

2-1-2004

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Recommended Citation

Elizabeth "Wendy" Trachte-Huber, *Mediating Multi-Party Disputes: Reflections on Leadership in Mediation*, 4 Pepp. Disp. Resol. L.J. Iss. 2 (2004)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/3>

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Mediating Multi-Party Disputes: Reflections on Leadership in Mediation*

Elizabeth “Wendy” Trachte-Huber**

Thank you to our wonderful Brothers in ADR here at Pepperdine Law School — Randy, Peter and others.¹ Having recently hired a Pepperdine graduate and hosted an extern, I can attest that they have a wonderful program here producing smart, interesting dispute resolution professionals.

As Randy has requested, I am here to offer some thoughts on things that are outside of the realm of conventional ADR. During our conversation, Randy said: “you know, we do not invite people to be keynote speakers who are among us.” I began to think: “you know, I think I have just voted off the island.” In an important sense, I am not one of you anymore. I have spent the last three years as the Claims Administrator (the CEO) of a mass claims facility, which is formally named the Settlement Facility — Dow Corning Trust (SF-DCT). As I

* This presentation was made at Pepperdine University School of Law Master’s Forum which was held October 17-18, 2003.

** E. Wendy Trachte (“Trocktee”) Huber is Claims Administrator for the Settlement Facility - Dow Corning Trust (“SF-DCT”). She is the Chief Executive Officer for the facility charged with the processing of all personal injury settlement claims against Dow Corning relating to medical implant products, including silicone gel breast implants. Trachte-Huber was previously Vice President for the American Arbitration Association (“AAA”). Trachte-Huber is past co-chair of the Alternative Dispute Resolution (ADR) Section of the State Bar of Texas.

Recent publications include: *Mediation and Negotiation: Reaching Agreement in Law & Business*, Anderson Publishing (1998) with Stephen K. Huber, *Arbitration: Cases & Materials*, Anderson Publishing (1998) with Stephen K. Huber, *Negotiation: Strategies for Law & Business*, American Lawyer Press (1995); *ADR Chapter, O’Connor’s Civil Trials 1997*, Jones-McClure Publishing (1997); *Alternative Dispute Resolution; Strategies for Law & Business*, Anderson Publishing (1996) with Stephen K. Huber; *Alternative Dispute Resolution: The Litigators Handbook*, American Bar Association (2000). She teaches negotiation, mediation, and introduction to ADR at the University of Houston Law Center and the College of Business Administration. Trachte-Huber also teaches at Pepperdine University School of Law and Rice University. She is frequentspeaker on alternative dispute resolution topics and has spoken to a broad range of audiences from retired business executive to fifth graders to real estate professional to construction professionals.

She received her Juris Doctor from the University of Houston Law Center and received a Bachelor of Science degree in education, magna cum laude, from the University of Houston. She is a licensed attorney in Texas.

1. Randy Lowry is founder and director of the Straus Institute for Dispute Resolution and a professor of law at Pepperdine University School of Law. Peter Robinson is Associate Director of the Straus Institute for Dispute Resolution and Assistant Professor of Law at Pepperdine University School of Law.

will discuss at length below, my mediation background has served me well in creating and administering a claims facility.

In preparing my remarks for this address I went to the literature on Mediating Multiparty Disputes. I was amused to find a recent United States Institute of Peace publication entitled: *HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD*.² It seemed to accurately describe the work we do in mediating large, complex, multiparty disputes. The Forward describes our task as multiparty mediators as follows:

“The mediation of contemporary conflict is an activity that typically involved throwing well-intentioned individuals into a lion’s den of conflicting interests, beliefs and forces. The mediator is usually asked to do no less than persuade the lions to lie down with one another, and though the onlookers customarily shout out encouragement and instructions, the hapless mediator is rarely armed with much more than quick wits, seasoned judgment and dedication. It is, to be sure a situation rich in dramatic possibilities — hence the opportunities for engrossing narrative. It is also a situation in which the odds are stacked so heavily against the mediator that any kind of success is not easy to explain — hence the need for intellectual sophistication.”³

Thus herding cats.

The distinguished chapter authors include former Secretary of State James A Baker III; former U.S. Ambassador and permanent representative to the United Nations Richard Holbrooke; first High Commissioner on National Minorities and former member of the Parliament in the Netherlands Max van der Stoep.⁴ The list continues, but a pattern emerges: these distinguished authors are not so called “reformed lawyers,” they are leaders — leaders engaged in “herding cats”. The hypothesis I would like to advance today — the importance of Leadership — may seem heresy to the “do no harm” mediation philosophers who consider leadership too invasive. However, I want to suggest that the skill most necessary in effectively mediating multiparty disputes is **Leadership**. I will spend my time with you considering why leadership is an important — even essential — aspect of multiparty mediation, and then turn to an examination of some of the important leadership skills that we use to mediate multifaceted, multiparty disputes.

Leadership in mediating multi-party matters is imperative. In my work as Claims Administrator for one of the largest ever personal injury/bankruptcy settlements (\$2.3 billion, net present value), I am charged with four primary areas of responsibility: (1) the efficient and fair evaluation of claims consistent with provisions of the Joint Plan of Reorganization; (2) the efficient delivery of payments to all approved claimants pursuant to the provisions of the Joint Plan;

2. See generally *HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD* (Chester A. Crocker, Fen Osler Hampson & Pamela R. Aall eds., 1999).

3. *Id.*

4. *Id.* Authors of chapters 9 (The Road to Madrid), 13 (The Road to Sarajevo) and 4 (The Role of the OSCE High Commissioner in Conflict Prevention) respectively. See *Id.* at 183, 325 and 65 respectively.

(3) the management and custody of the assets paid to the Settlement Facility; and finally (4) the faithful execution of the provisions of the Joint Plan in all respects. In my daily work I must mediate (and arbitrate) but, most important, I must LEAD.

When I assumed my present position, I identified several important skills I felt a Claims Administrator needed. The skills I have identified as core competencies for this position are the same leadership skills that must be considered by mediators in multi-party mediation — dealing with ambiguity, business or industry knowledge, conflict management, ethics and values, organizing, managing and measuring work, building effective teams, written and oral communications, process management, patience, perseverance and managerial courage. Let me now turn to some brief comments about each of these skills.

(1) Dealing with ambiguity.

Leaders must deal with imperfect information and a lack of clear solutions. Obviously, given unlimited time and complete information, leaders regularly can make optimal decisions. A mediator-leader must make more good decisions than bad ones based on imperfect information, few precedents and generally make them VERY FAST. A skilled mediator-leader shifts gears comfortably; can decide and act without a complete picture; can effectively cope with change or uncertainty, and is not upset when things are up in the air.

As Claims Administrator I must prepare an annual budget. In so doing, I must balance three factors: cost, speed and accuracy. (Some have said — In most analysis you have this balance but generally you are asked to choose only 2!!). I have a duty to protect the Trust funds and to process claims quickly and accurately. Alas, these goals are conflicting, and one can meet only two of them. Being fast and accurate is very expensive; being fast and cheap sacrifices accuracy; and being cheap and accurate sacrifices speed. We mediator-leaders must be as comfortable with uncertainty as with walking, talking, and breathing.

(2) Business or Industry Knowledge.

Leaders (and mediators) must have some fundamental understanding of how business works. As the song goes in The Music Man: “You got to know the territory!” This flies in the face of some fundamentalist mediators who think PROCESS is all you have to know — but I suggest that you need to know some of the territory to lead & mediate. A mediator-leader needs to know how businesses work and must be aware of how strategies and tactics work in a business setting. If asked to mediate a complex multiparty case involving mass claims,

you need to know the territory — you should not expect to rely exclusively on the process to get you through. If you have litigated these cases, served as Judge, served as a leader you understand the business. There are times when having “walked in the moccasins” allows a mediator-leader to present certain options to the parties. When one realizes the complexity of these matters and the multiple parties — you can better assist the parties in fashioning an agreement. The Asbestos Settlement “industry” is dominated by the same few mediators for a reason: they understand what is necessary to fashion an agreement among many disparate interests. As a mediator-leader you can learn or even seek expert advice.

(3) Conflict Management.

Strangely, those of us who are professional managers of conflict occasionally forget some of the basics — we hear stories of mediator-leaders who sue each other after fender benders, or who fight with their colleagues. We need to remember some basic organization conflict theory as leader-mediators. Organizations and multiparty cases are complex mazes of constituencies, issues, and rivalries. And do not forget that the people involved have strong egos, major sensitivities and empires to protect. We need to remember that political errors need to be avoided — anything from saying things you should not say to actions that are not right for the context. Also to be avoided are unacceptable initiatives, moves, tactics and strategies. (Remember the physicians’ creed: *primum, non nocere* — first, do no harm.) Unnecessary conflicts, tensions misunderstandings and rivalries can be created because you targeted a specific group or person. A leader-mediator must understand the politics of the organization: who are the real decision makers; who controls the flow of information (information is power); where is the major resistance. As the mediator-leader we must always be mindful of the need to stifle urges to behavior that can be construed in a politically incorrect way. In the Claims business we must be sensitive to the interests of both the Tort Claimants (representing the claimant population) and the defendant company that has provided the funds for the settlement.

(4) Ethics & Values.

Bromides like “do the right thing” sound good, but such generalities give little practical guidance to the mediator-leader faced with a difficult problem. Values and ethics are based in large part on our childhood and accumulated experiences. Few take the time to exercise their ethics and values, but in mediation (and leadership) we are often tested. The leader needs to adhere to an appropriate and effective set of core values and beliefs, and act in line with those values. She must clearly reward appropriate values and disapprove inappropriate

ate conduct. If in mediating a multi-party case you find yourself moving to a zone you cannot condone, you must have a clear plan for managing the moment.

(5) Organizing.

We are all aware that leadership is much easier if everyone is pulling in the same direction. As mediator, we look to the interests of the parties to identify areas of commonality. The skilled leader-mediator can marshal resources (people, funding material, support) to get things done. In a multi-party mediation the mediator must meet with (in some cases) hundreds of people. Just organizing the logistics requires great skill. Does the mediator-leader use resources effectively and efficiently? A good mediator-leader arranges information in a useful manner often, through the power of the pen. By placing issues on a flip chart or in a context, the mediator-leader reorients and focuses the attention of the parties.

(6) Managing & Measuring Work.

The mediator-leader understands that most people like to have goals. They like to measure things against objective standards. GETTING TO YES reminds us of the importance of clear objective standards.⁵ By clearly assigning responsibility for tasks & decision the mediator-leader allows the parties to effectively address and manage an unwieldy situation. Mediators have recounted stories in which they describe assigning various parts of the settlement to different consistencies. We often set clear objectives & measures for the agreement and we always design some feedback loops into our work.

(7) Building Effective Teams.

Relating to managing and measuring work is the ability to identify the correct representatives and teams for getting tasks performed. In mediating a large complex case there are generally many different interests and organizations. Consider, for example, some of the competing interest in a bankruptcy case — commercial creditors, personal injury claimants, insurance companies, shareholders of the company, etc. The mediator must get all these cats herded into

5. See Robert Fisher and William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 1991).

teams when needed. The mediator leader acts to foster open dialogue and assists the parties in cutting across boundaries to accomplish necessary tasks.

(8) Written and Oral Communication.

The mediator must speak quickly and succinctly to convey a message. The leader-mediator must have the ability to write clearly and succinctly, as well as the ability to verbally articulate to a wide range of audiences. Consider yourself in a foreign country, and a group of soldiers suddenly turns to you and points their guns at you. They ask you (in English/ or a foreign language) why you are there? Can you (a) speak their language (b) make it clear what you want (c) use as few words as possible and (d) effectively communicate your message? Mediator-leaders are frequently looked to for assistance, and a satisfactory response requiring quick thinking and action. This matter is closely related to the next of my dozen skills needed by effective leaders and mediators — process management.

(9) Process Management.

The mediator-leaders greatest skill, to many, is the management of the mediation process. In the “old days” we relied on the sort of process rules found in “Robert’s Rules of Order,” first published in 1870.⁶ Parliamentary procedure, together with the principle of majority rule, were presumed to be the best process to “assist an assembly in accomplishing the work for which it was designed [by] restraining the individual” so the interests of the group could be promptly and effectively accomplished. As we all know, this proves to be an unsatisfactory process in the context of dispute resolution, because the result leaves many people angry and disappointed. The mediator-leader must have strong skills in determining (often creating) an appropriate process for getting things done, and must be able see opportunities for synergy and integration where others cannot. Some mediation processes involving multiple parties utilize consensus building processes which include convening, assessing conflicts, identifying of appropriate parties, seeking funding, reaching agreement for agenda and ground rules, clarifying roles such as mediator, facilitator and recorders, deliberating, deciding and finally implementing. The mediator-leader must simplify complex procedures.

In a recent article an experienced mediator opined that the six most important skills for a mediator to exhibit are patience and perseverance, patience and

6. See Henry Robert, ROBERTS RULES OF ORDER, Newly Revised (1970) available at <http://www.constitution.org/ror/ror-00.htm>.

perseverance AND patience and perseverance — the next two leader-mediator skills are those.

(10) Patience.

Tolerance and the ability to “go to the balcony” is one of the most important skills for our mediator-leader. Mediator leaders try to understand the people and the data before wading in to help resolve their dispute. There must be sensitivity to time and process.

(11) Perseverance.

This means using a variety of ways to get something done. My favorite Texas mediator story is about the mediator who got down on her knees and begged the parties for some movement off their entrenched positions — she exhibited a willingness to try different ways even if she had already tried many others. People often are unwilling to persevere because they fear rejection or failure. A persevering person cannot take things personally even when they are meant to be personal. You must be willing to take a stand to get some thing done. With determination the mediator-leader proceeds to assist the contending parties to resolve their dispute. A mediator-leader cannot give up too soon, cannot take rejection personally, and definitely cannot give up before completing the task at hand.

(12) Managerial Courage.

The last of my dozen skills, and perhaps the most unusual one to mediators, is managerial courage. The mediator-leader does not hold back anything. The person with managerial courage lets people know where they stand, and provides current, direct, and complete feedback to others — both positive and corrective. Make no mistake: this is a direct and a directive approach. Mediators may feel uncomfortable taking action that requiring courage and leadership, but don't. Mediator-leaders have an obligation to assist parties to accurately assess the strengths and weaknesses of their case. This requires courage, and a willingness to take risk.

Let me sum up. We have identified a dozen skills that we must possess, hone and use. To mediate multiparty disputes one must e able to employ multiple skills: dealing with ambiguity, business or industry knowledge, conflict management, ethics and values, organizing, managing and measuring work,

building effective teams, effective written and oral communication, process management, patience, perseverance and managerial courage.

Each of you as mediators has unique opportunities to persuade the lions to lie down with one another. Good luck in “Herding Cats.”