

Course Packet

**Mediation Skills
Workshop
for Judges and
Mediators**

OCTOBER 25, 2013

*Sponsored by:
The U.S. District Courts for the Eastern and Southern
Districts of New York
&
The Federal Judicial Center*

SCHEDULE

Mediation Skills Workshop

1:00 – 1:15	Welcoming remarks
1:15 – 2:45	When Both Sides are Righteously Indignant
2:45 – 3:00	Networking Break
3:00 – 4:30	Implicit Bias
4:30 – 5:00	Closing Remarks

BIOGRAPHICAL SUMMARY OF SPEAKERS

Judge Jeremy Fogel

Born in San Francisco, raised in Los Angeles, California. Judge Fogel entered private practice in California from 1974 to 1978. Fogel was also a Lecturer in the Human Development Department of California State University from 1977-1978. From 1978 to 1981, Fogel was an Attorney for the Mental Health Advocacy Project, and served as the organization's Executive Director from 1980-1981. Fogel served as Municipal Court Judge for the Santa Clara County Municipal Court from 1981 to 1986 before being elected Superior Court Judge to the Santa Clara County Superior Court from 1986 to 1998. President William Clinton appointed Judge Fogel to the federal bench in 1998. Judge Fogel has served as a faculty member of the Federal Judicial Center since 2001 and as a lecturer at Stanford Law School since 2003. He received an A.B. degree from Stanford University in 1971 and a J.D. degree from Harvard Law School in 1974.

Married since 1977 to Kathleen Wilcox; two children: Megan, 29 and Nathaniel, 26.

Kathleen Sikora

Kathleen Sikora is a former Senior Attorney at the California Judicial Council's Administrative Office of the Courts (AOC), retiring in 2003 after four years on the Legal Staff and 15 years at the Center for Judicial Education and Research, the AOC's Education Division. A graduate of Stanford University and Hastings College of the Law, Ms. Sikora has continued since retirement to consult in three areas of expertise: judicial faculty development, curriculum development, and the current research on social cognition, more specifically the potential impact of implicit bias on decision making. On the last subject, she has served as an instructor in California statewide and local court judicial education programs for more than 10 years; nationally in 11 states outside California, the National Judicial College, the National Council of Juvenile and Family Court Judges, the National Organization of Bar Counsel, and the National Association of State Judicial Educators; and internationally at the Second International Conference on the Training of the Judiciary.

Claudia Bernard

Claudia L. Bernard is the Chief Circuit Mediator for the Ninth Circuit Court of Appeals. In this capacity she runs the court's Circuit Mediation Office, manages a staff of eight Circuit Mediators, and mediates civil and criminal cases on appeal. Prior to her appointment as Chief Circuit Mediator in 2007, she served as a Ninth Circuit Mediator for eighteen years, mediating over three thousand cases. She has taught negotiation and mediation at law schools throughout the U.S. and Germany. She has trained lawyers in mediation and mediation advocacy internationally including to judges and lawyers in India, Germany and the Pacific Islands; and nationally including to judges and lawyers in state and federal courts in California, Arizona, the District of Columbia, Idaho, Washington, Oregon, Alaska and Guam; and for lawyers in the U.S. Department of Justice, the California Attorney General's Office, the Federal Judicial Center, the American Bar Association, and the Federal Bar Association. She has a keen interest in neuroscience and its application to mediation, and has presented widely on the topic both nationally and internationally. She received the Mediation Society of San Francisco's 2011 Award for Outstanding Contribution to the Field of Mediation. Previously, she practiced as a civil litigator, and clerked for a federal judge.

Howard Herman

Howard Herman is Director of the ADR Program for the U.S. District Court, Northern District of California, in San Francisco. He previously served as Director of ADR Programs for Contra Costa County Superior Court in Martinez, California, and as co-director of the Ninth Circuit Mediation Program as it is known now. Since 1996, Mr. Herman also has taught negotiation and mediation at U.C. Hastings College of the Law. Most recently, he co-developed and co-teaches an annual seminar for international judges and lawyers on designing and implementing court ADR programs. He has led ADR training courses for lawyers and judges throughout the United States as well as Germany, Guam, India, Jordan, Malaysia, the Marshall Islands, Palau, and Thailand. He has particular interests in the psychological dynamics of negotiation, ADR ethics, and continuing education practices for mediators. In 2013, he was the inaugural recipient of the Exceptional Service Award presented by UC Hastings College of the Law's Center for Negotiation and Dispute Resolution. Previously he practiced as a civil litigator with the firms of Graham & James and Kindel & Anderson in San Francisco.

WHEN BOTH SIDES ARE RIGHTEOUSLY INDIGNANT: MEDIATOR TOOLS DERIVED FROM FEE-SHIFTING CASES

PRESENTED BY:

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PROGRAM OVERVIEW

Attorneys and parties in many different types of disputes and lawsuits often present as “righteously indignant.” They believe they are right about the law, the facts, their negative views of their opponents, their philosophical or moral stances and their case analyses. And, they believe, their opponents are wrong. When the statutory basis for a lawsuit allows for shifting fees and costs to the loser, the tendency toward righteous indignation is especially strong.

These cases raise particular challenges for mediators. Mediators need tools and strategies to help the parties and lawyers make good decisions despite their deeply negative attitudes toward one another. In addition, these cases require personal qualities and internal tools that enable mediators to “hold” this righteous indignation without losing their positive emotional center.

In this workshop, we share our understanding of the dynamics of these cases as well as some of the tools we find effective in handling them. The tools fall into three broad categories:

- Suggestions for convening and early intervention
- Interventions to use with the lawyers and parties
- Internal techniques for holding one’s center as the mediator

MATERIALS

1. Outline for Phone Conference Before Mediation Session, U.S. District Court, Northern District of California
2. Cognitive Traps Affecting Righteous Indignation
3. Selected Bibliography
4. Power Point Slides

**U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

OUTLINE FOR PHONE CONFERENCE BEFORE MEDIATION SESSION

I. INTRODUCTIONS

- A. Introduce yourself--mention that court selected you to serve in program and this case because of your expertise
- B. Make sure attorneys (and any participating clients) are introduced
- C. If you intend to use first names, ask if this is okay
- D. Emphasize your desire to serve needs of litigants and openness to suggestions within bounds of rule
Example: "I want to make this process as useful for you and your clients as possible-and I am open, within the boundaries set by the court's rules, to your suggestions about steps we could take to improve the productivity of the mediation session."
- E. Ask if they've had experience with mediation

II. PURPOSES OF THIS CALL

- A. Begin to build an effective working relationship with the participants on the phone conference
- B. Let counsel/clients know what to expect and how to prepare
- C. Decide on date, time, location and who will attend

III. NATURE/STATUS OF THE CASE

- A. Let them tell you a little about the case; perhaps ask some clarifying questions but do not allow the lawyers to get too far into arguing the merits
- B. Demonstrate that you've read the pleadings and know enough about the area of law to be effective as the mediator
- C. Determine the procedural posture of the case
 - 1. How much disclosure/discovery has been done or will be done by the mediation?
 - 2. Any pending motions?
 - 3. Any orders or stipulations?
 - 4. Any settlement discussions? Their status?

- D. Determine the right timing for holding the mediation session.
1. Is the case “ripe” for mediation, or would a delay be appropriate to allow for necessary disclosure/discovery and/or a ruling on a pending motion?
 2. Are the parties and attorneys ready to discuss resolution, or is there a different timing that may give them a better chance to resolve the case?
 3. What is the current deadline for holding the mediation?
 4. If there is agreement that a delay in the mediation is appropriate and the current deadline is looming, then ask the attorneys to prepare a stipulation and proposed order for the assigned judge seeking an extension of the deadline to allow for the appropriate delay in holding the mediation.

IV. MEDIATION PROCESS

- A. Ask counsel to familiarize themselves with ADR L.R. 6
- B. Process is non-binding and confidential (ADR L.R. 6-1)
- C. Mediation is a flexible process and mediators differ widely in the way they prefer to work. Describe your mediation style and usual procedures. At a minimum, you should cover your practice concerning:
 1. The type of opening statement you prefer;
 2. Use of separate caucuses, including the confidentiality rules you use for such caucuses;
 3. Participation by clients;
 4. Degree to which you will incorporate analysis of the strengths and weaknesses of the legal positions into the discussion;
 5. Use of the court’s confidentiality form. If you intend to use it, send it to all counsel in advance.
- D. If you are willing to adjust your style or process based on input from counsel, you should discuss this with them at this point.

V. LOGISTICS

- A. Determine:
 1. Location
 2. Date
 3. Time -- set aside half-day or whole day?
 4. Who will attend? (ADR L.R. 6-10)
 - a. Emphasize importance of having appropriate representatives at the mediation session
 - b. Which client representative will attend? Named parties, persons with knowledge and authority required by rule
 - c. Insurance representatives?
 - d. Which attorneys? Those who will try the case required by rule

- B. Special permission needed:
 - 1. for a party to participate by phone, must get the ADR Magistrate Judge's permission (ADR L.R. 6-10(d)) -- note that the rule requires telephonic participation on an open line, not telephone standby.
 - 2. to extend court's deadline for session, must get the assigned judge's permission (ADR L.R. 6-5).

- C. Remember: you are the "guardian" of the mediation process and owe it to the parties to use your best judgment to ensure that the session is effective and worthwhile.
 - 1. Make certain that you are comfortable that the parties and attorneys attending are the individuals required by the rule and that they are the individuals who will ensure that the mediation session is productive and has a chance to lead to resolution.
 - 2. If a party wants to participate by phone and you believe the likely result would be an ineffective mediation session, then say so.

VI. STATEMENTS (ADR L.R. 6-7 and 6-8)

- A. Content
 - 1. You might modify/add to requirements of ADR L.R. 6-7 (c) based on your discussions above
 - 2. You may ask for a short discussion of specified legal issues
 - 3. Ask counsel to attach key documents (e.g., contracts, policies)
 - 4. Statements that are submitted to the mediator and served on all other counsel are mandatory under ADR L.R. 6-7. Additional confidential written submissions are permitted under ADR L. R. 6-9.
- B. Confirm due date -- ADR L.R. 6-7 requires statements 7 days in advance of the mediation session. You may shorten the time if you wish.

VII. PAYMENT

- A. Explain usual payment rule
 - 1. You will provide your preparation time and the first four hours free of charge.
 - 2. Tell them whether you will charge the court-set rate of \$300 per hour for the next four hours of session and your regular hourly rate for time after 8 session hours.
 - 3. Parties are under no obligation to continue once the *pro bono* time is exhausted and should not be pressured to do so.

- B. In complex cases that require extensive preparation, beyond the normal couple of hours, Rule 6-3(c) allows you to request a reconfiguration of the allocation of your *pro bono* hours if the parties agree and the arrangement is approved by the ADR legal staff.

VIII. PREPARATION

- A. Discuss how much preparation you expect and how detailed the substantive presentations should be
- B. Consider whether it makes sense to encourage parties to agree to specified, limited disclosure or discovery before the session
- C. Suggest specific preparation by counsel of their clients:
 - 1. Identify clients' interests, not just their positions, and consider how these interests could be met
 - 2. Anticipate other side's interests, and consider how these could be met
 - 3. Analyze best and worst alternatives to a negotiated settlement
 - 4. Analyze strengths and weaknesses of case
 - 5. Review estimated budget to litigate the case through trial
 - 6. Prepare clients to participate, and explain procedures (show clients ADR Booklet pp. 14-16 or ADR L.R. 6)
 - 7. If you believe it is appropriate, encourage the attorneys to prepare a negotiation plan with their clients, to include
 - a. Their target number(s) and estimate of the other side's target number(s);
 - b. Potential opening offer(s) and estimate of the other side's opening number(s);
 - c. Their "bottom line" number(s) and estimate of the other side's "bottom line" number(s); and
 - d. Their negotiation strategy for moving from their potential opening offer(s) toward their target number(s).
- D. Bring key documents/evidence/photos, as appropriate

IX. CONCLUSION

- A. Schedule further calls as appropriate, either with all counsel or separately,
- B. Make certain none of the participants has any final questions.
- C. In your own style, encourage the participants to take the mediation seriously to come prepared to enter productive negotiations.
- D. In your own style, remind the participants that because there is a conflict serious enough to lead to a lawsuit, it is likely that any negotiations attempting to resolve the conflict will be challenging.
- E. Express your optimism that with thorough preparation and willing participation, it is possible to resolve even the most difficult case through mediation

COGNITIVE TRAPS AFFECTING RIGHTEOUS INDIGNATION

1. NAÏVE REALISM

We overestimate the degree to which others share our perspective, that is, we think that everyone sees the world through the same lenses as do we.

We have great difficulty conveying information with which we are very familiar to those for whom the information is not familiar; we assume they understand what we are saying when they do not.

When our efforts to persuade others of the merits of our position fail, we are likely to conclude that the others are unreasonable, biased, and driven by improper motives. The more the others disagree with us, the more we believe they are displaying bias.

2. PERSPECTIVE BIAS

We evaluate the strengths of our own case more favorably than would a neutral person; once we take on the role of adversary we believe in the correctness of our position.

3. OVERCONFIDENCE & OTHER POSITIVE ILLUSIONS

We overestimate our ability to control outcomes that are determined by factors beyond our control. As negotiators we believe that we are more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than our counterparts. 90% of us believe we are of above average intelligence.

4. CONFIRMATION BIAS & BIASED ASSIMILATION

We seek information that confirms rather than discredits our own views. We assimilate data in ways that are consistent with our pre-existing views.

5. FUNDAMENTAL ATTRIBUTION ERROR

We credit ourselves with good motives even in the face of our own bad behavior, (“I forgot to take out the trash”), while we attribute bad motives to others in the face of the same behavior. (“You’re always shirking your responsibilities”)

6. SELF-SERVING BIAS

We take personal credit for our successes and blame our failures on the situations in which they occurred.

7. IRRATIONAL ESCALATION OF COMMITMENT

We tend to escalate our commitment to an initial course of action, even if the course of action is not working. In the face of evidence to the contrary, we commit more resources to the course in the hope of a better outcome.

8. THE BIAS BLIND SPOT

While we tend to be willing to believe that others' views and behaviors are influenced by a myriad of influences, we are reluctant to accept that the same factors are at work in ourselves.

9. TRIBALISM

We both empathize and co-operate with those we perceive to be in our "in-group." We have difficulty empathizing and co-operating with those we perceive to be "out-of-group."

10. STEREOTYPING

We have basic knowledge structures that define our expectations about how the world operates, called *schemas*. *Schemas* fill in gaps in information and help us make inferences and judgments. *Stereotypes* are schemas that categorize people. Stereotypes consist of beliefs - favorable or unfavorable - about the characteristics of members of particular groups. We are likely to hold unfavorable, negative stereotypes of those we perceive to be "out-of-group" and positive, favorable stereotypes of those we perceive to be in our "in-group."

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**When Parties Are
Righteously Indignant**
*Mediator Tools Derived
From Fee-Shifting Cases*

U.S. DISTRICT COURTS FOR THE EASTERN & SOUTHERN DISTRICTS OF
NEW YORK
OCTOBER 25, 2013
CLAUDIA BERNARD & HOWARD HERMAN

Agenda

- Introductions and overview of workshop
- Demo – righteous indignation
- Discussion – forms, consequences and contexts of righteous indignation
- Understanding the righteous mind
- Mediator tools for working with parties
- Mediator tools for working with yourself



Core Concerns

1. Appreciation
2. Autonomy
3. Affiliation
4. Status
5. Identity
6. Fairness

Adapted from Dan Shapiro

Righteousness Defined

- Arising from an outraged sense of justice, morality or fair play

Self Righteousness Defined

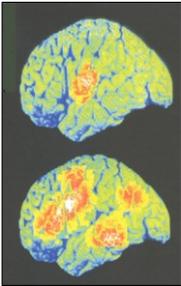
- Being convinced of one's own righteousness
- Especially in contrast to the actions and beliefs of others
- Being narrowly moralistic and intolerant

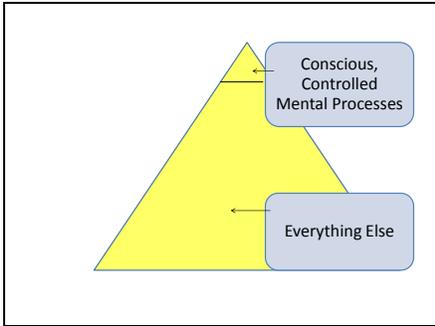
Understanding the Righteous Mind

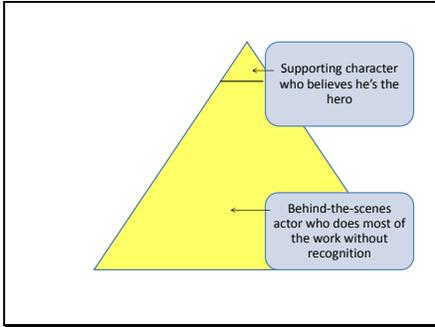
Our Divided Brain

New Brain: Conscious, controlled thought

Old brain: Emotions, intuitions, observations, gut feelings









The Rider: Conscious, Controlled Thought

<p>Tasks</p> <ul style="list-style-type: none"> - Long term thinking - Planning - Analysis - Language - Self awareness 	<p>Weaknesses</p> <ul style="list-style-type: none"> - Slow - Lazy - Doesn't believe in the elephant
--	--

The Elephant: Everything Else

Tasks

- Emotions
- Associations
- Automatic Processes
- Intuition
- Internal Cohesion

Weaknesses

- Is Not prone to doubt
- Suppresses ambiguity
- Creates a coherent story at all costs

Two Cognitive Systems

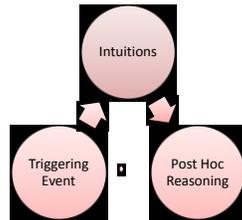
The Elephant

- Uncontrolled
- Effortless
- Associative
- Fast
- Unconscious
- Efficient

The Rider

- Controlled
- Effortful
- Deductive
- Slow
- Self Aware
- Consumes Energy

Intuitions Come First, Strategic Reasoning Second



Speak to the Elephant first!



Mediator Tools

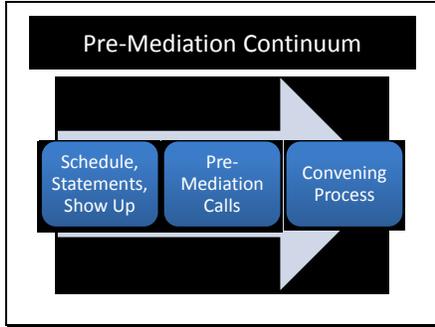
For Working with Self-Righteousness

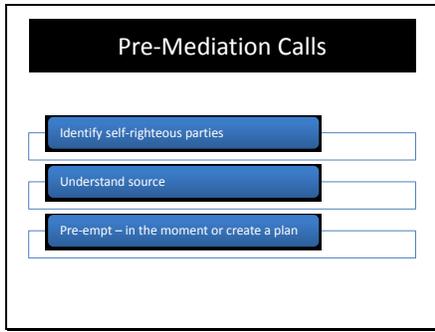
Working with Righteousness

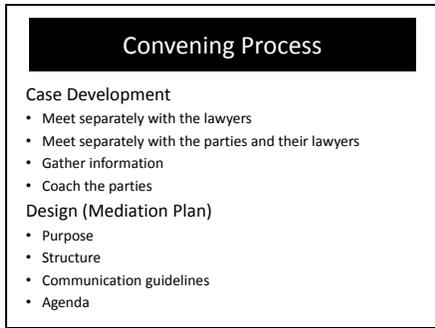
Pre-Mediation Process

Interventions for Lawyers & Parties

Managing Our Internal Responses







Interventions

for Parties and Lawyers

Mediator Tools for Dealing with Righteously Indignant Parties

-  Empathy
-  Mood
-  Normalization & Humanization

Empathy



Empathetic Practices

- Understanding
- Kindness
- Connection
- Respect

Mood



Effects of Good Moods

- Broadens cognition
- Widens attention
- Encourages flexible, creative thinking
- Increases ability to cope with adversity

Contagion Effect

- Happy moods of others influence us to cooperate more and engage in conflict less
- Happiness signals trustworthiness and willingness to cooperate

How Emotional Contagion Works

More Contagious	Less Contagious
<ul style="list-style-type: none">• Unpleasant Emotions• Leaders• High Energy	<ul style="list-style-type: none">• Pleasant Emotions• Followers• Low Energy

Normalization & Humanization



Mediator Tools

for Working with Yourself

- Tools for Working with Yourself
- Develop Self Awareness
 - Cultivate Non-reactivity
 - Know your emotional triggers
 - Replace judgment with curiosity



*If you want others to be happy, practice
compassion. If you want to be happy, practice
compassion.*

Dalai Lama

IMPLICIT BIAS

PRESENTED BY:

JUDGE JEREMY FOGEL
FEDERAL JUDICIAL CENTER

KATHLEEN SIKORA

Thank you for attending

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