

THE INTERVIEW

A CHAT WITH SIMEON BAUM

By Gary Shaffer



Simeon Baum

On the year's most quiet Monday, December 23rd, just before the Christmas/Winter break, I sat down with Simeon Baum to discuss his career and his ideas about mediation.

Simeon is well known as a long-standing leader in the effort to expand mediation.

He was the founding chair of the New York State Bar Association's Dispute Resolution Section, has trained State Supreme Court Commercial Division mediators for many years, and is President of Resolve Mediation Services, Inc. (www.mediators.com) in Manhattan. He has conducted over 1,000 mediations over the last 22 years, including a number that have hit the press. Among them is the Libeskind-Silverstein dispute over design fees for the Freedom Tower, as part of the master plan for rebuilding the World Trade Center; a billion-plus dollar dispute between Trump and Vornado over the Penn Yards buildings on the West Side of Manhattan; and the recent shareholder battle over Archie Comics. He has taught ADR for years at Benjamin N. Cardozo School of Law, and has twice been named "Lawyer of the Year" for ADR or Mediation in New York City by the Best Lawyers' listing.

We thought it would be interesting to speak with Simeon, who is known particularly for mediating commercial and a broad range of disputes, but not as a matrimonial mediator. We hoped that his perspective as one who has written, taught, and trained hundreds of mediators over the years, could be of interest, and possibly generate fresh thoughts, for matrimonial mediators.

Among his writings are a chapter in NYSBA's book, *Definitive Creative Impasse Breaking Techniques*, provocatively entitled, "The Technique of No Technique: A Paean to the Tao te Ching" and a chapter in *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers* (2011), entitled, "Hawking Our Wares in the Marketplace of Values — Sell Quality, Not Cost, When Promoting Mediation; The Interplay of Global Norms of Justice and Harmony in the Mediation Forum." From these pieces, and from his trainings — and as further explicated in our discussion — we see that Simeon draws upon the Taoist tradition and other long-standing religious traditions and cultural resources for insights helpful in mediation.

What ensued when I sat down with Simeon was a discussion reminiscent of "My Dinner with Andre." Given the length of our talk, his responses to some of our core questions are summarized and excerpted below.

What attracted you to mediation as a career?

Well, that's a rather long answer and actually goes back to a time, roughly 45 years ago, when I was in 10th grade, at what was then called Horace Mann School for Boys. Horace Mann was an intense, and highly competitive, place, although I did not realize it at the time — just as fish might be unaware of the water in which they swim. As a 15 year old, I simply took it for granted that that was just the way things were. But during my sophomore year, I had an English class with Tek Young Lin, who turned out to be one of my greatest influences. Mr. Lin was born in China, and in addition to teaching English, he was the cross-

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country coach, and the school gardener. Mr. Lin had us read the *Tao Te Ching*, which has influenced me ever since.

Our history teacher — believe it or not, named Bill Clinton — had us read it again in 12th grade, and I carry it in my briefcase to this day. Indeed, I read a random passage before every mediation, in part to remind me — despite the massive preparation and questions I have developed and the parties' and counsel's expectations of me — that the mediation is not about me. It is a reminder that we are participating in something much greater, and that we make most headway by letting it happen.

Core messages I drew early from the *Tao te Ching* included the idea that there was an alternative to competition, where one was always driving to be best, proving one is right, excelling against others. These, of course, have their value — both as promoting survival, and more, and in generating good for oneself and even others. Yet, the *Tao te Ching* presented an alternative. In place of competition, one could consider cooperation, accommodation, and even, at times, avoidance of conflict. There was the value of yielding, which could have the strength of flexible bamboo. There was a value symbolized by water — taking the low places, benefiting all, adjusting to circumstances. It represents humility, but also has the quality of neutrality (even its pH level, which balances acid and base, or HOH), and of being life supporting. Rather than standing apart or acting on things, the *Tao te Ching* opened the possibility of seeing oneself as harmoniously and naturally participating in a greater

whole. In place of absolutes — good and bad, win and lose — there was a recognition of the mutual dependence of these concepts, of forming a complementary whole. There was a reality beyond what is captured in words and concepts. And, very significantly, there was a comfort with silence and with deep listening. There were also values of simplicity, not going overboard, and deep love.

First in high school, and then in college, I also started exploring contemplative traditions and practices. Seeing Len Riskin and others teaching the value of mindfulness over the last decade, resonates with my own sources of influence, experience, discipline and reflection. All of it created the foundation for my entering mediation.

Can you say something more about how you continued this pursuit in college?

At Colgate, where I studied philosophy and religion, I had the good fortune of finding an excellent advisor early on in Dr. John Ross Carter. Dr. Carter was a Southern Baptist minister who had studied at the Harvard Divinity School and was a professor of Buddhist Studies. Dr. Carter had a profound influence on my world view and I could go on about him for some time.

So what did you learn from Dr. Carter and how does it relate to mediation?

The most influential ideas and approaches related to the comparative study of religion. In the early phases of inter-religious studies, there was a tendency to characterize others according to an outsider's own world view. Often, the comparative study focused on

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competing truth claims. Dr. Carter, as a student of Wilfred Cantwell Smith, recommended a different approach. First, he presented a humanistic view, with truth sought not outside, but within persons. Persons were seen as a locus of truth. Second, rather than take an "us/them" approach, he proposed, "we", emphasizing our common humanity and acknowledging the limits of knowledge. Rather than reifying "religion" — seeing it as a great something — he substituted two concepts: tradition, meaning the empirically ascertainable, including writings, beliefs, rituals, practices, etc.; and faith, which is more subjective and reflects one's orientation toward self, world, others, and which has a transcendent quality. In place of using the Aristotelian "either/or" in an effort to choose which tradition was "right", he suggested using "both/and." He encouraged us to act with disciplined self-consciousness when studying traditions other than our own.

All of this disposed me toward an approach of openness and exploration, rather than looking to "get it all together." You might imagine how this fit with law school and legal practice.

Indeed. So you must have taken those teachings and run right to law school.

Hah, not exactly. Dr. Carter arranged for year and a half master's program for me, which involved my going to Japan and writing a thesis about a Zen temple called Myoshinji, which translates as "Marvelous Mind Temple." After that I had to face

what to do next. Particularly in the area of religious studies, I was uncomfortable with an "ivory tower." I also was uncomfortable with the risks of "publish or perish" and being dependent on an institution. I actually thought of becoming a Rabbi and then getting a Ph.D. in Buddhist studies, taking the approach of a participant in one living tradition in dialogue with another. But I was not sure I could be comfortable representing a tradition and having my job tied to ideas that might in the future change. My grandfather, whom I admired, was a trial lawyer. So, from the time

I was 5, I had figured I would be a trial lawyer. Law seemed interesting, and not stuck in one industry or another. That was before we became so specialized. While writing my Master's thesis, I concluded that I would like to keep involved in "real life" problems and take the skills of the comparative study to help people work out resolutions despite conflicting or differing values. In retrospect that is not so different from what we do as mediators, though it's clear now how my understanding of the legal profession back then was somewhat off the mark.

"I read a random passage from the Tao te Ching before every mediation, in part to remind me that the mediation is not about me."

What did you think of law school, given the background you've described?

While stimulating in some ways, after seven years of studying contemplative traditions, I found legal thinking confining. I was never fully engaged by the Aristotelian either/or world of winners and losers, affirmation and rejection, that is required by legal decision making. I am sure there is a good reason for it, but it seemed to me a flat system of rights and duties. I wondered if there weren't another way to capture the

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living reality of the litigants' situations, so they could create solutions that were in harmony with the reality of change and their actual circumstances.

But aren't there times when that's just not possible? Take, for example, the passage of the civil rights laws in this country. The Jim Crow laws were not going to be disbanded because people saw the light. Or look how Title IX opened the door for women in sports. Sometimes law can actually lead the way by forcing people to do what they might not otherwise do on their own.

Absolutely. Law can certainly be a positive force for change. Of course the civil rights laws found supporters because a sector of the public that had already changed its views were clamoring more openly for change, and thus emboldened legislators to develop these new laws. On the flip side of change, law is also essential in helping us organize social relations and create a safer place, where there is needed predictability. For example, commerce flourishes because we can rely on contracts. Property rights keep one's family free from strangers breaking down the door and sleeping in one's bed.

Given your ideas about conflict, did you choose an area of law that didn't focus on conflict and judicial resolution?

I went directly into litigation. Now it turned out that litigation could be exciting, had good stories, and offered a chance for interesting human interac-

tions in depositions, motions, jury selection, and trials in particular. As we know, it was also painstakingly slow in discovery, costly, past oriented, and adversarial. It also required fitting facts into a rubric that did not exactly represent the color, dynamism, living subjectivity, and nuance of reality. I did 10 years of tort defense, commercial, and re-insurance litigation. Ironically, those ten years proved to be extremely good training for what I did after that.

And what did you do after ten years?

"The most influential ideas and approaches about mediation related to the comparative study of religion."

Sometime around 1991 I saw a blurb in the *New York Law Journal* about a mediation program that was beginning in the U.S. District Court for the Eastern District of New York in Brooklyn. I was accepted into the program, and joined the Southern District [in Manhattan] panel shortly after that. I remember my first trainings, with Margaret Shaw, Cathy Cronin-Harris, Linda Singer and Michael Lewis. I felt as if what I had been thinking all through law school and during the previous 10 years of legal practice, was being expressed by these trainers. Litigation is a tortuous process designed to generate a winner and loser, shaped like a pyramid as the decision point is approached. Mediation, on the other hand, offered a big open space, where there was a legitimate place for wonder, ambiguity, and uncertainty. It was a process where emotion and values would not be deemed immaterial or irrelevant. It was a zone of freedom, not coercion.

I still vividly remember my first mediation, a case involving a somewhat well-known entertainer

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who claimed to have been fraudulently divorced. It proved once again, as all mediators know, that fact is stranger than fiction. I had just spent 3 1/2 years litigating one big reinsurance case generating \$1,000,000 in fees, bickering over boxes of half a million underwriting, actuarial and claims files. Now, in just 3 1/2 hours, an interesting case was resolved. Plus, in those days, the counsel sent glowing letters of gratitude to the Court. I was hooked.

In a providential moment, I learned that a friend had just left his firm and needed help. He had overflow work and an extra office. I worked with him and eventually built my own legal practice to support my family while I built a mediation practice. I developed a five year plan, the gist of which, in the early '90s, was to find someone who would pay me to mediate by the end of 5 years. I joined Bar committees, put together CLE panels, did some writing, joined mediation panels, and mediated as much as I could. Eventually, it led to teaching at NYU and Cardozo, service on court system ADR advisory groups, taking greater leadership roles in the Bar, and training mediators. I also got the www.mediators.com domain name for my website, a benefit of an early start in the field. The hope was that pro bono mediations would generate repeat users. Little by little, my practice grew.

You mentioned that you thought your litigation experience was in fact very useful for mediation. How so?

On the surface, that may seem contradictory, given the potentially collaborative nature of the mediation process and the need to create a safe forum for people to explore alternatives and be creative in deal making. Still, litigation gives one an understanding of the court process. This can be useful when engaging in risk analysis and transaction cost analysis. As a

practical matter, being a former litigator can also give one credibility with the parties and counsel. That, too, can be useful.

Most of the people reading this are divorce mediators. Since divorce mediation is such a popular area of practice, how come you decided not to do divorce mediation?

Candidly, I was concerned about my tendency to seek reconciliation, and that I might wish to bring parties back together again. I am sure they generally do not come to a divorce mediator for that service!

What do you think would be essential to know or learn before serving as a divorce mediator.

Well, I am guessing it would help to know the child support guidelines, to have a better sense of the nuances of custody arrangements, and to have more knowledge of tax law. I certainly don't know how to do a QDRO.

[Laughter] Simeon, no one knows how to do a QDRO. At every CLE course on divorce mediation, there's ten minutes on what a QDRO is, followed by a list of firms that handle QDROs.



Simeon Baum and Gary Shaffer (right) look at a picture of one of Simeon's daughters' soccer team.

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Have you ever done a divorce mediation?

I've actually done three, under special circumstances, but that was out of over 1,000 mediations. Plus, I have done a number of same-sex dissolutions. That was a very interesting area, particularly before there was any law permitting gay marriage. As an uncharted area of law, it required application of bits and pieces of legal concepts, claims and processes, and also creativity by the parties in developing values and arrangements. Typically, for some reason, in my experience, the parties in these matters also had business arrangements to unwind. It felt like a special service mediation could provide, where the law was silent.

There are several different schools of mediation – among them: Facilitative, Evaluative and Transformative. There is also the Himmelstein/Friedman Understanding-Based Model. Do you feel you fall into any particular camp?

Not really. Lori Matles, an employment mediator, had a good phrase: the 360 degree mediator. I think a good mediator needs to connect with the participants and have a high degree of awareness, empathy and sensitivity. One needs to be very attentive, responsive, receptive, and flexible, and not interfere too much, though as I said earlier, that doesn't mean being passive. Barry Berkman has said that being neutral doesn't mean you're not on one side. It means you're on everyone's side. In trainings I emphasize facilitative approaches because I identify with their core values: non-coercion, party lead, openness, flexibility, and helping others help themselves. Nevertheless, there are times when I will put in my two cents if I think it seems appropriate, devel-

ops rapport, or can help the parties see freshly and reach a resolution.

How have your ideas about mediation changed over the past 22 years?

I have to confess that in the most essential ways, my ideas about mediation have remained constant. I suppose the greatest change is that, over time, I have been a bit more open to giving evaluative feedback. But it is always dependent on having first encouraged the parties to participate in a process in which I am a facilitator and they are the stars. I still believe, but have grown clearer, that the mediator helps create the atmosphere, connecting with everyone through the mediator's presence, sending the core message: we are all in this together; we are all persons of good will and capacity, and we are working together towards resolution. This is done with every pore of the mediator's body.

Do you mediate cases differently now than you did 20 years ago? If so, how?

Well, I used to really use silence. I still do, but possibly I do a bit more talking. I am not sure whether this is a good development. I do think that sometimes one communicates genuineness through active participation, just the way disclosure by one party can induce disclosure by another party.



Gary Shaffer and Simeon Baum

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Mediation has been the next best thing for many years now, but overall a very small number of cases are mediated. Why do you think that's so and what do you think can be done to expand the use of mediation?

I actually think that the use of mediation has grown tremendously over the last 20 years. And it continues to grow. We see mediation in all areas of practice: securities, real estate (landlord/tenant), construction, insurance and reinsurance, first and third party matters, intellectual property, environmental matters, a wide range of tort claims, commercial matters, unfair competition, trusts and estates, employment — you name it. And I have mediated in all of these areas. Primarily, I think it is a function of time and acculturation. I think use of mediation will continue to grow. One countervailing force, which is a good thing, is that as the collaborative law or the "new civil lawyer" culture spreads — and as litigators continue to settle cases and to have experience in mediations — there should be an increase in lawyers' belief that they and their clients can arrive at a resolution themselves, without the need of a neutral third party. If we encourage more use of effective negotiation, that would be a wonderful by-product of the growth of mediation.

What do you think about court ordered mediation?

That is a good point, Gary. I do think court-ordered, or court-annexed mediation has been a major cause of the growth of mediation. I support manda-

tory mediation, as long as the parties are getting a real mediation process. I recall when letters to the Court saying "we came in kicking and screaming, but thanks to the good efforts of the mediator, we left with a deal." Mandatory mediation does lead the horses to water. Once they are there, quite a good number of them drink. Folks see that this is a great opportunity. With the mediator's encouragement, they take advantage of that opportunity.

"I was concerned about my tendency to seek reconciliation, and that I might wish to bring divorce mediation parties back together again."

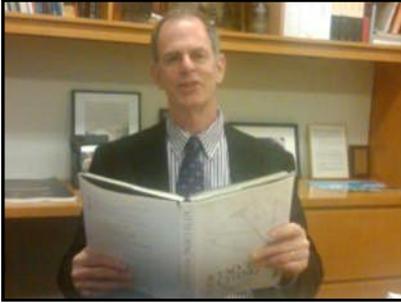
It is important, though, in most instances, to preserve a wall between the mediation and the court. Providing a "real mediation" means giving the parties a process where party self-determination and non-coercion by the mediator are paramount. It includes giving the parties and counsel confidence that their communications will be kept confidential. They need to trust the mediator and the process.

What changes have you observed in the mediation field since you began to practice?

It has become a more "normative" aspect of the legal field. Not only are more people engaged in it, but we now see the growth of mediation clinics in law schools and bar association committees that provide a forum to discuss ADR issues and can present quality CLE courses.

If you were going to choose five books for a mediator to read, what would they be?

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My top by far would be the *Tao te Ching*, which I consider to be the mediator's Bible. I assign this in my ADR

and Negotiation

classes and have used excerpts from it in the commercial mediation training that Steve Hochman and I have given for the last 18 years. This book towers over any others I might mention. After that, one that people might not otherwise consult is Martin Buber's *I and Thou*. I see it as a counterpoint to the Fisher/Ury, Harvard Negotiation Project books, such as *Getting to Yes*, *Getting Past No* and *Beyond Reason: Using Emotions As You Negotiate*, by Fisher and Shapiro. I see *I and Thou* as a corrective to Fisher, Ury and Shapiro's observations that being "soft on the people" and sensitively handling emotions aids in the creation of an environment for collaborative bargaining, which enables one to generate the best deal. These observations, while valid, are a bit utilitarian, in which kindness and respect are a means to an end. Buber helps us see a distinction between dialogue and negotiation. His message of the primacy of relationship to living a fully human life, involves a view of self as defined by standing in relationship, one whole person encountering another, and finding oneself in this relationship. These readings provide insights into self and interpersonal processes. Particularly with the *Tao te Ching* and Buber, they provide the opportunity for a shift in orientation that opens one to richer possibilities for living life and being human. And, to be utilitarian after all, the ensuing shift to empathy and understanding makes for a better mediator. Moreover, if we see mediation as a facili-

tated negotiation, the insights offered by the Harvard Negotiation Project books help the mediator grease the wheels of the parties' and counsels' negotiation.

What kind of training do you think is necessary for a person to become a good mediator?

Well, I have been training mediators for 18 years, so I should be careful what I say. Of course, I believe training is useful. People love role plays and exercises for good reason. They are fun and therefore memorable ways to be surprised, to learn, and to have opportunities for reflection. We can also model skills, like active listening or "looping" (a Himmelsstein/Friedman term), and we can prepare a context for mediation that enables the mediator to have a sense of what is going on and provide guidance where ethical or practical issues arise.

That said, I believe that character and orientation are paramount. People bring these with them into trainings. It is the result of their life experience, life choices, worldview, personal commitments, sense of the world and the nature of, and possibilities for, humanity. It includes whether one has values that might help in mediation, *e.g.*, patience, love, forgiveness, generosity, a sense of ethics, insight, energy, empathy, compassion, even sympathetic joy. I know this sounds like a lot — and might make one gag — but I believe you find many of these qualities in many of the most effective mediators. Mediators are, by and large, a fairly altruistic bunch. Is one comfortable not being in control? Can one be a participant without having to be the star of the show? Is one inclined endlessly to learn from and listen to others? There is so much that can be said for character, disposition, orientation. This is not the product of 40 hours. Rather, 40 years.

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What do you think the differences are between commercial mediation and divorce mediation?

It is tempting to say that matrimonial mediation is emotional and commercial is just about the money, but we know that is not the case. My colleague, Steve Hochman, asks during our trainings: in how many commercial mediations are emotions involved? And he answers: 100%, give or take. And, of course, there can be a heavy focus on financial issues in a good number of divorce mediations.

Still, commercial mediations generally involve deals which commenced with an interest in money, some sort of profit motive or desired financial return.

What advice would you give people in building a successful mediation practice?

My advice would be to do the things I described when I mentioned my five year plan earlier. For lawyer-mediators, get involved in ADR Bar groups. The NYSBA Dispute Resolution Section has had up to 3,000 members. It is a great place to get a sense of what is happening in the mediation field and

to be known as a mediator. Take leadership roles. Write. Take trainings and where possible, facilitate and learn to do trainings. Mediate as much as possible to get notches in your belt, even if it is for free. Read in the area. Find a source or sources of depth and inspiration, including, *e.g.*, developing a mindfulness practice or something that gets one in touch with what is happening within, and something that gets one clear on, and refreshes recognition of, one's values.

I believe that mediation is a process skill, and one need not be a practicing expert in the substantive area of the mediated dispute. However, users of mediation sometimes are looking for folks with expertise. So, one might take advantage of that for marketing purposes. If one has an area of substantive legal expertise and an accompanying network, let that network know that you are mediating. Attend meetings of that substantive group. Send out emails, do the blitz. Set up a mediation website.

While it is not as undeveloped a field as it was 22 years ago, I would add advice that I got from Margaret Shaw at the time: keep your day job. It still takes a long time to develop a mediation practice.



Gary Shaffer, a member of NYSCDM, is an attorney practicing mediation in Brooklyn. He also teaches Mussar classes and is currently President of The Mussar Institute. He can be reached at gary@shaffermediation.com and his website can be found at www.shaffermediation.com.

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