CHAPTER NINETEEN

THE TECHNIQUE OF NO TECHNIQUE: A PAEAN TO THE *TAO-TE CHING* AND PENULTIMATE WORD ON BREAKING IMPASSE

Simeon H. Baum, Esq.

Mediators and ADR aficionados love to discuss impasse. Transformative mediators remind us that fostering party empowerment and recognition—not settlement or problem solving—should be the mediator's driving purpose.[1] Still, we confess that for many of us, impasse remains a bugaboo. Those of us who seek to maintain and generate "constructive" discussion and even problem solving in a mediation aptly value the treasure trove of techniques and suggestions that can be found in a book like this one.

[19.0] I. TECHNIQUES

While recognizing the value of these suggested "how-to's," a compendium of impasse breakers for mediation is well served by a final corrective: the technique of no technique. About a dozen years ago, this author moderated a program titled "Impasse Breaking," hosted by the New York County Lawyers' Association. That night, four excellent, experienced mediators presented one technique apiece.

Professor Lela Love suggested that when the parties are snagged on one issue, the mediator can change the agenda. The parties can "pin" the frustrating issue for the time being, lifting a phrase from the entertainment industry, and shift to another potentially more workable issue. With a history of success behind them, they can later return to the troubling issue if, in fact, it has not dissolved or morphed into a more easily resolvable form.

Margaret Shaw suggested applying standards coupled with a transaction cost analysis. In her example, drawn from the employment context, one could derive a back pay number from considering the standard that would be applied by a court, and then compare it to the cost of litigation (which might be even greater).

Judge Kathy Roberts suggested use of the "mediator's proposal." While Steve Hochman develops this concept in his chapter within this compendium, Judge Roberts differed from Mr. Hochman by selecting "doability" as the standard for her proposal—is it likely to settle the case?—rather than fairness or predicted case outcome. This proposal generated a very interesting debate with Professor Love on whether use of a mediator's proposal distorts the mediation process. There were multiple concerns. First, Professor Love questioned whether it is even the media-

1 See, for example, Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994), which sets out this transformative manifesto.

tor's role to provide evaluative feedback or direction to the degree reflected in the mediator's proposal. Moreover, where parties have been encouraged to be candid, exposing case weaknesses and settlement thoughts in caucus, there is a question of whether they might regret that candor if it were now factored into an endgame solution. Conversely, if parties anticipate that there will be a "mediator's proposal," there might be excessive emphasis on spinning the mediator—whether it is with their thoughts on what might settle the case (in the doability model) or their thoughts on legal risks (in a case outcome or fairness model). Over time, its use could stifle candor and creativity. Overall, there is a risk that mediation would shift from partycentric to mediatorcentric. Rather than fostering party empowerment and recognition, or joint, mutual gains problem solving, using the mediator's proposal as the cherry on top of the ice cream sundae threatens to convert that open, fluid, meaningful, and enriching process into an alter ego of court or settlement conferences, where the mediator, and not the parties, is the star of the show.

Roger Deitz suggested use of a "ball and chain." He advises parties at the commencement of the mediation that there might come a time when they wish to leave the mediation. He extracts, *ab initio*, a commitment from each party that if that time arises, he or she will stay if so requested by the mediator. Considering that one of the most valuable services rendered by the mediator is keeping people at the table, this is a useful thought indeed.

[19.1] II. NO TECHNIQUE

At some point that evening, I had the opportunity to suggest the approach I raise here, terming it the "technique of no technique." The core point was that the greatest value a mediator brings to the table is not a set of skills or a bag of tricks; rather, it is the character of the mediator, and particularly the ability to communicate and engender trust. Cultivating trust in the mediator encourages the development of trust among the participants. Essential to this is the mediator's presence. The mediator brings a quality of open awareness that is expressed in all conceivable ways. It is not simply what the mediator says or does. It includes posture, bearing, tone of voice, eye contact, and the power of omission. It involves a sensitive awareness, deep listening, flexibility, and a genuine quality of connectedness or relatedness. The mediator models a mode of being with the parties that implicitly communicates a message. The silent message is we are all decent, capable people of good will who are all in this world together, and can work through this problem together. Underpinning this

message is the sense that there is a force in and embracing us that will work it out, if we persist and let it happen.

Now, this might sound a bit vague or even otherworldly. But the power of attitude cannot be overrated. This intuition finds support in two recent studies by Margaret Shaw and Stephen Goldberg. In a study they did in 2007 polling users of mediators with no judicial background, and in a more recent study they did with Jeane M. Brett, which included users of former judge mediators, they received responses from hundreds of lawyers on what made the mediator effective in moving a matter to resolution. The researchers grouped answers into three broad categories: (1) confidence-building skills (the ability to gain the trust and confidence of the parties), (2) evaluative skills (the ability to encourage agreement by evaluating a party's likelihood of achieving its goals in court or arbitration), and (3) process skills (skills by which a mediator seeks to encourage agreement, not including evaluative skills). By far, the greatest source of success of was confidence-building skills, with 60% of the responses identifying this quality. This was followed by process skills (35%) including patience and perseverance, with evaluative skills being the least significant (33%).[2]

[19.2] A. Attitude

A core takeaway from the Shaw-Goldberg studies is that trust and confidence is key to success in mediation. The highlighted attributes that build trust and confidence relate to character and attitude: "Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions"; "High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional." There are many traits and acts that can be identified. Yet, central to all, I would submit, is the fundamental attitude—call it the mediator spirit—described above, before our mention of this study. The point of using this type of term is to emphasize that there is something whole, something integrative, something at the heart of the mediator that cannot be divided, manipulated, juggled and parsed—a gestalt, to borrow from Fritz Perls[3]—that is essential to the mediator's power. That power, of course is the spe-

2 Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three,* 23 Negotiation J. 4, 393–418 (Oct. 2007). Confidence-building attributes included interpersonal skills of empathy, friendliness, caring, respect, trustworthiness, integrity, intelligence, the readiness to find solutions that comes with obvious preparation. Process skills included patience and persistence, good listening, and diplomatic tact.

3 *See, e.g.*, Frederick S. Perls et al., Gestalt Therapy: Excitement and Growth in the Human Personality (1951).

cial power that comes precisely from powerlessness. In place of judicial or other form of authority, might, or coercive force, is the quality of the mediator that fills this void. That is a power of trust—trusting and trustworthiness, cultivating trust in others. An attitude that values freedom and recognizes that the parties themselves are the valued decision makers. It is a letting go that brings with it the embrace of the whole.

The aspect of the mediator highlighted here affects atmospherics. It does not have to be showy. (Hopefully it is not!) But it makes a major difference in keeping people in the room. It supports communication and creativity. It communicates positive regard for the participants, reinforcing their willingness to continue what can be a difficult discussion.

[19.3] B. Non-Doing

A central point of the "technique of no technique" is not that the various approaches and methods are not valuable. They certainly are. Still, there is something perhaps more essential. There is a time-honored term drawn from China, *wu wei*, which can be translated as "non-doing." This loaded term can be found in the 2,500-year-old classic, the *Tao-te Ching*. If there is any text which could serve as the mediator's bible, my vote would be for this one. Attributed to Lao Tzu, there are hundreds of English-language translations of this seminal text in the Taoist tradition.[4] Discussing the meaning and philosophy of the *Tao-te Ching* and its application to mediation is a major topic that could support a book and is beyond the scope of this chapter. Moreover, there is certainly no intent here to persuade readers that one must adhere to a particular religious or cultural tradition in order to be an effective mediator. But, in *wu wei*, the

4 Two lovely translations of the *Tao-te Ching* are Stephen Mitchell, *Tao-te Ching* (Harper & Row 1988) (with broad poetic license) and Wing-tsit Chan, *The Way of Lao Tzu* (*Tao-te Ching*) (Prentice Hall 1st ed. 1963).

Taoists supply us with a very useful and suggestive concept.[5] One insight of *wu wei* is that sometimes one makes greater progress by not interfering with the activities of others. Rather, letting a course of events develop on its own, as it were, with patience, confidence, and open, accepting attention, can permit the being or event to develop as it should. *Wu wei* suggests stepping out of the way, rather than directing, controlling and manipulating events. To draw on an overused term, it suggests a holistic approach, where the mediator recognizes that larger forces are at play and permits, encourages or assists in their constructive movement.

There are many practical applications of "non-doing" with which we are all familiar. We all know that sometimes it makes sense to hold one's tongue. We all have experienced moments when, by letting someone struggle with a problem, we permit them to arrive at a solution which our intermeddling might have blocked. Our silence can permit a truthful expression or insight to develop in a dialogue that our speech might have stifled. Tact is based on non-doing.

[19.4] C. Stepping Aside

In negotiation, the negotiators have an inner drive towards resolution. They want a solution that will meet their needs. They have their own fears and concerns about legal outcomes. Moreover, extrinsic forces and circumstances support resolution. Costs continue to mount. All the forces of the business, legal, and broader community continue to operate and impinge on the players. Time ticks away. These things are already operating without our encouragement. Non-doing simply helps them find a way of expression, of recognition, and then of choices to take action to dissipate concerns and satisfy needs, to limit risks and reduce costs which no rational or even emotional actor genuinely wants to incur.

5 At least 10 of the 81 chapters (or quatrains) of the *Tao-te Ching* specifically recommend or observe the benefits of *wu wei*. *See* W.T. Chan, *The Way of Lao Tzu (Tao-te Ching)*, chapters 2, 3, 10, 37, 38, 43, 48, 57, 63 and 64. *Wu wei* involves action so integrated with larger reality that the actor is more like one participating in a dance to a universal tune. This actor does not claim credit (Ch. 2), and effectively lets things happen without imposing his will on them or taking possession of them (Ch. 10). This actor does not rely on her own ability (Ch. 2) and has a quality of tranquility (Ch. 57), simplicity (Ch. 48, 57), and softness (Ch. 38): "The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of *taking no action*." Some clues to *wu wei* are found in recommendations to pursue a "stitch in nine" philosophy—dealing with problems before they become too large—and fractionation—breaking down big problems into more workable component parts (Ch. 63, 64). The approach of *wu wei* implies a profound discernment of the power of spontaneous transformation (Ch. 37). To proceed with *wu wei* is to proceed with no *a priori* plan or purpose, and, at a minimum with a high degree of flexibility, sensitivity and adaptiveness.

The preceding examples are just a fraction of the meanings which can be drawn from *wu wei*. A classic image from the *Tao-te Ching* is water. It moves without effort or conscious force, finding the low places, from shape of terrain and force of gravity. The mediator's presence can similarly have influence, without any particular effort on the mediator's part. A handshake, a smile, a nod. We can point to these things and note what a difference they might make in reducing the interpersonal temperature in a room. Yet often, like leaves falling in autumn, they are simply a natural consequence of the mediator's overall character and nature—a character that is supported by disciplined self consciousness.

Continuing with the Taoist theme, while we are at it, we can take another example from *tai chi,* a martial art itself imbued with the philosophy found in the *Tao-te Ching*. We have seen tai chi players in the park, with their flowing, continuous, graceful movements. One component of that martial arts practice is "push hands." Push hands involves two players standing facing each other. As party A places his hands on the other's arm, party B senses the force. As party A presses, party B shifts direction and recedes, so that at no time does he confront or oppose party A's force. Party B, in turn shifts to press party A, who likewise shifts direction and recedes. The main objective in the execution of the four simple push hands moves of "ward off, rollback, press and push" is for the players to maintain contact throughout, forming a harmonious whole, with no more than four ounces of pressure building up at any time. While this practice can be used as a model of non-confrontation, the most significant point to be derived here is of continuous relatedness or connection.

Like a push hands player, the mediator preserves a gentle connection with all participants through the mediator's presence and broad, affirming awareness. The importance of this presence to preserving continuity of constructive dialogue cannot be underestimated. Just as, when things get knotty in push hands, the skilled player neither breaks away nor erupts with force, but maintains sensitivity and lets the form work itself out, so too, the mediator neither breaks off the session, nor necessarily rushes to caucus, nor desperately argues the parties into doing something. Most effective is gently remaining present, perhaps just waiting, listening

deeply, and sensing what is happening, what perhaps is driving this interaction, while also seeing the broader context.[6]

In one employment mediation, conducted a decade ago, an attorney complained that "the mediator did nothing; we settled it ourselves." Assuming the mediator was there throughout and supported continuing talks, staying out of the parties' way, this, too, is non-doing. It is well beyond the role of simple message bearer. One quotation from Stephen Mitchell's translation of the *Tao-te Ching* is apt here:

> When the Master governs, the people
> are hardly aware that he exists.
> Next best is a leader who is loved.
> Next, one who is feared.
> The worst is one who is despised.
> If you don't trust the people,
> you make them untrustworthy.
> The Master doesn't talk, he acts.
> When his work is done,
> the people say, "Amazing:
> we did it, all by ourselves!"[7]

6 With apologies to transformatives who assert that a mediator should maintain a microfocus—not seeking the "big picture"—this statement is made with a recognition that both ends of the microscope and telescope may reveal an opening to something that can move people from the snag of apparent impasse. But living with the impasse is the heart of non-doing. To quote mediator Barry Berkman (of the Himmelstein Friedman school), it is the "paradoxical nature of change" that change can develop when we recognize and accept the reality of a given situation—even of one that seems undesirable.

7 Stephen Mitchell, Tao-te Ching, Ch. 17. Here is Wing-tsit Chan's translation:

> The best (rulers) are those whose existence is (merely) known by the people. The next best are those who are loved and praised. The next are those who are feared. And the next are those who are despised.
> It is only when one does not have enough faith in others that others will have no faith in him.
> (The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow Nature.

Wing-tsit Chan, The Way of Lao Tzu (Tao-te ching), Ch. 17. Although both versions of Chapter 17 speak of the ruler's acting, it is noteworthy that this is seen as others doing it themselves or the ruler's just following Nature. *Cf.* citations in note 4, *supra.*

In 2010, Gerald Lepp, ADR Administrator for the mediation panel of the United States District Court for the Eastern District of New York, held an "ADR Cross Cultural Workshop" structured and facilitated by Hal Abramson of Touro Law School, with Dina Jansenson and Jeremy Lack as panelists. Professor Abramson presented a number of scenarios depicting cross-cultural misunderstandings and elicited suggestions from the audience/participants on how to correct them. At the end of this session, Dina Jansenson wisely observed that most of the time in mediation, the mediator will, appropriately, do nothing more than be aware of the dynamic.

There is much to be said for recognizing that often, less is more. We do not have to fix everything. Beyond this, silence itself is a tremendous force. As noted above, refraining from filling the void is often the greatest wisdom. It leaves space for meaning, creativity, and a host of valuable and significant expressions to emerge.

Professor Len Riskin made a splash in the mediation field in the mid-1990s with his seminal article, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed."[8] "Riskin's Grid," which created a typology of mediators ranging from evaluative and directive to facilitative, and from narrowly to broadly focused, fostered great debate on whether it was within the mediator's purview to conduct evaluations or to direct parties at all.[9] Since 2002, Riskin has embarked upon another groundbreaking path within the legal and ADR field: promoting mindfulness meditation.[10] Drawing on Buddhist Vipassana teachings, Riskin observes that disciplined practice of awareness of one's breathing, and of one's physical, emotional and mental states, can increase relaxation, calm, alertness, and sensitivity to others. He suggests that this can enhance the humane practice of the law and of dispute resolution.

8 1 Harv. Negot. L. Rev. 7 (1996).

9 *See, e.g.,* Kimberlee K. Kovach and Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997). Riskin's 1997 poetic rejoinder can be found online at: http://www.law.fsu.edu/journals/lawreview/downloads/244/riskin.pdf.

10 *See, e.g.,* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients,* 7 Harv. Neg. L. Rev. 1 (2002); Leonard. L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution,* 54 Journal of Legal Education 79 (2004); Leonard L. Riskin, *Knowing Yourself: Mindfulness,* The Negotiator's Fieldbook—The Desk Reference for the Experienced Negotiator (A. K. Schneider, C. Honeyman, ed.) (ABA Section of Dispute Resolution 2006).

Interestingly, I remember years ago reading about a Zen master who mediated a deadly dispute between warlords in medieval Japan. He remained calm, gave recognition to each party, identified interests, promoted a resolution that permitted the saving of face, and was detached from identifying with one side or the other. While, unfortunately, I have not been able to recover this reference, I recall that it struck me at the time as not insignificant that the practice of meditation supported this function. Profound awareness of self enhances calm and deep awareness of others. That, in turn, supports connection and presence.

The "technique of no technique" includes the suggestion that mediators not be stuck on any one technique or approach. In the ABA Dispute Resolution's *Negotiator's Fieldbook*, Peter S. Adler exhorts negotiators not get boxed into a single type defined by two pairs of opposites—moral or pragmatic, competitive or cooperative—but rather, remain flexible: the Protean negotiator. The same recommendation applies to mediators facing impasse. Definitely, we should peruse our bag of tricks. But, whatever our preferred strategy, style, or approach, we might be alert to the possibility that it makes sense, under the circumstances, to break the rules. Even the attentive, trust-generating, integral, flexible, supportive mediator—who modulates presence and relatedness—ought to be ready, at times to try one of the approaches recommended in this compendium.