Faulkner and Reaching Higher in Today's ADR World

"Always dream and shoot higher than you know you can do. Do not bother just to be better than your contemporaries or predecessors. Try to be better than yourself." – William Faulkner

BY PEGGY FOLEY JONES

When I started at Giffen & Kaminski nearly 10 years ago, the best advice that I got was from my law partner, Kerin Kaminski. She gave me a brochure for an advanced mediation training seminar being put on by ABA in Toronto, Canada. *Why would I need **that,*** I thought? I was a Common Pleas Judge for 12 years; I knew how to "mediate" a case. Boy was I green behind the ears! That seminar changed my life. I met an amazing faculty and ADR practitioners like Tracy Allen and Professor Lela Porter Love who taught me techniques and skills that maximize opportunities for settling cases.

So I want to pay it forward and encourage you to take the time to attend skills training in your area of expertise, whether that is the CMBA, ABA, DRI or OSBA. Just do it! You will meet remarkable, experienced practitioners who will enhance your skills and make you better at what you do. And perhaps, along the way, you too can impart your knowledge to someone or join a section or committee that will expand your horizons and increase your networking opportunities.

This Spring, I attended the ABA's Section of Dispute Resolution's Annual Conference in NYC. Over the course of four days, the attendees could pick from over 100 programs put on by leading scholars and ADR practitioners from all over the world. Here are some interesting concepts that I learned about in three of the most impactful sessions.

1. "The science of making better decisions"

As hard as it is to get up early after a night out in NYC, I am so glad I got up to hear Professor Francesca Gino speak at 8:00 am about "The Science of Making Better Decisions." Wow! Professor Gino is a professor of business administration in the Negotiation, Organizations & Markets Unit at Harvard Business School. (Gino's full bio is available at www.francescagino.com) Her research focuses on judgment and decision-making, negotiation, motivation, productivity, and creativity.

According to Professor Gino, our brain is hard-wired to make decisions and we need to understand that wiring and become architects of the context of our decisions. She stressed the importance of recognizing the limitations in the way we make decisions and that, by changing the psychology of making decisions, we can be more successful in our professional and personal lives. By way of example, she talked about an experiment that was done to look at consumers' behavior in completing a car insurance form. The result of the experiment was that, on average, by moving the customer's signature line from the bottom to the top of the form, there was a 2,400 mile difference in mileage claimed on new policy forms.

"What does all this have to do with mediation?" you may ask. My takeaway from Professor Gino is that we as mediators and attorneys need to understand the psychology of how parties make decisions. People are more thoughtful in making a decision if they are reminded of the importance of the decision they are making. Also, there is so much more to settling a case than just talking about money. Mediation is about understanding the parties' emotions and needs, and as suggested by Professor Gino, offering them something that will be helpful to them other than just money. You can learn more about the "science of making better decisions" by visiting Professor Gino's website at http://francescagino.com/judgment-decision-making-negotiation.

2. Venting in Mediation: Helpful or Harmful

Another session I attended at the conference was "Venting in Mediation: Helpful or Harmful?" This seminar focused on examining evidence from neuroscience and psychology as to whether venting can be either helpful or harmful in the mediator setting. I believe parties oftentimes use the mediation process as their "day in court" and it is my experience that expressing their emotions or venting is beneficial to the process; however, I learned that not everyone agrees with me on this.

Martha K. McClintock, Ph.D., the David Lee Shillinglaw Distinguished Service Professor in Psychology at the University of Chicago, discussed a number of studies that focus on the problems of venting negative emotions. One such study challenged the catharsis theory (a popular theory that venting one's anger will produce a positive improvement in one's psychological state). The researchers compared whether distraction or rumination works better to diffuse anger. In this study, angered students hit a punching bag and thought about the person who angered them (rumination group) or thought about working out in order to get in physical shape (distraction group). After hitting the bag, the participants reported how angry they felt. The conclusion was that people in the rumination group felt angrier than did people in the distraction group. Also, the study found that doing nothing at all was more effective than venting anger. ("Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger and Aggressive Responding." Brad Bushman, Iowa State University.)

In another study examining how people process negative emotions, it was suggested by Professor McClintock that focusing on one's negative feelings and their causes increases stress and anger. The better approach is to "self distance" the individual from the negative emotion and focus on the reasons underlying the emotions, rather than focus on what was experienced. ("When Asking 'Why' Does Not Hurt. Distinguishing Rumination From Reflective Processing of Negative Emotions." Ethan Kross, Ozlem Ayduk, Walter Mischel.)

3. Dispositive Motions in Arbitration: When to File and When to Hear them

When I started as an arbitrator 10 years ago, there was reluctance among my arbitrator colleagues to hear and grant dispositive motions. Some of the reasons for the concern back then were: 1) arbitration was supposed to be an efficient and expedient process and dispositive motions delay the hearing date; 2) AAA and ADR providers did not have rules authorizing arbitrators to consider motions; and 3) there is always the concern that granting a motion may make the award vulnerable to being challenged in the courts. However, times have changed and now there is a trend for dispositive motions being filed in arbitration.

Neither the Federal Arbitration Act ("FAA"), nor the Uniform Arbitration Act ("UAA") expressly provide for dispositive motions. However, AAA Commercial Rule No. R-33 and AAA Employment R-27 provide that an arbitrator may allow the motion only if the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case. See also JAMS Comprehensive Rule No. 18 and FINRA Code of Procedures for Customer Disputes Section 12206 and 12504.

There is also legal authority for the arbitrator's authority to now grant summary judgment motions. *Sherrock Brothers, Inc. v. Daimler-Chrysler Motors Co., LLC*, 260 Fed. Appx. 497 (3rd Cir.2008). Under the FAA and AAA Commercial Rules, the arbitrator did not deny a party a fundamentally fair hearing by basing the arbitration award on a motion for summary judgment. *Brooks v. BDO Seidman, LLP*, 31 Misc.3d 653, 917 N.Y.S.2d 842 (2011) (Confirming an arbitration award that rendered summary judgment and rejecting the argument that rendering summary judgment on the merits constituted arbitrator misconduct); *Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 6th Cir. No. 99-3322, 2000 U.S. App. LEXIS 1909 (Feb. 8, 2000) ("Arbitration may proceed summarily and with restricted inquiry into factual issues.")

There was a lot of discussion and disagreement among the attendees at the conference on dispositive motions. Some of the commercial arbitrators stated that they would never allow parties to file a dispositive motion because it delays the proceedings and increases the parties' costs. Many of the arbitrators in employment matters felt that because there is almost always a factual question in employment arbitrations, they would never allow a summary judgment motion to be filed. Another issue that was addressed was whether the arbitrator should have the motion submitted on the briefs only or also allow an oral argument. And should the arbitrator schedule an evidentiary hearing if requested by the non-moving party? A good reference for advice on issues that arise in arbitration is The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, 3rd Edition (2014).

In conclusion, attending an ADR conference made me a better mediator and arbitrator — and it will do the same for you. The conference introduced me to practical, interesting perspectives from experts across various disciplines, all of them grounded in research and experience. Learning from those perspectives has made me more thoughtful in asking questions so as to diffuse anger and emotions, while I continue learning how to be a better listener.

The ADR conference experience is transformative and the information gained and discourse heard are empowering. Now, let me empower **you**. Consider attending a skills training conference and expand your horizons even more, for in the words of Faulkner, you can "always dream and shoot higher than you know you can."

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