best on two (or more) separate lists of goals.¹⁹ Super-optimum solutions are better than "win-win solutions."²⁰ They are settlement results which are better than the disputants' best expectations of results achievable by adjudicatory means. Professor Nagel has identified various types of super-optimum solutions. Four examples are as follows:²¹

1. Solution that achieves a super-optimum goal: A super-optimum goal is one that is far higher than is traditionally considered to be the best attainable. An example would be doing better than zero percent unemployment by simultaneously eliminating or reducing traditional unemployment and greatly increasing job opportunities for those who are willing and able to work more, but who were formerly considered outside the labor force or formerly considered fully employed.

2. Solution that resolves public policy disputes: This type of solution satisfies liberals and conservatives in a policy dispute so that both liberals and conservatives consider the solution to be better than their original best expectations as measured by their own respective goals and priorities.

3. Solution that resolves adjudicative or rule-applying controversies: This solution satisfies disputants in a way that is better than their best expectations. An example would be where a plaintiff demands \$900,000, the defendant refuses to pay more than \$300,000, and they agree that the defendant will turn over merchandise, which the defendant manufactures, that is worth more than \$1,000,000 to the plaintiff, but whose variable cost to produce is worth less than \$200,000 to the defendant.²²

4. Solution that enables all sides in a dispute to add substantially to their original net worth: An example, using the same litigation dispute described in the preceding example, would be the defendant agrees to give the plaintiff a franchise for selling defendant's products and the franchise brings in a net of \$1,000,000 each year, with \$500,000 a year

18. Cooley, *supra* note 1, at 255.

19. Cooley, *supra* note 1, at 255.

20. Nagel & Mills, *supra* note 17, at xii.

21. See MULTI-CRITERIA METHODS FOR ALTERNATIVE DISPUTE RESOLUTIONS 226-42 (Stuart S. Nagel & Miriam K. Mills eds., 1990) [hereinafter Nagel & Mills, MULTI-CRITERIA METHODS].

22. John W. Cooley, *Merging of Minds and Microcomputers: The Coming of Age of Computer-Aided Mediation of Court Cases*, in SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION 72-73 (Stuart S. Nagel & Miriam K. Mills eds., 1990).

for plaintiff and \$500,000 a year for defendant. This type of expanded sum solution would still be met if the total net worth of all participants substantially increased, even if the worth of some of the participants slightly decreased, provided that the decrease did not cause those participants to go below a minimum level of satisfaction.²³

Achieving super-optimum solutions should be the principal goal of every mediator in assisting the reframing of conflict, where reframing is feasible. But even where super-optimum solutions are not achievable, the classical reframing techniques can be effectively employed by the mediator to alter mindframes of the disputants and thereby facilitate less ideal, yet satisfactory, solutions in the spectrum of solution types. The remainder of this article will examine the time-honored techniques developed by one of the original experts in mental constructs and reframing—Socrates.

III. THE SOCRATIC METHOD AND REFRAMING OF CONFLICT

A. Socrates—the Person

Before considering Socrates' techniques for reframing mental constructs or perceptions, the reader should know something about Socrates personally. Born in Athens in the year 469 B.C., Socrates is credited with giving mankind two valuable gifts: inductive argument and general definition.²⁴ His father was a sculptor and his mother was a midwife.²⁵ At one point in his life he served in the army as a heavy-armed infantryman.²⁶ Little is known, however, about his employment history after military service, except that he eventually became an itinerant philosopher who lived in poverty.²⁷ It is said that Socrates met and talked with most of the great thinkers of his day and that the oracle at Delphi considered no man wiser than he.²⁸ Socrates never missed the opportunity to engage an expert in discourse and exercise the techniques of, among others, *elenchus* (pronounced il-eng-kis) (a type of refutation or cross-examination), *epagoge* (pronounced epa-go-jee) (a type of inductive reasoning), and Collection and Division (a type of rational definition).²⁹

23. Nagel & Mills, MULTI-CRITERIA METHODS, *supra* note 21, at 239.

24. TREVOR J. SAUNDERS, EARLY SOCRATIC DIALOGUES 19 (Trevor J. Saunders ed. & trans., 1987); *see also* HUGH TREDENNICK, PLATO: THE LAST DAYS OF SOCRATES 8 (Hugh Tredennick trans., 1989).

25. TREDENNICK, *supra* note 24, at 8.

26. TREDENNICK, *supra* note 24, at 8.

27. TREDENNICK, *supra* note 24, at 8.

28. TREDENNICK, *supra* note 24, at 8.

29. TREDENNICK, *supra* note 24, at 8.

Socrates' wisdom lay in his recognition of his own ignorance, and it was through that recognition that he became perhaps the greatest of all teachers.³⁰ Perplexed by the oracle's pronouncement of his superior wisdom and by his own feelings that he had no wisdom, Socrates decided to approach:

a man with a reputation for wisdom and study him first hand. He found that the man thought . . . [himself] wise but was not. Going then to many other men of repute, he always had the same experience. In one class, the men of skillful hands, there was some real wisdom; but this led to so much conceit of other, non-existent wisdom as more than outweighed it. Socrates concluded that he was really wiser than the wise because, whereas they knew nothing, he knew the single fact that he knew nothing.³¹

In 399 B.C., Socrates was tried and executed on what is widely believed to be "trumped up" allegations.³² He was indicted on a triple charge of not recognizing the gods recognized by the state, of importing other new divinities, and of corrupting the young.³³ He died, at least in part, because of his philosophy and because his search for answers to questions³⁴ was seen to be mockingly hostile to the existing political regime.³⁵ Were it not for Plato, Socrates' student who later wrote all of the Socratic dialogues, the reframing methods of Socrates would have been lost for all time since Socrates, himself, never recorded these techniques.³⁶

B. *The Socratic Method—General*

To gather the many techniques, skills, and theories which Socrates used in his recorded dialogues and label them as the "Socratic Method" would be to overgeneralize to the highest degree. Even among the most renowned philosophers since Socrates' day, there has been no agreement as to what would be included under such a broad heading.³⁷ Most experts agree, however, that in many of the dialogues, particularly the early and middle ones, a discrete method is discernible. The technical name for this method is "the dialectic."³⁸

30. TREDENNICK, *supra* note 24, at 9-10.

31. RICHARD ROBINSON, *PLATO'S EARLIER DIALECTIC* 13 (2d ed. 1953).

32. SAUNDERS, *supra* note 24, at 33-34.

33. SAUNDERS, *supra* note 24, at 33.

34. The questions he sought answers to included: "What is virtue?", "What is courage?", and "What is justice?". SAUNDERS, *supra* note 24, at 22.

35. SAUNDERS, *supra* note 24, at 22, 33-34.

36. SAUNDERS, *supra* note 24, at 32-36.

37. See generally ROBINSON, *supra* note 31, at *Preface*, 1-6.

38. The term "dialectic" will generally be used interchangeably with the expression "the Socratic Method."

Pure dialectic is a form of conversation, proceeding on premises supplied by one of the parties, which does not require any special knowledge on the part of either the questioner or the answerer(s).³⁹ Questions are usually posited as requests for a judgment on a particular statement or for the definition of a term or object, especially in the early stages of the conversation.⁴⁰ The answerer must always give an answer, he is expected to answer truthfully, and he is required to remain consistent with his original hypothesis.⁴¹

The power of pure dialectic comes from the gradual acceptance of the premises generated by the questioning and, finally, of the conclusions drawn from these accepted premises.⁴² Ideally, these conclusions are valuable and difficult truths that can only be reached through the methodological pursuit made possible by dialectic.⁴³ Of course, this result is contingent upon the answerer's truthfulness and belief in his answers.⁴⁴ It is also contingent upon the skill of the questioner in eliciting premises that either affirm the initial thesis (in which case the answerer is more than happy to assent) or that the answerer has no choice but to accept, even though they are contrary to his original thesis.⁴⁵

Techniques of the dialectic, or Socratic Method, that relate directly to transforming of mindframes in mediation include: (1) Recollection; (2) Irony; (3) *Elenchus*; (4) *Epagoge*; (5) Analogy; and (6) Collection and Division (also called Synthesis and Division).⁴⁶ Several of these techniques have characteristics which vary from the description of pure dialectic.⁴⁷

C. Six Techniques of the Socratic Method

1. Socratic Recollection

Socrates' classic handling of the slave boy in Plato's dialogue, the *Meno*,⁴⁸ demonstrates the technique of Socratic Recollection. It clearly describes how the Socratic Method can be used gently to facilitate an answerer's self-persuasion as to the appropriateness of a particular solution. The *Meno* embodies the classic adductive technique for classroom teaching. In mediation, the technique of Recollection can be used

39. ROBINSON, *supra* note 31, at 77-78.

40. ROBINSON, *supra* note 31, at 77.

41. ROBINSON, *supra* note 31, at 77-79.

42. ROBINSON, *supra* note 31, at 79.

43. ROBINSON, *supra* note 31, at 71.

44. SAUNDERS, *supra* note 24, at 29.

45. ROBINSON, *supra* note 31, at 78-80.

46. See *infra* notes 48-130 and accompanying text.

47. See *infra* notes 48-53, 56-67, 95-130 and accompanying text.

48. The dialogue is adapted from Plato's *Meno* translated by and reprinted in W. R. M. Lamb, *Plato: The Meno*, 299-327 (W. R. Lamb trans. 1927).

by the mediator for many purposes, including helping disputants identify and solve the two types of "presented problems."⁴⁹ The two sections which immediately follow first examine how the Recollection technique can be used, generally, to solve a presented problem, and then consider an example of generating discovered problems and using the Recollection technique for testing the appropriateness of the solutions, which are in fact presented problems.

a. Recollection Technique and Presented Problems Generally

In the *Meno*, Socrates engaged in a discussion with a young nobleman named Meno concerning, among other things, the nature and origins of knowledge.⁵⁰ In his dialogue with Meno, this paradox emerged:

Either a person knows something or he does not. If he knows it, there is no need to inquire. If he does not know it, he will not know what to inquire about. Therefore, inquiry is either superfluous or impossible.⁵¹

Seeking to resolve this paradox, Socrates posited that all knowledge is a recollection of things experienced in past lives. In essence, Socrates believed that solutions to problems reside in the minds of the respondents and can be "recollected" or recognized by the respondents by framing answers to questions posed to them.

He further contended that even a slave boy could be shown to have knowledge of something like geometry, even though he had no formal education.⁵² To prove this proposition, Socrates initiated a dialogue with one of Meno's slave boys. Socrates' goal was to show that the boy knew that to create a square B, which has twice the area of square A, each side of B must be equal to the diagonal of A. His technique was to have the boy first convince himself that an arithmetic solution was impossible, and then move directly to the notion of the diagonal. Socrates' discourse with the slave boy can easily be reframed into a present-day caucus in which a mediator is asking questions of a disputant, whom we will call Mr. Smith. Assume that Mr. Smith is a tenant whose landlord had agreed to convert Mr. Smith's present square-shaped commercial space into a square-shaped space twice the original size. A dispute developed when Mr. Smith reviewed his landlord's proposed lease which read, in part: "each side of the new commercial space will be the length of the diagonal of the original commercial space." Mr. Smith did not believe that this description of the new space satisfied the re-

49. See *supra* notes 8-11 and accompanying text.

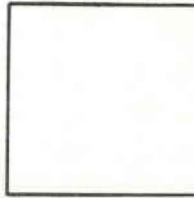
50. LAMB, *supra* note 48, at 260-63.

51. KENNETH SEESKIN, *DIALOGUE AND DISCOVERY: A STUDY IN SOCRATIC METHOD* 98 (1987).

quirement that the new space be twice as large as the original space. Further assume that the dispute is submitted to mediation and that the mediator knows the routine process for solving the problem. In this configuration, the mediator would be confronted with a presented problem of the second type.⁵³ The mediator's caucus with Mr. Smith, closely tracking the actual dialogue in the *Meno*, might proceed something like this:

Mediator: Tell me, Mr. Smith, . . . you know that a square figure is like this. (Mediator draws a square on a piece of paper.)

Figure 1



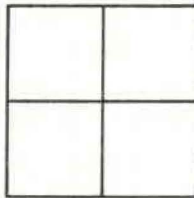
Mr. Smith: I do.

Mediator: Now, a square figure has these lines, four in number, all equal?

Mr. Smith: Certainly.

Mediator: And these, drawn through the middle, are equal too, are they not?

Figure 2



Mr. Smith: Yes.

Mediator: And a figure of this sort may be larger or smaller?

Mr. Smith: To be sure.

53. See *supra* text accompanying notes 10-11.

Mediator: Now if this side were two feet and that also two, how many feet would the whole be? Or let me put it thus: if one way it were two feet, and only one foot the other, of course the whole space would be two feet taken once?

Mr. Smith: Yes.

Mediator: But as it is two feet also on that side, it must be twice two feet?

Mr. Smith: It is.

Mediator: Then the space is twice two feet?

Mr. Smith: Yes.

Mediator: Well, how many are twice two feet? Count and tell me.

Mr. Smith: Four.

[The mediator has elicited the basic information necessary to solve the problem. Now the mediator must get Mr. Smith to apply those basics to the problem of doubling the area of the square.]

Mediator: And might there not be another figure twice the size of this, but of the same sort with all its sides equal like this one?

Mr. Smith: Yes.

Mediator: Then how many feet will it be?

Mr. Smith: Eight.

Mediator: Come now, try and tell me how long will each side of that figure be. This one is two feet long: what will be the side of the other, which is double in size?

Mr. Smith: Clearly, double.

[This is obviously incorrect as a square made with sides double two feet would yield an area of sixteen feet, not the desired eight feet. At this point, the mediator can ask well-crafted questions to have Mr. Smith convince himself that he is incorrect, yet capable of ascertaining the correct answer. This is exactly what the mediator does next.]

Mediator: Tell me, Mr. Smith, do you say we get the double space from the double line? The space I speak of is not long one way and short the other, but must be equal each way like this one, while being double its size - eight square feet. Now see if you still think we get this from a double length of line.

Mr. Smith: I do.

Mediator: Well, this line is doubled, if we add here another of the same length?

Mr. Smith: Certainly.

Mediator: And you say we shall get our eight foot space from four lines of this length?

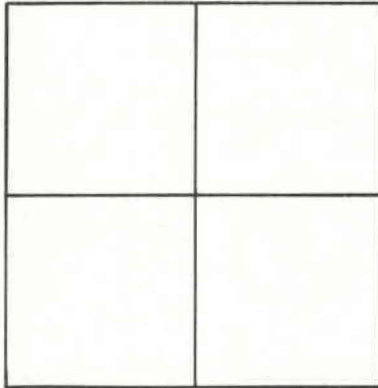
Mr. Smith: Yes.

Mediator: Then let us describe the square, drawing four equal lines of that length. This will be what you say is the eight foot figure, will it not?

Mr. Smith: Certainly.

Mediator: And here, contained in it, have we not four squares, each of which is equal to this space of four feet?

Figure 3



Mr. Smith: Yes.

Mediator: Then how large is the whole? Four times that space is it not?

Mr. Smith: It must be.

Mediator: And is four times equal to double.

Mr. Smith: No, to be sure.

Mediator: But how much is it?

Mr. Smith: Fourfold.

Mediator: Thus, from the double-sized line, Mr. Smith, we get a space, not of double, but of fourfold size?

Mr. Smith: That is true.

Mediator: And four times four is sixteen, is it not?

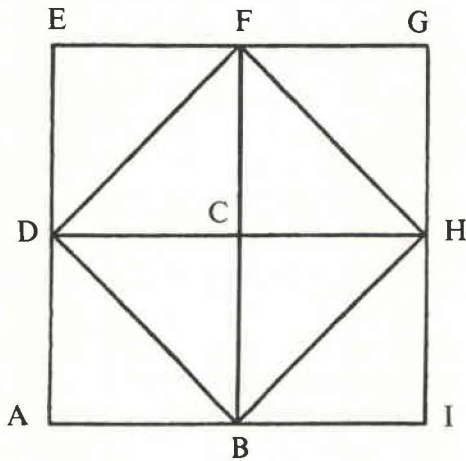
Mr. Smith: Yes.

[The mediator has just demonstrated, with Mr. Smith's constant participation, the error of Mr. Smith's initial answer. The mediator accomplished this respectfully. Applying the Recollection technique, the mediator did not dogmatize, nor did he put himself in the position of a judge. By making Smith feel perplexed, numbing him as it were, the mediator performed a service which Smith could not perform for himself.]

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self — helping to remove the false conceit of thinking one knows when one does not. What followed in the *Meno* dialogue was a similarly patient technique of slowly eliciting the correct answer from the boy. When necessary, the boy was asked additional leading questions. No premise was accepted as true, however, until Socrates was certain that the boy agreed that it was true and understood why that was so. Through the Recollection technique, Socrates won the boy's approval by helping him to become satisfied with his own admissions. Socrates continued to question the boy (as does the mediator) using the sixteen square foot figure as follows.]

Figure 4



Mediator: Tell me Mr. Smith, here we have a square of four feet [ABCD], have we not? You understand?

Mr. Smith: Yes.

Mediator: And here we add another square [DCFE] equal to it?

Mr. Smith: Yes.

Mediator: And here a third [CHGF], equal to either of them.

Mr. Smith: Yes.

Mediator: Now shall we fill up this vacant space [BIHC] in the corner?

Mr. Smith: By all means.

Mediator: So here we must have four equal spaces?

Mr. Smith: Yes.

Mediator: Well now, how many times larger is this whole space than this other?

Mr. Smith: Four times.

Mediator: But it was to have been only twice, you remember?

Mr. Smith: To be sure.

Mediator: And does this line [BD], drawn from corner to corner, cut in two each of these spaces?

Mr. Smith: Yes.

[Having helped Mr. Smith to convince himself that an arithmetic solution is impossible, the mediator now shifts attention to the possibility of a geometric solution and focuses on the concept of the diagonal.]

Mediator: And have we here four equal lines [BD, DF, FH, HB] containing this space [BDFH]?

Mr. Smith: We have.

Mediator: Now consider how large this space [BDFH] is.

Mr. Smith: I do not understand.

Mediator: Has not each of the inside lines cut off half of each of these four spaces?

Mr. Smith: Yes.

Mediator: And how many spaces of that size are there in this part?

Mr. Smith: Four.

Mediator: And how many in this [ABCD]?

Mr. Smith: Two.

Mediator: And four is how many times two?

Mr. Smith: Twice.

Mediator: And how many feet is this space [BDFH]?

Mr. Smith: Eight feet.

Mediator: From what line do we get this figure?

Mr. Smith: From this.

Mediator: From the line drawn corner-wise across the four-foot figure?

Mr. Smith: Yes.

Mediator: In geometry, this is called the diagonal; so if the diagonal is its name, then according to you, if each side of the new commercial space is the length of the diagonal of the original commercial space, then the new space will be exactly twice as large as the original space, correct?

Mr. Smith: Yes, it certainly will be.

“Getting to yes” was never so easy.⁵⁴ In this questioning process, Mr. Smith, with the help of the mediator, reframed his initial perception that the landlord’s description of the new space did not satisfy his double space requirement. The mediator used persuasion to achieve the

54. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

reframing by ensuring that the tenant agreed with him at each step of the problem solving process. In summary, the Recollection technique can be used in any mediation situation where the parties are attempting to solve a presented problem whose solution is achievable by a routine process, and the mediator, or one of the parties, is aware of the method.

b. Recollection Technique and Discovered Problems

The technique of Socratic Recollection can also be used to test the appropriateness of one or more solutions (found problems) to a "discovered" problem. In this context, a mental search is conducted within the scope of a discovered problem to identify a "presented" problem — a hypothesis which can be tested critically. Preserving a geometric theme for simplicity purposes, assume the existence of these facts. Mr. Franklin is a high-level manager at Acme Fabricators, a national corporation which manufactures tables and tabletops of all types. The company prides itself on custom-building tables and tabletops to purchasers' specifications. Recently, Acme's sales department received an invitation to bid on a major contract with Sheffield Corporation, one of the premier suppliers of luxury office furniture in the country. If Acme is successful in its bid, Acme will design and manufacture 2,500 rosewood conference tabletops at a projected wholesale unit price to Sheffield of \$1,000, for a total contract amount of \$2,500,000 on delivery. The bid invitation solicited design proposals, provided only very rough dimensions (twenty feet by six feet in the rectangle configuration), and specified that "each tabletop be designed in the shape of a triangle, divisible into three parts in such a way that the parts can be put together again to form a rectangle in one configuration and a square in another configuration."

About a month after Acme received the bid invitation, a dispute erupted between Mr. Ralph Klein, the manager of Acme's design department, and Ms. Priscilla Overlord, the manager of Acme's contract and compliance department. Klein told Overlord that he would not begin work on a design proposal until he received more detailed specifications. Overlord told Klein that time was of the essence and that "he had better get his design proposal in pronto." Overlord refused to recontact Sheffield because the deadline for submitting the bid was approaching. She had already assured Sheffield that the specifications were clear and that there would be no problem at all in responding to the bid invitation. Privately, she admitted to Franklin in a telephone conversation that she was unsure how the tabletops could be designed to meet Sheffield's specifications, but as she stated, "that was a design problem I would like to be concerned with."

Whether he likes it or not, Franklin has been cast in the role of a mediator. Like Klein and Overlord, he also does not know how the tabletops can be designed to meet the bid invitation specifications. Since Acme delayed addressing the matter and contacting Sheffield now might reflect poorly on Acme's corporate efficiency, Franklin's preference is to resolve the problem in-house without involving Sheffield. Franklin has met with Overlord, who basically dug in her heels and suggested that Klein should be told to "get with the program" or resign from Acme. Franklin has scheduled a private meeting (caucus) with Klein. After an initial exchange of pleasantries, the heart of the dialogue might proceed as follows.⁵⁵

Mediator: Ralph, I understand that we are running up against a deadline on submitting a design for the Sheffield bid.

Klein: That's right, Mr. Franklin. I told Priscilla Overlord to get some more details from Sheffield and I would work up a design for her. As usual, she has dragged her feet, and we are running right up to the wire.

Mediator: What is the problem as you see it, Ralph?

Klein: The problem is simple. I don't have enough information. The bid invitation calls for a tabletop to be designed in the shape of a triangle, divisible into three parts in such a way that the parts can be put together again to form a rectangle in one configuration and a square in another. I don't even know what kind of triangle Sheffield wants. Do they want a right triangle, an isosceles triangle, a triangle with an obtuse angle? The only solution is to have Overlord do her job and get on the horn to Sheffield to get the facts.

Mediator: How do you know that Sheffield cares what kind of triangle it is?

Klein: Well, we *could* find out if Overlord would just call Sheffield.

Mediator: Well let's assume that Sheffield doesn't care what kind of triangle it is. Then what?

Klein: In that case, I would start designing. I've already given some thought to a possible design, but without much luck.

Mediator: I have too, with no success. Let's think about this together and maybe we can come up with something.

55. This example is based on a geometric problem presented in EDWARD DE BONO, *LATERAL THINKING: CREATIVITY STEP BY STEP* 177-79 (1990); see also COOLEY, *THE APPELLATE ADVOCACY MANUAL*, *supra* note 7, Ch. 2, at 195-96.

[Here is where the mediator should begin to generate discovered problems and to identify related found problems. Sheffield's tabletop specification is a presented problem with incomplete or missing information. A skilled mediator will recognize this situation and seek to redefine or reframe the problem so that the matter of the missing information becomes irrelevant. An infinite number of discovered problems could be generated here. For example, "How is a circle like a square?" would be one kind of discovered problem, but since a circle is not part of the specifications, the utility of this discovered problem would be suspect. Generating discovered problems of this sort, however, is often beneficial in stimulating an idea for another discovered problem which may eventually lead to a found problem which can be easily solved. Another discovered problem might be: "Formulate a problem about a triangle, a rectangle, and a square and solve it." Found problems within the scope of this discovered problem would be: "How is a triangle like a square?"; "How is a square like a rectangle?"; and "How is a rectangle like a triangle?"]

Mediator: Let us explore a few possibilities. Ralph, help me out here. How is a square like a rectangle?

Klein: Well, that's easy Mr. Franklin. A square is a rectangle with all four sides being equal in length.

Mediator: Okay, then what is the nature of the shape of a rectangle as compared to the shape of a square?

Klein: A rectangle can be all sorts of shapes—skinny, fat, long, short, etc. A square has only one shape.

Mediator: Okay, I think we're getting someplace.

[Franklin realizes that he has stumbled onto something important. There is only one table shape that is not in doubt — the square. The search for found problems within the scope of the discovered problem has led to a presented problem which needs to be solved, namely: how can a square be divided into three parts in such a way that the parts can be put together again to form a rectangle in one configuration and a triangle in another configuration? Reframed in this way, the problem may still have missing information or its solution process may be unknown. If so, Franklin may have to explore a new series of discovered problems (and their included found problems). Ideally, this search will lead to a presented problem for which Franklin or Klein may know a routine solution process.]

Mediator: Let's play with these shapes a little bit, Ralph.

Klein: Okay.

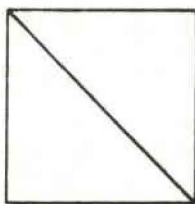
Figure 5



Mediator: How do we convert this to a triangular shape?

Klein: Well, I can make two triangles by just drawing a diagonal, like this.

Figure 6



Mediator: What can be said about the size and shape of these two triangles?

Klein: They are identical in size and shape.

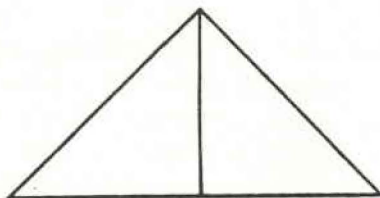
Mediator: Is there any way we can make a large triangle out of the two small triangles?

Klein: Sure.

Mediator: How?

Klein: Just rotate one of the triangles and place it next to the other one, like this.

Figure 7

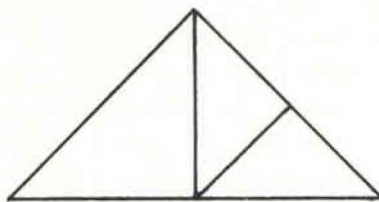


Mediator: Okay. Now, do you see a way to make a rectangle out of the triangle?

Klein: Not immediately.

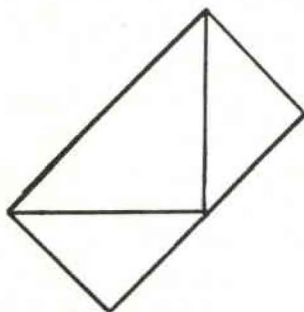
Mediator: Well, what if we divided one of the two original triangles into two equal parts, like this?

Figure 8



Klein: Oh, I see. If we did that, we could form a rectangle by just rotating one of the newly formed small triangles like this.

Figure 9



Mediator: Excellent. Now, have we come up with a design format that satisfies Sheffield's specifications?

Klein: It sure looks like it. I'll let Priscilla know that I'll be getting the drawings to her in the next couple of days.

Mediator: Fine. Thanks for your help, Ralph, in working this out.

There are several ways to reach a solution to this design problem. After solving the discovered problem, that is, noting the importance of the "shape" of the square, the mediator was able to find a presented problem for which he knew a process for solution. The mediator used the Recollection technique to help Klein solve the presented problem and eventually see not only the appropriate solution pattern — the tabletop design for Sheffield — but also the solution to the relationship conflict with Overlord, while at the same time satisfying Franklin's and Acme's business needs and interests. Truly, the Recollection technique here yielded, at a minimum, a win-win solution.

2. Socratic Irony

Socrates often employed "Socratic Irony" as a helpful technique to successful dialectic.⁵⁶ He employed it from the outset of the conversation and he used it whenever he determined that the answerer believed himself to be an expert on the subject of a particular conversation. Socratic Irony has little, if anything, to do with the term "irony" as it is used today.⁵⁷ It is best explained as a type of humility concerning the questioner's knowledge of the conversation's subject.⁵⁸ In many Socratic dialogues, Socrates claimed to be completely ignorant of the subject of the questioning.⁵⁹ Scholars, however, believe that the logical precision and workmanlike nature of Socrates' refutations made the falsity of these statements rather obvious in the end.⁶⁰ This false humility was combined with stroking of the answerer's ego with suggestions that, because Socrates was totally ignorant and the answerer was so wise, the answerer would have to instruct Socrates in the true answers to the questions at hand.⁶¹ The result of this combination was that the answerer was at ease and was completely unaware of Socrates' desire to refute the answerer's theories or answers.⁶² Thus, the answerer volunteered answers much more freely and without the suspicion that might inhibit the honesty essential to a successful dialectic.⁶³ Socrates also employed irony to ensure that the conversation did not end before the refutation was complete, and as a stalling device while Socrates figured out his next question.⁶⁴

The problem with Socratic Irony was that many answerers eventually realized that they were victims of false humility and slyness.⁶⁵ That realization caused many of the dialogues to end in anger.⁶⁶ In fact, some scholars feel that this tactic cost Socrates more than a few friends, and may even have helped guarantee his demise by a state-ordered hemlock cocktail.⁶⁷ Mediators are cautioned to use the technique of Socratic Irony with a great deal of trepidation. Catching a

56. ROBINSON, *supra* note 31, at 8-10. For a discussion as to how Socratic Irony can be used in cross-examination of a witness at trial, see COOLEY, *THE APPELLATE ADVOCACY MANUAL*, *supra* note 7, § 3.01.50 (Supp. 1993).

57. ROBINSON, *supra* note 31, at 9.

58. ROBINSON, *supra* note 31, at 8-9.

59. ROBINSON, *supra* note 31, at 8-10.

60. ROBINSON, *supra* note 31, at 9.

61. *See, e.g.*, H.N. FOWLER, *PLATO WITH AN ENGLISH TRANSLATION* 17 (1926).

62. ROBINSON, *supra* note 31, at 8-10.

63. ROBINSON, *supra* note 31, at 8-10.

64. ROBINSON, *supra* note 31, at 9.

65. ROBINSON, *supra* note 31, at 10.

66. ROBINSON, *supra* note 31, at 9-10.

67. TREDENNICK, *supra* note 24, at 33.

disputant in the trap of an untruth, if attempted at all, should be accomplished by the mediator as gently and as respectfully as possible. Otherwise, the mediator risks compromising his perceived impartiality or neutrality. Masterfully employed in caucus, however, the technique of Socratic Irony can be an enormously effective tool in making disputants much more realistic about settlement options or monetary settlement ranges.

Assume this set of facts. A mediator is attempting to resolve a medical malpractice dispute. Dr. Franken is accused of performing a surgical operation that is inconsistent with the generally accepted practice in the pertinent medical community. The doctor's insurance company has staunchly refused to make any kind of settlement offer. The plaintiff alleges that the defendant doctor removed a cancerous tumor and then resected her colon when he should have performed a colostomy. Shortly after her surgery, the plaintiff experienced complications and underwent emergency colostomy surgery performed by a different surgeon.

In a caucus with plaintiff and her counsel, plaintiff's counsel provided a copy of a paper presented and distributed by Dr. Franken at a surgical society convention held two months prior to the challenged surgery. The paper was never published in a medical journal, but it described a situation, identical to plaintiff's, in which Dr. Franken had suggested that a colostomy, and not removal and resection, was the appropriate medical procedure. In the paper, Dr. Franken had even gone so far as to say that "the tumor removal and resection procedure was *passee*, that it was fraught with post-operative complications, and that any surgeon using it should increase his malpractice insurance coverage." Plaintiff's counsel was reluctant to permit the mediator to disclose this "smoking gun" to defense counsel, but, in a "soul searching" caucus, plaintiff and her counsel finally agreed to give the mediator a copy of Dr. Franken's speech, as well as allow the mediator to confront Dr. Franken and his insurance company's lawyer with this information. In a caucus, a mediator might use the technique of Socratic Irony in the following manner.

Mediator: Dr. Franken, you have practiced as a general surgeon for over thirty years, isn't that right?

Dr. Franken: That's correct.

Mediator: And during that thirty years, I suppose you have performed many operations to remove cancerous tumors in the colon?

Dr. Franken: I would estimate, madam, that during my thirty years of practice, I have performed literally thousands of such surgeries.

Mediator: Please tell me about your experience in this area of medical practice.

[The mediator desires to put Dr. Franken at ease with this open-ended question by allowing him to talk limitlessly about himself, his interests, and his medical practice. What the doctor does not realize is that his answers to questions may lead to his undoing. After Dr. Franken's lengthy response, the mediator continues with her questioning.]

Mediator: Dr. Franken, during your thirty years of practice have you ever performed the procedure you performed on the plaintiff with patients who presented the same medical diagnosis?

Dr. Franken: Oh, probably a few times.

Mediator: Was this early in your career, or recently?

Dr. Franken: Oh, it was probably twenty years ago. But tumor removal and resection of the colon is still an acceptable procedure. I would consider it as an option in a case like the plaintiff's.

Mediator: Dr. Franken, I would imagine that you are a member of several medical associations and societies.

Dr. Franken: Oh, certainly. I am a member of several medical and surgical associations. I was also president of the Midwest Surgical Society three times during my thirty year career.

Mediator: Dr. Franken, have you ever published any articles regarding the surgical procedure in question?

Dr. Franken: Not this particular procedure, no.

Mediator: Have you presented any unpublished papers at a surgical convention regarding this procedure?

Dr. Franken: Well, . . . uh, . . . uh . . .

[Dr. Franken knows that he has, but this is something he has not told his lawyer. He thought no one would ever find out about it. The mediator must handle this situation very delicately so as not to alienate either Dr. Franken or his lawyer.]

Mediator: Dr. Franken, just a few minutes ago, plaintiff provided me with a copy of a paper you allegedly presented at a convention of the Midwest Surgical Society about two months prior to plaintiff's surgery. I can't vouch for its authenticity. Perhaps you can help verify or identify its author.

Dr. Franken: Well, I . . . uh . . . I . . . uh.

Lawyer: Let me see that.

Dr. Franken's fate is sealed and the mediator has used Socratic Irony to foster a complete reframing of the situation. The insurance com-

pany's attorney may now be much more inclined to discuss settlement options and ranges.

3. Socratic *Elenchus*

"*Elenchus*" means questioning a person with regard to statements he has made by putting forth questions calling for further statements, in the hope that the questioner and the answerer will ascertain the meaning and truth or falsity of the initial statements.⁶⁸ More often than not, the truth expected is falsehood, making it akin to refutation or cross-examination. One of the purposes of Socratic *Elenchus* is to have the answerer admit ignorance, while at the same time giving the answerer maximum freedom to go in any direction he desires.⁶⁹ In this way, the answerer has only himself to blame if the direction proves unfruitful; everything follows from what he or she has admitted.⁷⁰

The *elenctic* examination is most effective when the questions do not rush the inquiry or insult the answerer.⁷¹ The inquiry ordinarily begins by assuming, in some sense, that the answerer already knows the solution.⁷² The answerer may be mistaken, but he or she is never completely ignorant. There is also an assumption that the answerer's opinions have value — they are views of a person who has a partial grasp of the truth or of a solution, but is having trouble "seeing" it.⁷³ Another underlying assumption is that the answerer has the knowledge needed to come to the appropriate conclusions if he is questioned in the proper way.⁷⁴ Although each Socratic *Elenchus* is different, they do seem to follow a certain pattern. That pattern normally proceeds in the following way:

(1) Socrates usually opened up with some laudatory remarks concerning the answerer's knowledge of the identity of "X." This was simply an aspect of Socratic Irony.⁷⁵

(2) Socrates then posed a number of general questions to the answerer — usually in the form "What is 'X'?"⁷⁶ This was done to elicit a primary answer which should encompass the answerer's true defini-

68. ROBINSON, *supra* note 31, at 7. For an example of Socratic *Elenchus* used in cross-examination at trial, see COOLEY, THE APPELLATE ADVOCACY MANUAL, *supra* note 7, § 3.01.50 (Supp. 1993).

69. ROBINSON, *supra* note 31, at 7; SEESKIN, *supra* note 51, at 101.

70. SEESKIN, *supra* note 51, at 101.

71. SEESKIN, *supra* note 51, at 101-03.

72. SEESKIN, *supra* note 51, at 101-02.

73. SEESKIN, *supra* note 51, at 102.

74. SEESKIN, *supra* note 51, at 101-02.

75. See, e.g., FOWLER, *supra* note 61, at 15-17.

76. SAUNDERS, *supra* note 24, at 29-32.

tion of "X" in a way acceptable to Socrates.⁷⁷ It was imperative to the success of the questioning that the answerer truly believe in the primary answer.⁷⁸ The answerer had to think it was true in order for Socrates to successfully demonstrate to him its falsity.⁷⁹

(3) The primary answer was then subjected to many more questions. The first of these was usually a request for assent to propositions that seem obvious and harmless to the original assertion.⁸⁰ Because of this, and possibly with help from additional Socratic Irony, the answerer readily agreed with these propositions.⁸¹ As these questions continued, the answerer soon realized that his assents were forming the basis of an unavoidable conclusion that was contradictory to his initial assertion.⁸²

(4) This realization often caused the answerer to revise his or her primary assertion or to submit a new one.⁸³ Subsequent *Elenchus*, however, produced the same result.⁸⁴

(5) Socrates then summarized the content of all statements to which the answerer had assented, saying something like: "Come now, let us add our admissions together."⁸⁵ The answerer unhappily realized that he could not have both his original assertion and the conclusion they had reached.⁸⁶ His original assertion had to be abandoned because of the obvious logic with which the new conclusion was reached. The *Elenchus* had succeeded.⁸⁷

This result was only an ideal, however.⁸⁸ In reality, the conclusion was usually a number of things "X" was not.⁸⁹ For this reason, the conversations sometimes ended with both Socrates and the answerer in a state of helplessness or confusion, called "*aporia*."⁹⁰

The power of Socratic *Elenchus* in reframing conflict in mediation can be demonstrated by the following example of a mediator's questioning of a defendant during a caucus in an automobile personal injury

77. SAUNDERS, *supra* note 24, at 29-32.

78. SAUNDERS, *supra* note 24, at 29.

79. SAUNDERS, *supra* note 24, at 29-32.

80. SAUNDERS, *supra* note 24, at 30.

81. SAUNDERS, *supra* note 24, at 31.

82. SAUNDERS, *supra* note 24, at 30.

83. SAUNDERS, *supra* note 24, at 30.

84. SAUNDERS, *supra* note 24, at 30.

85. *See, e.g.*, LAMB, *supra* note 48, at 165.

86. SAUNDERS, *supra* note 24, at 30.

87. SAUNDERS, *supra* note 24, at 30.

88. SAUNDERS, *supra* note 24, at 30.

89. SAUNDERS, *supra* note 24, at 30.

90. SAUNDERS, *supra* note 24, at 30.

case.⁹¹ The defendant, Mark O'Brien, testified in his deposition and reiterated in the initial joint session with the mediator that, on the night of the automobile accident, he "had watched a basketball game at home with friends, went to a bar where he had one rum and Coke, and ended up at a party where he stayed for several hours and had at most two more drinks."

In the first caucus, plaintiff's lawyer told the mediator that when pressed during the deposition, O'Brien said he could not remember whether he drank any alcohol while he was watching the basketball game. O'Brien firmly maintained that he had complete control of his faculties at the time of the accident and that he was not inebriated. No breathalyzer test had been administered. One witness, however, testified in deposition that she remembered that the defendant's speech seemed slurred at the accident scene. The mediator noted a natural slur in defendant's speech during the opening joint session. O'Brien's attorney has already advised the mediator that the insurance company would be more inclined to settle if the evidence were stronger that O'Brien was driving while intoxicated on the night of the accident. Barring that, there would be no settlement. In caucus with O'Brien and his lawyer, the mediator might employ Socratic *Elenchus* as follows:

Brien,'ql,vu Mediator:Mr. O'Brien, I would . . . O'Brien:You can call me Mark, ma'am. Mediator:Thank you, Mark. I would like to get clearer in my mind the events leading up to the accident. O'Brien:Certainly. Mediator:You mentioned in the joint session, Mark, that on the evening prior to the accident, you watched a basketball game at home with friends, went to a bar where you had one rum and Coke, and ended up at a party where you stayed for several hours and had at most two more drinks. Am I correct about that? O'Brien:Yes, that is true.[This is the primary answer which is the subject of further inquiry during the *Elenchus* which follows.]

Mediator: Now, between 7:30 and 10:00 p.m. you were watching the Bulls play the Lakers, correct?

O'Brien: That's right.

Mediator: You were watching the game with a couple of your buddies?

O'Brien: Yeah.

Mediator: Guys you hung around with pretty frequently?

O'Brien: Yeah.

Mediator: Guys you'd watch sports with?

O'Brien: Yeah.

91. The following example is adapted from ARNOLD J. WOLF, CROSS-EXAMINATION ON THE Socratic Method, 19 23 (1988).
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[The mediator has elicited unqualified assents to a number of seemingly harmless questions. O'Brien's response to the next question, however, is the important one, and in light of the responses to the previous questions, O'Brien must answer it affirmatively unless he wishes to appear inconsistent or less than truthful.]

Mediator: Guys you'd drink with?

O'Brien: Yeah. We've been known to "tip a few."

[The mediator will now use the fact that these guys are Mark's close drinking buddies to make his primary answer, seem less plausible.]

Mediator: During the three hours you were watching the game, I suppose you had some beer to drink?

O'Brien: Yeah, sure.

Mediator: Did the three of you split a couple of six-packs?

O'Brien: Just one six-pack.

[During the answers to these questions, the mediator noticed that the insurance company attorney grimaced slightly. The mediator has uncovered an inconsistency in O'Brien's deposition testimony. O'Brien's primary answer has been partially contradicted and the contradiction is obvious to the insurance company attorney. The *Elenchus* is working. O'Brien did not previously disclose that he remembered drinking alcohol earlier in the evening while watching the basketball game. In fact, in his deposition, he affirmatively asserted that he didn't remember. In the segment which follows, the mediator drops this line of questioning so as not to antagonize O'Brien, while leaving open the issue of how the one six-pack was "split."]

Mediator: In any event, Mark, at about 10:30 you're at the bar, and you order a rum and Coke?

O'Brien: Yes.

Mediator: This is a bar maybe two miles from where you live?

O'Brien: Yes.

Mediator: Was that the first time you had ever been in that bar?

O'Brien: No, it wasn't.

Mediator: You knew the bartender?

O'Brien: Yes.

Mediator: He knew you?

O'Brien: Sure.

[O'Brien is assenting to seemingly harmless propositions, but these propositions lead into the next questions. O'Brien's answers to the later questions will necessarily render him less credible, but his dilemma is that they are mandated by his previous assents. Consequently, he will be breaking out of the "yes/no" mode in an attempt to qualify his an-

swers. These extended answers will only highlight O'Brien's lack of candor.]

Mediator: Did the bartender skimp on the rum when he poured your drink?

O'Brien: It was a good drink.

Mediator: Was it in one of those tall frosted glasses?

O'Brien: It was a tall glass.

Mediator: About half rum and half Coke?

O'Brien: Not that much rum, I don't believe.

[Of course, who is going to believe that O'Brien can now remember the fractional proportions of his drink when at his deposition he could not remember splitting a six-pack when he watched the basketball game with friends. His credibility is beginning to deteriorate and the conflict is beginning to be reframed.]

Mediator: Had you eaten anything that evening?

O'Brien: Oh, sure. I didn't have dinner or anything, but we had some potato chips and pretzels while we watched the basketball game.

Mediator: Did the potato chips and pretzels make you thirsty?

O'Brien: I suppose they did.

[The mediator has just uncovered the important fact that not only did O'Brien drink more alcohol that evening than he had originally disclosed, but he did so on a relatively empty stomach. One begins to wonder what other information O'Brien has omitted or distorted. The mediator now moves on to another area of questioning on this topic.]

Mediator: How long did it take you, Mark, to finish your rum and Coke? Maybe half an hour?

O'Brien: About that.

Mediator: You stayed in the bar until midnight?

O'Brien: Yes.

Mediator: So between 11:00 and midnight, Mark, you were standing around in that bar without anything to drink?

O'Brien: Maybe it took me longer than half an hour to finish the drink.

Mediator: As long as 45 minutes to finish one drink?

O'Brien: It's possible. I don't really remember.

Mediator: Is it possible that you had more than one rum and Coke during the time you were at the bar?

O'Brien: It's possible, I guess. Anything's possible.

This *Elenchus* is getting close to "*aporia*," that state of hopeless confusion where Socrates usually ended up bringing his victims. For
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Socrates, *aporia* was the way to true knowledge, as it demonstrated to the answerer his own ignorance or lack of credibility. In a personal injury case, such as this, where the amount of a defendant's alcohol ingestion is at issue, *aporia* concerning his alcohol intake that night is an indication that the defendant may have been more intoxicated than he originally admitted. If this line of questioning continued, the mediator would probably be successful in having O'Brien admit that it is "possible" that he had more than two drinks at the party he attended after leaving the bar. By admitting that it is "possible" that he had more alcohol than he originally stated in his primary answer, it eventually becomes obvious to O'Brien that his primary answer has been contradicted.

This example of Socratic *Elenchus* demonstrates at least two important things. First, regardless of the outcome of the *Elenchus*, it is crucial that the answerer be convinced of the truth of the conclusion and the truth of his own answers.⁹² Second, in the end, the link between the primary answer and the eventual contradictions must be obvious to the answerer in order to convince the answerer that the conclusion was inevitable.⁹³ Also, remember that the art of successful *Elenchus* is in *finding premises that are believed by the answerer and yet entail the contrary of the primary answer*.⁹⁴ This was Socrates' great skill and it is also the source of the power of *Elenchus* which can be used to a mediator's advantage.

4. Socratic Epagoge

Epagoge is "an argument from one proposition, or from a set of coordinate propositions, either to another proposition superordinate [more universal in relation] to the premises . . . or to another proposition coordinate with the premises, or first to a superordinate and then to a coordinate proposition."⁹⁵ This concept is best understood by reference to an example.

In the *Apology*, Socrates was forced to defend himself against charges that he corrupted Greek youth and that he did not believe in the gods.⁹⁶ One of his accusers, Meletus, did not deny Socrates' belief in spiritual things, yet he did accuse him of not believing in the gods.⁹⁷

92. SAUNDERS, *supra* note 24, at 29-30.

93. ROBINSON, *supra* note 31, at 16.

94. ROBINSON, *supra* note 31, at 15.

95. ROBINSON, *supra* note 31, at 33. For a discussion of Socratic *Epagoge* used in cross-examination at trial, see COOLEY, THE APPELLATE ADVOCACY MANUAL, *supra* note 7, § 3.01.50 (Supp. 1993).

96. FOWLER, *supra* note 61, at 63.

97. FOWLER, *supra* note 61, at 69-100.

Socrates refuted this charge by arguing from a series of propositions to a coordinate proposition and then to a superordinate proposition in classic *Epagoge*. Socrates addressed the court and Meletus:

Is there any human being who believes that there are things pertaining to human beings, but not human beings? [proposition #1]. . . Is there anyone who does not believe in horses, but does believe in things pertaining to horses? [#2]. . . or who does not believe that flute-players exist, but things pertaining to flute players do? [#3] Is there anyone who believes spiritual things exist, but does not believe in spirits? [This is the coordinate proposition and Meletus agreed with it.]⁹⁸

Having reached the coordinate proposition, Socrates then asserted, as a given, the fact that the spirits are the children of the gods.⁹⁹ With this, Socrates was then able to assert the superordinate proposition that since the children of the gods are spirits and Socrates believes in them, he must therefore believe in the gods.¹⁰⁰ Arguably, Meletus' assertion that Socrates did not believe in the gods was significantly weakened by *Epagoge*.

In a questioning situation, the similarity between the *epagogic* propositions and the conclusion desired by the questioner make it very easy for the answerer to see where the questions are leading.¹⁰¹ An answerer who can clearly see that the outcome of a line of questioning is contrary to his thesis is not very likely to assent to each of the propositions.¹⁰² For this reason, *Epagoge* is more successfully used to adduce premises, rather than final conclusions, which the answerer is more likely to grant because when taken alone they appear innocuous.¹⁰³

Socratic *Epagoge* is very useful in mediation to reframe conflict. By showing that a certain result was reached in a number of similar cases, a mediator can help a disputant, or other person who needs to be persuaded, to draw the inference that the same result is warranted in the instant case or that a particular conclusion is warranted or perhaps even inescapable. Depending on the circumstances, the concluded coordinate or superordinate proposition may or may not be explicitly stated by the mediator. This is classic inductive reasoning, as opposed to argument by analogy¹⁰⁴ where less than two examples are used. Inductive reasoning is used when a mediator questions a disputant with respect to a number of situations analogous to the present situation. The mediator

98. FOWLER, *supra* note 61, at 101.

99. FOWLER, *supra* note 61, at 101-03.

100. FOWLER, *supra* note 61, at 101-03.

101. ROBINSON, *supra* note 31, at 40-41.

102. ROBINSON, *supra* note 31, at 40-41.

103. ROBINSON, *supra* note 31, at 40-41.

104. See *infra* notes 105-15 and accompanying text.

induces the disputant to give his opinion as to the desired result in each situation (in the case of hypothetical situations) or asks his opinion as to the correctness of the other results (when actual earlier situations are used). The mediator then attempts to display the similarities between the analogous situations and the present one in the hope that the witness will agree that the same result reached in those situations should apply in the present situation. The key to successful use of Socratic *Epagoge* in reframing conflict is for the mediator to construct, or to assist in the construction of, premises that do not seem immediately contradictory to, or damaging to, a disputant's earlier statements.

What follows is an example of a mediator's use of Socratic *Epagoge* to construct a premise that weakens the credibility of the president of a closely held corporation which has been sued for racial employment discrimination. The lawsuit, which has been submitted to mediation by agreement of the parties, alleges that the company, which manufactures and distributes automobile parts and has about 5,000 employees, discriminates on the basis of race by failing to promote minorities to management positions. Out of 100 low and middle management positions, only five positions are filled by minorities: two by hispanics, two by orientals, and one by an African-American. These individuals received their promotions two years ago, after the lawsuit was filed. Of the ten upper management positions, all are occupied by caucasian males.

In a caucus with the corporation's president, Mr. Frank Parker, and the company's general counsel, the mediator might inquire as follows:

Mediator: Mr. Parker, could you please give me a little background about your company?

Parker: I'd be happy to. The company was founded by my grandfather, Jonathon Holofield Parker, III, in 1932. He started the company with twenty-five employees. He managed the company for years with the help of my father. Together, they made all the hiring and firing decisions. The company prospered with the growth of the automobile industry. My father, who is largely responsible for the company's expansion and success, is still alive and serves as special advisor to the Board of Directors.

Mediator: How are promotion decisions currently made in your

Parker: I make all promotion decisions for low and mid-level managers based on recommendations of my younger brother, the Executive Vice-President of the company. For high-level management promotions, I make recommendations to the Board of Directors, which makes its decision after considering the advice of my father.

[These initial, stage-setting questions have uncovered some very valuable information for the mediator. Promotion in the company appears to be tightly controlled by the Parker family. The mediator must now walk the tightrope of proceeding with the *Epagoge* without alienating or insulting the corporate president.]

Mediator: I suppose in making your decisions for low and mid-level positions, you always attempt to be fair.

Parker: Unquestionably. Promotions are based entirely on merit. Length of employment with the company is a factor, but merit is the bottom line.

Mediator: Do you recall what occurred when Alice Mayfield was considered for promotion to the position of comptroller of the company?

Parker: Yes, I remember that situation well. She was one of five people considered for that position and I remember that I recommended to the Board of Directors that Stan Brown be promoted to that position, and the Board accepted my recommendation.

Mediator: The plaintiffs have alleged that Alice's qualifications were equal to three of her competitors and were better than Stan Brown's. Are they correct about that?

Parker: Well, it depends on how you look at it. She had more seniority than the other four and her efficiency reports were very good, but there were rumors in her department, related to me by my brother, that she was a little too assertive in her management style.

Mediator: Is Alice Mayfield a person of color?

Parker: Yes, she is African-American.

Mediator: And Stan Brown?

Parker: A white male.

[In this and subsequent inquiries, the mediator is adducing the premise that minority promotion applicants, better qualified than their non-minority competitors, are in every situation being denied promotion. The mediator is careful not to directly address or explicitly state the related conclusion (coordinate proposition) from these premises; that is, that the company intentionally discriminates in promotions on the basis of

Mediator: Do you recall the circumstances surrounding the promotion decision made regarding John Guzman?

Parker: Not really.

Attorney: Here's the file, Frank.

Parker: (Examining the file) Oh yes, I remember this one. Guzman was applying for a mid-level management position in our design department. After considering the candidates, and on my brother's recommendation, I selected someone else.

Mediator: Does the file indicate the respective qualifications of the candidates?

Parker: (Examining the file again) Well, on paper, Guzman seems to be the best qualified of the three candidates. But my handwritten note here says that he doesn't contribute to the annual United Fund campaign. Failing to contribute to a charity tells you a lot about a person.

Mediator: Is John Guzman a person of color?

Parker: Well, he's Hispanic, if that's what you mean.

After a couple more of these inquiries, uncovering Mr. Parker's personal biases, the truth of the premise will become even stronger and the conclusion that the company intentionally discriminates in promotions on the basis of race will gradually seem more valid and perhaps inescapable. By demonstrating the common thread in a number of similar instances or propositions, the mediator can leave the coordinate proposition — here, that the company racially discriminates — unspoken, yet clearly on the mind of the answerer and anyone who hears the answers. In turn, this will have a definite impact on reframing of the conflict and influencing the party, in this case the defendant, to be more amenable to settlement.

5. Socratic Analogy

In contrast to the Socratic *Epagoge* in which each proposition is used to illustrate a coordinate or universal proposition that is usually clearly evident and sometimes explicitly stated, Socratic Analogy is only concerned with a universal proposition that is never stated, no matter how evident it becomes.¹⁰⁵ Instead, an analogy is used to shed light on one case (the unknown) by finding corresponding details in another case (the known) without ever mentioning a universal proposi-

105. ROBINSON, *supra* note 31, at 207. For a discussion of Socratic Analogy used in appellate oral argument, see COOLEY, *THE APPELLATE ADVOCACY MANUAL*, *supra* note 7, § 11.09.50

tion.¹⁰⁶ Stated another way, Socratic Analogy is not used to prove the evident, but the unstated universal.¹⁰⁷ It is used to discover the misunderstood elements of the unknown case and to guide those using the analogy in a search for proofs of the implied universal proposition.¹⁰⁸ This is based upon Socrates' idea that it is possible to recognize and understand a universal proposition as it is stated in one case; yet, absent assistance, misunderstand the application of the universal proposition to a set of facts very similar in nature.¹⁰⁹ Socratic Analogy is best explained by an example from the classics.

In Plato's *Republic*, Socrates analogized the necessity of health to a body to the necessity of justice to the soul.¹¹⁰ Socrates' goal in the *Republic* was to prove that justice is better than injustice.¹¹¹ The health/body-justice/soul analogy was meant, however, as an illustration only, not as a means of proof.¹¹² Proof must be provided by other methods.¹¹³ This limited use did not undermine the importance of the analogy. By opening the listeners' minds to the idea that justice can benefit the soul, through comparison to the effects of health on a body, Socrates made his subsequent proof more plausible.¹¹⁴ This opening of the mind to a new idea, concept, or solution is the essence of Socratic Analogy.

If the technique of Socratic Analogy is strictly applied in mediation, the selected analogy can *imply* the pertinent universal proposition so strongly that an attentive disputant can grasp it with little difficulty. Understatement can be a powerful communication tool. In certain situations, however, it may be necessary for the mediator, in aiding in the reframing of conflict, to depart from the pure technique of Socratic Analogy by verbalizing the pertinent universal proposition and showing its specific relevance.

It is important to remember that the purpose of Socratic Analogy is to open up a disputant's mind to the *possibility of applying the universal proposition* to an aspect of the resolution of the present conflict, *not to prove that the universal proposition must apply*. In this way, a disputant may be enlightened, and a novel idea may more easily take root in the listener's mind.

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106. ROBINSON, *supra* note 31, at 207.
 107. ROBINSON, *supra* note 31, at 207.
 108. ROBINSON, *supra* note 31, at 206-08.
 109. ROBINSON, *supra* note 31, at 207-08.
 110. ROBINSON, *supra* note 31, at 205.
 111. ROBINSON, *supra* note 31, at 205.
 112. ROBINSON, *supra* note 31, at 204-08.
 113. ROBINSON, *supra* note 31, at 207.
 114. ROBINSON, *supra* note 31, at 207-08.

To see how Socratic Analogy can be applied in mediation, consider this set of facts. A large oil refining corporation (Vanguard) has been dealing for twenty years with a small company (Unique) which designs, tests, manufactures, and installs oil refining equipment. There are only two or three companies in the country that manufacture such equipment for refineries. This is due to huge start-up costs, immense product failure risks, and a severely limited market for the products. Actually, many refineries have subsidiaries which build their oil refining equipment. Recently, a dispute has arisen that threatens the very fabric of the long term business relationship between Vanguard and Unique. A breach in the business relationship affects the livelihood of both companies. Vanguard needs Unique's products and services because it could not switch to another supplier without an interruption of its refining process. Unique needs Vanguard's business because Vanguard is its principal customer. Also, Unique could not survive the costs of an extended litigation battle with Vanguard. Unique has already complained to the mediator privately that "the court thing has escalated practically out of control," and Unique fears that it is going to get "beat up pretty badly financially before its all over with." In a caucus with a Unique official, Ms. Shelton, and her attorney, the mediator might use Socratic Analogy as follows.¹¹⁵

Mediator: This dispute is much like the story of two neighbors who have gotten into a disagreement and have become angry at one another.

Shelton: Yes, that's true.

Mediator: In the situation I envision, one of the neighbors goes out and buys a shotgun for defense.

Shelton: Well, that's true also. Vanguard went and hired one of those big gun Chicago law firms.

Mediator: In my story, the other neighbor goes out and buys a better shotgun.

Shelton: (Looking at her lawyer and smiling) I can identify with that.

Mediator: Fearful of his neighbor's hostile intentions, the first neighbor decides to add to his armaments and to be on the lookout for menacing acts.

Shelton: (Smiling)

115. The following example is based on an analogy used by William Jennings Bryan. See Richard M. Weaver, *A Responsible Rhetoric*, in *THE INTERCOLLEGIATE REVIEW* 84 (Thomas D. Clark and Richard L. Johannsen eds., 1976).
<https://ecommons.udayton.edu/udlr/vol19/iss2/7>

Mediator: The second neighbor does likewise. This series of events continues until one neighbor shoots the other neighbor in "self-defense."

The analogy created by the mediator is very simple, yet, to the Unique official, very persuasive. Many people who might not understand how minor corporate disputes transform into major battles of destruction can surely understand how two neighbors may come to blows and possibly kill one another. The unstated universal proposition is that fear, not checked, can escalate into irrational, destructive behavior. The mediator's analogy required only that the listener accept that the two situations resembled one another in all important aspects, and that a result of armed conflict among the neighbors was as probable as destruction of the business of a corporation. Like all arguments by analogy, the effectiveness of the mediator's analogy here hinged on the similarity of the analogized situation to the present situation.

6. Socratic Collection and Division

Collection and Division is a technique of Socratic Definition.¹¹⁶ This is an important Socratic technique for the mediator to master because, very often, a satisfactory solution in mediation turns on the parties reaching a mutual agreement, or at least acquiescence, as to the definition and/or appropriate interpretation of terms in a document.¹¹⁷ To fully understand the mediation application of Collection and Division one must first understand its classical origins.

Generally speaking, Socratic Definition is a form of words — a *logos*. Consider, for example, several things with the same name: (my) table, (your) table, (his) table. Each of these objects has one or more properties (e.g., a flat top) without which it would not be a table. A Socratic definition of table would be:

a description of the constitution or structure of a bundle of those essential properties which, being present in certain particular objects, justify their being called tables. . . . For instance, a table may or may not be large, or black, or three-legged; but these qualities are not essential to it *qua* table; they are not part of its *ousia*, its essence. The bundle of *essential* properties Socrates often calls an *eidos* or an *idea*, the "appearance" or "look" of a particular class of things, which is present and common to all the members of that class, and which serves to mark that class off from every other class of thing. In the case of tables, it is *tableness*; [and] in the case of just acts, justice¹¹⁸

116. KENNETH M. SAYRE, *PLATO'S ANALYTIC METHOD* 216-17 (1969).

117. The term document refers to things such as a contract, insurance policy, will, corporate by-laws, procedural rules, and federal and state laws.

In several of his dialogues, Plato used the Collection and Division technique for determining the Socratic definition of a thing. The dialogue which perhaps best illustrates this technique is the *Sophist*.

According to Plato, a definition is *adequate* if it satisfies both *necessary* and *sufficient* conditions for being the kind of thing defined.¹¹⁹ In the *Sophist*, an "angler" was defined as: (1) "an artisan practicing"; (2) "acquisition"; (3) "by force"; (4) "through stealth of"; (5) "living"; (6) "water animals, specifically"; (7) "fish"; (8) "by striking"; (9) "from below"; and (10) "during daylight."

Plato's definition conceived of a fisherman who hooked fish from beneath without using bait, but rather with a jerk on the line at the opportune moment.¹²⁰ Each of the ten features identified above is *necessary* for the definition because anything lacking one of these features would not be deemed an "angler." For example, one who operated a fish hatchery would not be an angler because that person acquired fish through caring for fish eggs, not by force. Similarly, one who noisily fished at night with nets would not be an "angler" because he could not satisfy the force, stealth, or daylight conditions. But the analysis of the adequacy of the definition of "angler" is not yet complete. To be an adequate definition, not only do each of the ten features have to be necessary, but the *combination* of the ten features must be *sufficient*.¹²¹ A definition is *sufficient* if there is no conceivable thing possessing all of the ten features which would not be conceived to be an "angler" as well. Disallowing the oxygenated skin diver of recent origin, Plato's definition would seem to meet the tests for adequacy.¹²²

According to one expert on the dialectic, the technique of Socratic Definition, determining the adequacy of a definition, consists of two stages: Collection and Division. The Collection stage occurs first, during which one formulates a conjecture (hypothesizes) as to what features are necessary for being a thing of the kind in question (Step A).¹²³ The hypothesis is tested by examination of further instances of the kind in question (Step B).¹²⁴ If the results are unsatisfactory, one returns to Step A and then proceeds to Step B, and so on, until each feature is determined to be *necessary*.¹²⁵ Next, in the Division stage,

119. SAYRE, *supra* note 116, at 216-17.

120. SAYRE, *supra* note 116, at 217.

121. SAYRE, *supra* note 116, at 217.

122. SAYRE, *supra* note 116, at 217.

123. SAYRE, *supra* note 116, at 226-27.

124. SAYRE, *supra* note 116, at 226-27.

one hypothesizes as to what features should be added to distinguish things of that kind from all other things (Step C).¹²⁶

The hypothesis is then tested by considering whether things can be found outside the kind in question which also possess this combination of features (Step D).¹²⁷ Stated another way, in this final Step D, one determines whether the *combination* of features under consideration (each of which has been found *necessary*) is *sufficient* to distinguish things of the kind in question from *all* other things.¹²⁸ If it *is* sufficient, the definition is adequate. If not, one proceeds again to the Division stage and formulates new hypotheses, and then continues the analysis through the final stage again, until an adequate definition is achieved.¹²⁹

Let us consider an example of how the Collection and Division technique might be used in mediation. Consider these basic facts. The O'Hare International Airport is owned and operated by the City of Chicago. The City Council of Chicago is empowered to establish regulations governing the conduct and safety of persons using the airport. Confronted with a mounting problem of a homeless population and begging in the O'Hare Airport main terminal, the City of Chicago ordered the closing of particular areas of the terminals after 9:00 p.m. each evening. After several public hearings, the City Council also passed a bill entitled "An Anti-begging Ordinance," which provided in pertinent part: No person shall, for his or her account or for the account of any unlicensed or unaccredited organization, beg, panhandle, or engage in any other form of solicitation of funds at any facility owned or operated by the City of Chicago.

In the afternoon of August 18, 1991, John Franklin, Todd Hecker, and Kathy O'Meara, all adults, were in the main terminal building of O'Hare International Airport. They were homeless and had been in the terminal all day. They had constructed various signs and placards, some of which contained the following messages: "Help the Homeless"; "Please Provide What the President and Congress Refuses: Food for the Needy"; and "I am Hungry — Please Help!!" They did not behave in a harassing or intimidating manner. They did not initiate conversations with travelers, nor did they pursue them. They only talked to travelers who voluntarily stopped and spoke to them first.

126. SAYRE, *supra* note 116, at 226-27.

127. SAYRE, *supra* note 116, at 226-27.

128. SAYRE, *supra* note 116, at 226-27.

129. SAYRE, *supra* note 116, at 226-27. For a discussion of the use of Collection and Division in appellate oral argument, see COOLEY, *THE APPELLATE ADVOCACY MANUAL*, *supra* note 7, § 11.09.50 (Supp. 1993).

Attempting to enforce the “anti-begging ordinance,” several Chicago police officers approached the three homeless persons and ordered them to “cease their begging” and to “remove their signs from the terminal.” Franklin, Hecker, and O’Meara, refused to comply, stating, “This is a free country” and “We have our rights.” Police sergeant Mary Appleton, attempting to confiscate the signs, slipped and fell to the ground, where she cut her hand on a can opener which belonged to one of the homeless persons. Two other police officers proceeded to apprehend Franklin, Hecker, and O’Meara, who resisted strenuously, loudly yelling “Stop abusing the homeless!”, “False arrest!”, and “Get your grimy hands off me!” A scuffle ensued and one of the police officers, Patrolman Goldstein, was bitten by O’Meara with such force that the bite broke the skin. Franklin and Hecker sought to fend off the police by spitting at them profusely. Some of the spit landed “on or near” the cut on Sergeant Appleton’s hand.

The homeless trio was arrested on charges of assault and resisting arrest. All three refused to submit to a blood test by a Chicago Police Department physician, ordered pursuant to the following ordinance:

Any person who is arrested for an offense against the City of Chicago and who interferes with the official duties of a peace officer by biting or transferring blood or other bodily fluids on, upon, or through the skin of a peace officer shall be subject to an order of the court to require testing as provided herein If the court finds that probable cause exists to believe that a possible transfer of blood, saliva, or other bodily fluid took place between the defendant and a peace officer, the court shall order that defendant provide a blood sample, which shall be tested to determine whether it contains the human immunodeficiency virus (HIV) (AIDS virus).

On application to the United States District Court by the trio’s attorney, a staff counsel with the Indigent Legal Services Office, the court issued a temporary restraining order (TRO) barring extraction of the trio’s blood by the Chicago Police Department. The district court entered the TRO on the tentative findings that: (1) the mandatory blood-test ordinance violated the Fourth Amendment because it authorized a blood test without a showing of probable cause to believe that such test would reveal that plaintiffs’ blood would contain the HIV virus; and (2) the anti-begging ordinance violated the trio’s freedom of expression protected by the First Amendment. Noting that both ordinances were criminal in nature and subjected violators to criminal penalties, the district court also tentatively found that the ordinances were vague and overbroad, in violation of the due process guarantees of the Fourteenth

The district judge scheduled a preliminary injunction hearing ten days from the date of the TRO, but strongly urged the parties to proceed to mediation prior to that hearing to resolve the matter. The parties agreed to mediate the matter. A portion of the mediator's caucus with the Corporation Counsel for the City of Chicago, Mary Stetson, and one of her staff counsel, Tim Roseberg, who had drafted both of the challenged ordinances, might proceed as follows. [The mediator, Phil Carter, has already introduced himself, and the attorneys all agreed to address each other by their first names.]

Mediator: I would like to focus, for a minute, on the judge's tentative finding that the blood-test ordinance is unconstitutional on its face for vagueness.

Stetson: That's as good a place to start as any, I suppose.

Mediator: My first concern is the language, "Any person . . . who *interferes* with the official duties of a peace officer by biting or *transferring* blood or other bodily fluids, on, upon, or through the skin of a peace officer . . ." Do you interpret that language to mean that *transferring* of blood or other bodily fluids, in and of itself, is intended by the ordinance to constitute *interference* "with official duties of a peace officer?"

[This is a preliminary question which serves to narrow the focus of the inquiry.]

Stetson: Well, we think that the plain meaning of the words of the ordinance is that a simple *transfer* of blood or other bodily fluids is sufficient to constitute interference with the official duties of a peace officer.

[By this preliminary question, the mediator begins to prepare for the later application of the Collection and Division technique.]

Mediator: Is the word "person" defined anywhere in the ordinance?

[This is another preliminary question which further narrows the focus of inquiry. Stetson still probably does not know where the mediator is headed with his questioning.]

Stetson: Is it, Tim?

Roseberg: Not specifically — no.

Mediator: Also, Mary, as I read this ordinance, a court *must* order a blood test if there is probable cause to believe that a possible transfer took place. Is my reading correct?

[This is still another preliminary, focusing question.]

Stetson: Yes, that's true.

[This answer is critical to the later effectiveness of the Collection and Division technique.]

Mediator: All right then, let's concentrate on the words "bodily fluids."

[Here is where the mediator begins to employ the technique of Collection and Division.]

Stetson: Fine.

[Stetson feels slightly relieved that the mediator has shifted to another topic. But the relief is short-lived.]

Mediator: Would it be fair to say that the ordinance itself defines two *types* of bodily fluids — blood and saliva?

[Here, the mediator exposes *types* of the kind in question from which the features of "bodily fluids" may be inferred. By analogy, he has identified a black table and a red table, but he still has to identify the features that are essential to tableness.]

Stetson: That is correct.

Mediator: Would it be fair to say that a "bodily fluid" has these features: One: it is a substance?

Stetson: Yes.

Mediator: Two: primarily liquid in nature?

Stetson: Correct.

Mediator: Three: that flows — in other words a *frozen* substance would not be within the definition of "bodily fluid?"

[Here, the mediator hypothesizes a different form of the kind in question to test which features are *necessary* to the definition.]

Stetson: I would agree that the ordinance does not necessarily contemplate frozen substances, wouldn't you Tim?

Roseberg: Yes, I would agree.

Mediator: Four: which originates from inside a body?

Stetson: Yes.

Mediator: Five: or which originates from the surface of a body?

Stetson: Correct.

Mediator: So, the definition of a bodily fluid is: (1) a substance; (2) which is primarily liquid in nature; (3) that flows; (4) and that originates from inside a body; (5) or from a surface of a body. Does that sufficiently define a "bodily fluid?"

Stetson: It would seem so.

Roseberg: Yes, I would agree.

Mediator: Is "bodily fluid" now adequately defined?

Stetson: Yes.

Roseberg: I agree.

[Defense counsel has just made a major *faux pas* in reasoning. If counsel had employed the technique of Collection and Division along with the mediator, they would have realized that the *Division* stage is not yet complete. Hypotheses need to be formulated to see if the features are *sufficient* to define “bodily fluid,” that is, whether the definition as it currently stands identifies something outside the kind of thing in question. A hypothesis might be formulated: Does the substance have to originate from a specific body? From the City of Chicago’s point of view, the features would not be sufficient unless the substance originated from the body *of the person arrested*. It would have been appropriate for defense counsel to have suggested this definitional feature in response to the mediator’s questions. That would not completely resolve defense counsel’s problem.]

Mediator: Then, it appears folks, that a person could violate this ordinance who is arrested for speeding on a hot summer day and who, in following the officer back to the squad car, trips, brushes against the officer and transfers perspiration to the officer’s bare arm. Is that correct?

Stetson: If the ordinance is read literally, yes. But we must have faith in the individual officer’s judgment to seek a blood test only in appropriate circumstances.

Roseberg: That’s right. We must have faith in our officers.

[Counsel is beginning to dig his own grave. Counsel has implicitly admitted that the ordinance is capable of selective enforcement and that an officer, virtually on a whim, could enforce the ordinance against an arrestee.]

Mediator: But my hypothetical appears to satisfy all the prerequisites for a trial judge to find probable cause to believe that a “possible transfer of bodily fluids took place,” correct?

Stetson: Yes, I can’t argue with that.

Mediator: And under this ordinance, on a finding of probable cause, a judge *must* order a blood test. Isn’t that true?

[The specific relevance of one of the mediator’s preliminary questions now becomes painfully evident to defense counsel.]

Stetson: It appears so.

[Defense counsel would like to stop this line of reasoning now, but they cannot. Their doom is sealed by the logic that the mediator has constructed.]

Mediator: Further, counsel, isn't it true that even a child arrested for jay walking would be subject to mandatory blood testing if he transferred bodily fluid (slobbering, perspiration, or anything else) to a peace officer, or bit a peace officer, even accidentally?

[The mediator's preliminary question regarding the scope of the word "person" in the ordinance comes back again to haunt defense counsel.]

Stetson: No question about it. A child could violate this ordinance.

Mediator: And under the ordinance, to be subject to a blood test, the bodily fluid does not necessarily have to belong to the person arrested. That is, an arrested person could transfer someone else's bodily fluid to a police officer and still be subject to mandatory blood testing, correct?

[This is the clincher question. This was the feature omitted from the Division stage and it causes the definition to fail for lack of sufficiency. It also, of course, is a necessary feature of the definition. It is too late for defense counsel to point out the defect, because they have already accepted the mediator's definition of "bodily fluid" as being adequate.]

Stetson: It appears so, yes.

Roseberg: Yeah.

In the preceding example, the mediator used a combination of both Socratic *Elenchus* and Collection and Division to obtain certain admissions by defense counsel about a reasonable interpretation of the ordinance. While these techniques may seem to be trickery and gamesmanship, in actuality they are not. They are simply effective tools to test reality, that is, to bring the disputant to, and sometimes across, the threshold of insight. After experiencing the above *Elenctic* application of the Collection and Division technique, it is likely that defense counsel reframed their perception about the clarity of the ordinance and may now be convinced that the ordinance has some serious overbreadth problems which need attention. It is also probable that defense counsel will be more inclined to settle the case with the homeless trio thereby foregoing the preliminary injunction hearing and appeal proceedings.

IV. SOME GENERAL THOUGHTS ON THE MEDIATOR'S SOCRATIC ROLE

What the foregoing teaches, if nothing else, is that the mediator's primary role is to be a philosopher. It is the business of the philosopher to be a child who never grows up: to ask basic, probing questions seek-

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ing the essence of things.¹³⁰ Like the itinerant philosopher Socrates, the mediator must be willing to discover new knowledge about that which he thinks he knows best; to be taught more about that which he teaches; and to continue to seek to understand a paradox, knowing that it can never be fully understood.¹³¹

Not surprisingly, the mediator's role itself is fraught with paradoxes of the kind described by Socrates in the *Meno*.¹³² A few examples that I have come to appreciate over many years of mediation experience are:

- (1) the mediator must be perceived as fair, but never knows what fair is.
- (2) the mediator must be perceived as just, but never knows what justice is.
- (3) the mediator must not be perceived as an advocate, but must be an advocate for the process.
- (4) the mediator searches for "truth," but never is sure what the "truth" is.
- (5) the mediator must be perceived as neutral, but must be able to alter mindframes.
- (6) the more a mediator is a teacher, the more a mediator must be a student.
- (7) the more a mediator is a student, the more a mediator teaches.
- (8) the more a mediator thinks he knows, the less a mediator can learn.
- (9) the more a mediator learns, the more he knows that he does not know.
- (10) The more a mediator knows that he does not know, the more he knows.

Mediators have much to learn from Socrates — perhaps not so much from any body of knowledge he developed, as from the *process* by which he was able to reframe perceptions of those who thought they had knowledge. By his challenging the "known" through the dialectic, those individuals discovered how much they did not know. As a teacher, he was a student, and as a student, he was a teacher. His process for finding the essence of things was simple, yet quite effective. First, he parted with conceit, for as the Roman Philosopher Epictetus (60-138 A.D.) much later observed, "it is impossible for a man to learn

130. SAUNDERS, *supra* note 24, at 13.

131. SAUNDERS, *supra* note 24, at 13.

132. See *supra* note 51 and accompanying text.

what he thinks he already knows."¹³³ Second, he viewed the world and worldly concepts through the eyes of a child. He asked questions with naive innocence and without the layers of preconceived notions and assumptions that human experience naturally deposits. Socrates' advice, as communicated by his conduct, was as follows: ask the questions a child would ask and you will learn forever. A mediator who knows only this knows all that is *necessary*, for only then can the mediator clearly see the truth that his knowledge will never be *sufficient*.

133. EPICETUS, DISCOURSES, BK. II, Ch. 17, *reprinted in* R.M. HUTCHINS, 12 GREAT
http://ecommons.dayton.edu/olr/vol19/iss2/7