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Client Science: Bad News and the Fully Informed ADR Client

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ADR Advocacy

Client Science: Bad News and the Fully Informed ADR Client

BY MARJORIE CORMAN AARON

Professor Aaron comments that this piece, excerpted from: “Bad News and the Fully Informed Client,” the first chapter of her book, Client Science, addresses the lawyer’s challenge when counseling clients where “bad” news—negative, pessimistic or unwelcome developments or analysis—must be conveyed, whether or not within an ADR process. “As a mediator of civil cases, I suspect that mediation involves a higher than average percentage of cases involving ill-counseled clients or ‘difficult clients’ who may fairly be characterized as ‘counseling-resistant’ despite the best efforts of skilled lawyers. When the lawyer explains ‘bad news’ about case developments or likely outcomes, he risks the client’s suspicion or accusation of less than zealous advocacy. While a mediator can assist with client communication when legal circumstances are grim, counsel are obligated to ensure their clients are well informed of realistic expectations when exercising autonomy and self determination.”

DIFFICULT AND TRICKY ROAD TO BAD NEWS DELIVERED WELL

On this less than sunny day, you represent a plaintiff facing a defense motion for summary judgment, and, in a different case, a defendant who wants

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desperately to obtain summary dismissal of a personal fraud claim against him. In both, you see a low probability of success based upon your thorough review of the evidence, recent case law, and the judge’s track record. You now strongly believe the plaintiff-client’s case will be lost on summary judgment and the defendant-client will face the fraud claim at trial. For both clients, you are not entirely optimistic about their chances of success at trial. You anticipate client anger, sadness, frustration, and resistance to this conclusion. When meeting with either one, your goals are that:

1. The client continue to *feel connection*, trust, and loyalty in his relationship with you, despite the bad news;
2. The client *fully understand* the bad news—your unfavorable conclusions, their basis in reasoned analysis, and how they impact his legal case and personal or business circumstances;
3. The client *maintain confidence in your competence*—the meeting would be unsuccessful if the client came to wonder whether a “better lawyer” would have reached a more favorable conclusion; and
4. The client continue to *believe you will zealously represent him*—the meeting would be unsuccessful if the client came to doubt whether you remain fully on his side and will fight for his cause.

If you are mindful and strategic, you can deliberately choose more effective ways to use your voice, order the presentation of bad news, difficult concepts, and unwelcome reasoning, and reduce client resistance to your message. This is not to diminish client choice: he is entitled to resist or reject his lawyer’s advice regarding what choice to make. However, that choice should come only after the client is

indeed fully informed and has fully integrated his lawyer’s analysis of legal realities.

INSIGHTS FROM COMMUNICATION SCHOLARS ON DOCTORS TO LAWYERS

Profoundly bad news, or even profoundly good news, with potentially life-altering impact, can cause us to experience a rupture in the fabric of our everyday lives. Professor Douglas Maynard, of the University of Wisconsin, whose research has focused on the social psychological impact of good and bad news, writes that these cause us to “experience a breakdown, however momentary or prolonged, which requires realignment to and realization of a transfigured social world.”

Professor Maynard and other scholars base advice to the bearers of bad news upon narrative data research primarily from doctor-patient counseling, but also to some degree from family, employment, and lawyer-client contexts. My experience confirms the value of that research and the wisdom of this advice. I offer the following specific suggestions for lawyers who, mindful of the obligation to fully inform their clients, seek to deliver bad news so as to strengthen, or at least, maintain the lawyer-client relationship, and facilitate client realization and acceptance.

1. Be prepared—make sure you have all important information and you are ready to articulate it, and know your own emotional responses. Know what your own emotional responses are likely to be.
2. Arrange for private, comfortable surroundings and an in-person conversation, if possible. History is replete with examples of outrage at bad news delivered indirectly or impersonally, by telephone (or worse, email, voice mail, or in the olden days,

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snail-mail “Dear John” letters).

3. Forecast or preface the bad news up front, with sensitivity and expression of caring, to foster your client’s emotional readiness for what is to come. (Important caveat: don’t be too blunt with your *opening* words—“your tumor is malignant,” in the medical context—or “the judge threw out your case.”)
4. After the preface, don’t stall: don’t delay communication of the bottom-line news by waiting until after complete delivery of lengthy and detailed explanations of law and process.
5. Be direct and scrupulously accurate—don’t allow a natural instinct to “soften the blow” to deter you from conveying the reality of the circumstances, whatever they are.
6. Provide information at a pace comfortable for the client, in simple language, without jargon.
7. Attend to your client’s emotion. Be caring and empathetic, not detached.
8. Allow your client time to absorb and come to terms with the news.

The first two admonitions – be prepared and arrange for comfortable private surrounding – are wise, but common sense. Two possibly counter-intuitive or uncommon items bear highlighting: (1) forecast or preface the bad news up front—avoiding bluntness but without stalling, and (2) be direct and scrupulously accurate. Lawyers often fail to provide advance warning that bad news will follow an explanation of law and process; many avoid the true magnitude of the problem and its impact, “softening” through words that distort reality.

PREFACE AND FORECAST BAD NEWS—NEITHER BLUNT NOR STALLING BE

- **Forecast bad news up front**

When you must convey bad news, *do* gently preface or provide warning of that bad news up front—*before* launching into the whys, hows, and therefore. This approach helps your client prepare emotionally for what is coming, and, if you communicate your unhappiness

about his bad news, it helps maintain the client’s feeling of connection. You might begin the conversation by saying:

I very much regret having to tell you of some recent developments that pose serious risks for your case. I am concerned about some legal hurdles that will make it difficult to achieve your goals through litigation, the way we thought the last time we met

- **Where appropriate, consider inquiry and confirmation**

Research from the medical context, suggests that a doctor should begin by enquiring as to the patient’s awareness of likely bad news. For example, the doctor might ask: “What do you feel these symptoms might mean?” If the patient indicates that he understands the symptoms to be troubling signs of a serious condition, or suspects the imminence of bad news, the doctor can then confirm the patient’s intuition, and undoubtedly elaborate. Even if the patient doesn’t fully recognize the extent of an illness, his suspicions begin the conversation, which the physician then moves to the more grave medical realities. In some sense, the patient’s bad news has come from within, which helps prepare him emotionally for his physician’s confirmation and elaboration.

The legal context sometimes presents opportunities for the lawyer to begin with an initial inquiry and then to confirm suspected bad news. For example, imagine that your defense client attended a deposition at which the opposing lawyer was obviously satisfied—virtually triumphant in tone. When you meet with your client to break the bad news that summary judgment is just not going to happen (and may not be worth filing), you might begin by asking what his impressions were of the deposition. Perhaps he will comment: “I could see it didn’t go well, because their lawyer was much too happy by the end. It made me wonder whether we will get rid of this case as quickly as I had hoped.” You would then confirm your now entirely pessimistic estimate of the chances of avoiding trial in the case. Your inquiry and the client’s response will have laid the foundation for bad news in a way that may be easier for your client to recognize and accept.

- **After the forecast, be direct, don’t stall**

Explanation of legal process, issues and risks must *follow* communication, in essence, that the news is bad. To do otherwise is to stall, which feels insensitive to the client, and renders it more difficult for the client to integrate and process information received along the way.

Experience in hundreds of student-lawyer to actor-client counseling sessions supports this advice. When the actor-clients first learn of bad news only after their lawyers’ matter-of-fact explanation of legal process and case law, they report feeling as if the lawyer has heartlessly walked them to the edge of a cliff and dropped them over the side. In contrast, they express appreciation for their lawyers’ early and empathetic signal that there is bad news to come, followed by concise summary of that reality. Thus, we advise the lawyer first to say, in words or in substance, the forecast of bad news noted above:

I very much regret having to tell you of some recent developments that pose serious risks for your case. I am concerned about some legal hurdles that will make it difficult to achieve your goals through litigation, the way we thought the last time we met. . . .

Then the lawyer should move to the real bad news, by saying:

I will explain these legal hurdles and issues and how and why they work, but you should know that, unfortunately, I am concerned because I think they create a strong risk that your case would be dismissed before we ever get to trial. I would of course fight that risk, for you and with you, but as your lawyer, I have to be straight with you about the chances of succeeding in litigation and why you might want to consider settling your case instead of continuing to litigate. After I’ve explained all of the risks, issues, and arguments, the direction we take will still be your choice.

- **Don’t soften, and thus distort reality**

People much too often use euphemism, choose weaker adjectives, and insert hedge words when delivering bad news. I have seen lawyers who believe their clients’ case is highly likely to lose at trial say “well, the trial might be a little bit risky.” The reason of course is that

we wince at the thought of inflicting pain on another person and we fear their reaction. In a good lawyer-client relationship, we anticipate and seek to avoid our client's disappointment, anger, or despair. So it's understandable. But it's no excuse. A lawyer should foreshadow, sensitively—"I wish I didn't have to give you this news, but there have been some developments that cause me great concern"—and then directly, accurately, carefully, and empathetically inform his client of the realities.

VOICING BAD NEWS

- **Don't let your voice send false signals**

Even after prefacing in an appropriate tone, a lawyer should be mindful of vocal tone and speed when discussing bad news. Our voices normally reinforce our intended meaning, so why worry about voice when discussing that bad news in more detail? Why wouldn't effective voice come naturally?

It happens that legal doctrine and process underlying "bad news" are often complex and unfamiliar to the client. As a lawyer labors to explain difficult concepts, the cerebral takes over. Enmeshed in the intellectual exercise of explaining what summary judgment is, or how jurisdictional challenges work, empathy fades to the background. The brain is focused on black letter law, logical sequence, and decisions about how much technical description of legal process is necessary. While the words chosen may be clear, the voice used tends to reflect the intellectual task occupying the lawyer's brain.

I have observed many law students deliver perfectly accurate explanations of summary judgment to their actor-clients and then conclude—without break in tone or speed—confirming bad news by stating "that is why the other side is likely to win on summary judgment, and you will not recover anything." Our actor-clients express that a lawyer's matter-of-fact, even-keel voice pattern makes them feel that the lawyer has been strolling along a logical road and is unaffected by its conclusion.

Ironically, not just logic but also the lawyer's emotions may generate vocal miscues. When a lawyer nervously and empathetically anticipates a client's reaction to bad news, he may nod, smile, and speak more quickly, in a higher pitch, or with an "up" tone at the end of a sentence – behaviors usually associated with positive emotions. The lawyer may under-

standably be uncomfortable, wishing he could make the news seem "not so bad." He may fear the client will blame the messenger. His nodding or smiling may reflect unconscious seeking of his client's approval, despite bad news. These signals may also diminish the client's recognition of the seriousness of the case development. Or, if the client does fully recognize the problem, he may again feel alienated by his lawyer's insensitivity.

When discussing bad news in full doctrinal and procedural detail, the lawyer should be mindful of slowing, deepening, and dipping his voice empathetically at appropriate junctures, to enhance connection as the client absorbs more fully the import of the bad news. If the news is really all bad, the lawyer's voice should reflect and reinforce that reality.

- **Perverse habits of nerves and feelings**
Confidence in Competence and Zealous Representation

Assume the client's feeling of connection with his lawyer remains intact despite his lawyer's having communicated the bad news that winning on a motion or at trial is unlikely. What if the client wonders whether the news is bad because his lawyer is less than effective in the litigation arena? Particularly where the bad news is predictive—a future defeat at trial or on a preliminary motion—how can the lawyer maintain client confidence in her analytical and persuasive competence and her willingness to advocate zealously on his behalf?

There is a bit of a paradox here, as some personal qualities of empathy and caring may be viewed as inconsistent with forcefulness. Excellent lawyers have both, but when the lawyer displays the "softer" characteristics, does she negatively impact the client's confidence in her ability to be aggressive? Some clients complain about the personal impact of a lawyer's insensitivity, but then seek the "tough mercenary" as best suited to wage war on their behalf.

For a client to be fully informed, the lawyer must enable him to anticipate and understand legal arguments and counter-arguments, case or statutory analysis, process twists and turns, the magnitude of risks, and a range of possible negative and positive outcomes, including their costs. Thus lawyers need strategies for communicating the realities of risk and costly consequences to clients, while enhancing cli-

ents' confidence in their competent, forceful, and zealous representation.

Communicating the Force of the Other Side's Arguments (especially if you think they are likely to win)

The most challenging and important bad news for a lawyer to convey is a prediction that the other side's arguments or evidence are likely to prevail. Because negative predictions arise in contexts where the client is more likely to have choices and a decision to make, the lawyer's success in conveying them matters most. If the client understands and accepts the bad news prediction, he will carefully consider settlement options and, presumably, make a wise and informed decision.

Unfortunately, many lawyers begin their explanation by presenting the other side's arguments. Fearing their clients will draw unwarranted optimism from review of their own arguments, the lawyers focus exclusively on the stronger arguments of the other side and their support in common law or statute. My experience suggests that the opposite strategy is far more effective.

- **Start with your side and articulate your client's arguments forcefully before moving to the other side and a full analysis**

Our actor-clients join me in recommending that your presentation to the client proceed in roughly the following order:

1. First, articulate the arguments you would make to the court or jury on his behalf;
2. Then move on to articulate the opposition's arguments;
3. Finally, explain why you have concluded,
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Professor Aaron notes that this advice is consistent with the findings by Professors James Stark and Douglas Frenkel in their excellent—CPR prize winning (bit.ly/1wP79UZ)—article, "Changing Minds: The Work of Mediators and Empirical Studies of Persuasion," (28 Ohio St. J. Disp. Resol. 263 (2013)). Their survey of empirical research indicates that refutational statements are more persuasive when the speaker articulates both sides of an argument and explicitly states a conclusion and the reasoning that leads to it.

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in light of the applicable law, that they are more likely to succeed.

This order is more powerful—more likely to persuade the client while maintaining his confidence in your representation—than stating the opposition’s arguments first followed by a de-emphasized summary of your arguments.

Why? Imagine the conversation that starts with presentation of the opposition’s arguments. As he listens, the client begins thinking: “Hey, wait a minute, that’s not right! What about this fact and that circumstance? Did my lawyer forget that fact? We have something to counter that . . .” The client isn’t absorbing the strength of the opposition’s arguments, he’s pushing them away. He may become agitated and argue back, troubled or angry that his lawyer appears to be on the other side.

Now imagine that the lawyer *begins* by articulating the client’s position first, saying “Here is how I would argue on your behalf, in writing and before the court . . .,” and then outlining all of the facts, circumstances, and legal points on the client’s side. These are easy for the client to hear, and he listens. The lawyer should present them with echoes of the tone, manner, and polish she would use before the court. Impressed by his lawyer’s command of the case and her forceful representation, he hears her make all of the arguments supporting his position. He harbors no doubt about her zealotry, loyalty, or advocacy skills.

Then, the lawyer can and should say: “It’s important for you to understand the arguments of the other side and why I believe they are problematic.” She should then proceed to articulate the other arguments with equal skill. While the client still may find this difficult to hear, he will not have the reaction described earlier—questioning whether the lawyer remembered that fact and this counter-argument. He is also less inclined to question his lawyer’s forcefulness in making his arguments. He just heard her do so.

This order of presentation facilitates the client’s acceptance of his lawyer’s analysis. It is tremendously powerful for a client to see his loyal and forceful attorney hold all of his arguments in one hand, and then all of the other

arguments in the other hand, and still, regrettably, reach an unfavorable or strongly pessimistic conclusion. That client is more likely to come to terms with the bad news, consider the consequences, and make a wise decision.

- **Reduce resistance by preserving ego and identity**

A lawyer’s choice of language, metaphor, elaboration, and inference in explaining a legal issue can greatly affect client response. Where a legal rule would suggest culpability on your client’s part, clarity and accuracy are best achieved diplomatically, with attention to preserving ego.

Consider the plaintiff client who slipped and fell on carrot juice spilled in a grocery store aisle. The defendant grocery store has filed a motion for summary judgment, under the “open and obvious” state law doctrine. Assume the lawyer has explained what summary judgment is and how the process works, and has signaled the bad news that the defense is likely to succeed on its motion. The lawyer now launches into a description of “open and obvious.” He could say:

Applying the open and obvious doctrine, the court is likely to rule that the accident was more than 50% your fault because you could have and should have seen it and avoided the hazard.

Or

Under the open and obvious doctrine, the defense will argue that it was your responsibility to watch where you were going and the carrot juice on the white floor was so obvious that anyone who was paying attention would have seen it.

Or

Under the open and obvious doctrine, if a person is injured because of a dangerous condition that a reasonable person would have seen, the court holds them responsible. Here they are arguing that a reasonable person should have seen the carrot juice on the white floor.

These characterizations of the open and obvious doctrine are all more or less accurate

and clear. Your client would UNDERSTAND but would also resist, voicing a reaction either to the lawyer or internally, such as this:

My fault?! My responsibility?! I didn’t spill the carrot juice. How dare they?! . . . I was paying attention, even if I wasn’t staring at the floor while shopping for groceries. They weren’t paying enough attention to clean up that spill . . . A REASONABLE person would have seen?! I am a reasonable person and I didn’t see it. If I had seen it, I wouldn’t have walked right into it, OBVIOUSLY!

Driving the resistance is a personal identity/ego, making it difficult for the client to acknowledge that the court might indeed rule against him. If he acknowledges that risk, he must acknowledge himself to be a “careless klutz” responsible for his consequent injuries and life upheaval. That’s painful, especially if it is inconsistent with his self image (as it would be for most of us).

- **Avoid blaming the client**

With the benefit of having observed hundreds of attempts at explaining the open and obvious doctrine, let me suggest this one instead to illustrate a different strategy of word choice:

If a hazard is out in the open, not covered or hidden, and there’s an accident, and someone is injured in it, the law does not hold the property owner liable.

Most clients will be more receptive to hearing that description and less inclined to fight it.

The author notes that, while the primary example discussed in this chapter is of a plaintiff in a personal injury case, her mediation experience confirms that there is no lack of ego on the defense side, and it often requires sensitivity and protection. Other chapters in the book provide more business or defense-side examples. In short, this advice applies to people—including business clients or their representatives—who have professional or personal and thus psychological and/or emotional investment in their side of a dispute.

What's different? This phrasing doesn't directly blame the client. It uses the neutral word "accident" and emphasizes the non-liability of the property owner. The reasonable person is absent because most clients bristle at any suggestion that they are not reasonable.

Of course, the phrasing *implies* most of what was troubling in the others' explanations of the open and obvious doctrine, but allows some time and some ego space for the client to listen, understand, and integrate his lawyer's conclusion about the risk posed by the open and obvious doctrine on summary judgment.

- **Remove the safe harbor of unfair and abstract**

I have observed clients who, at some level, have come to understand the relevant law. However, because that law seems entirely and obviously unfair, they simply don't believe "deep down" that it would actually be applied against them. Lawyers and mediators become frustrated when clients hear patiently delivered, entirely clear explanations of the "open and obvious" doctrine, or "at-will-employment," or the "elements necessary to prove discrimination" and yet persist in certainty of victory, despite directly contrary case law or a lack of evidence. Sometimes, the client does UNDERSTAND the law, and SAYS he accepts the lawyer's dire assessment, but he doesn't really BELIEVE it will come out that way, because he can't imagine his case being dismissed or losing would contradict his firm belief in the myth of our legal system as always just and fair.

Consider the strategies below when you sense your client understands your dire assessment, but can't imagine or doesn't believe it.

- **Assist imagination with real stories**

Some clients are able to imagine the unimaginable upon learning of real people in similar circumstances for whom predicted bad news became reality. When lawyers refer to "comparable case law," we know that's what it means and, in the abstract, the client may also. Still, it is worth taking a moment to tell a story: "In a recent Ohio case, a 32-year-old man broke his back when he slipped and fell, not in a grocery store but in a cafeteria, on some splattered tomatoes. The court applied the open and obvious doctrine and granted summary judgment, and he recovered nothing,

even though he had severe injuries—\$60,000 in medical bills and \$50,000 in lost wages." The client can identify with another person who has a name, slipped and was injured, and perhaps faced a similar decision about whether to settle.

- **Remember to separate liability from harm**

Well-educated and intelligent clients may simply assume that claims are won on proof of injury alone. When a lawyer notes the risk of losing, the client may assume the reality of his injury is at issue. Thus, he may disregard any lawyerly concerns because he *knows* the injury will be easily proven. The client may also feel insulted and reject the idea of risk because it suggests he is lying or exaggerating. Lawyers should anticipate this by clarifying up front:

There is no doubt that you were seriously injured and that you will be able to prove it to the jury. Even the defense recognizes and will probably admit that you were injured in the accident. The problem is that we have to prove they were legally at fault and thus legally liable. Based upon the witnesses and other information gathered in discovery, I see a serious risk of losing the liability question. If that happens, then even though everyone can see you were injured, you would lose and wouldn't recover anything.

ON MYTH, BELIEF, AND REALITY

Sometimes, resistance arises from the direct conflict between the lawyer's assessment and the client's strongly held myths about the legal system. In the slip-and-fall example discussed above, the lawyer's conclusion that the client is likely to lose on summary judgment conflicts directly with the myth that the legal system is always fair and just and the good guy always wins.

- **Banish the fairness myth**

Too often, the lawyer's only choice is to expose and banish the myth directly. You might say: "I know we are taught that our justice system is perfect and fair, but it isn't, at least not all of the time." Reviewing examples of dismissals or verdicts that seem obviously unfair is important here too.

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Imagine a case in which you strongly predict your client will lose at trial, but the client can ONLY believe the jury will see the truth, and that is, of course, her truth. Address the myth of perfect truth head on and note that the jury wasn't present and has to rely on witnesses and expert wit-

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nesses to try to reconstruct what happened. She may lose if there are conflicting witnesses—even if she knows and testifies to what happened.

- **Or, leave myth alone; locate reality within it**

Myths tend to maintain residence; after all, if I can no longer believe our laws are always fair, what other pillars must fall? However, if your client comes to see how a law might sometimes be viewed as fair, he will acknowledge its power and reality and, only then, its potential impact.

Assume you have explained the high risk of summary judgment, based upon the open and obvious doctrine. The client says he

understands, but is determined to press on. When you raise the problem again, the client responds: “The law isn’t fair. It lets the grocery store get away with this. It helps the big corporation and not the little guy.”

You might describe a hypothetical case in which that law WOULD seem fair for your client:

Yes, the way the law applies here, it helps the store and not you. Of course, it could work the other way. Imagine that a storm blew a tree branch across the front walkway to your house. Your neighbor then came over to borrow the proverbial cup of sugar, tripped on the tree branch, and sustained real and costly injuries. She sued you, seeking payment. In that case, you would use the open and obvious doctrine to argue that the tree branch

was out in the open and you shouldn’t be liable to your neighbor. The open and obvious doctrine would protect you from your neighbor’s suit, and you would find it fair.

While the client is asked to shift perspective in the example above, it is NOT for the purpose of generating empathy, but for the purpose of generating a fairness rationale that he could accept in other circumstances. While not all “unfair” legal doctrines are so easily shifted for a client to see how he might seek their protection, it is well worth the effort to imagine and discuss such a circumstance, where your client is wrestling with a conflict between reality and the myth of fairness. ■

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The Master Mediator

Back to Basics Series: Ghostbusters & Me

BY ROBERT A. CREO

Editor’s Note: *The Master Mediator is taking a break from his in-depth series on neuroscience and the psychological factors and cognitive biases that may affect dispute resolution. As Bob Creo’s earliest columns, describing and discussing mediation room techniques and practice issues, appeared only on the CPR website, he has agreed to reprise and update them for Alternatives, beginning with last month’s issue, in a new “Back to Basics” series. Last month’s column covered the concept of satisfactory compromise, while this one addresses “ghostbusting” in mediation. Future columns will cover such essentials as terms of reference and constructing settlements.*

The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in thousands of cases in the United States and Canada since 1979. He conducts courses on negotiation behavior that focus on neuroscience and the study of decision-making, and was recently recognized by *Best Lawyers in America* as 2014 Mediator of the Year for Pittsburgh. He is the author of “Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner” (George T. Biesel Co. 2006). He is a member of *Alternatives’* editorial board, and of CPR Institute’s Panels of Distinguished Neutrals. His website is www.creoidrs.com.

After presenting at the World Mediator Forum conference in Jerusalem in 2006, I was approached by Tzofnat Baker-Peleg, an Israeli mediator and conflict resolution consultant. In our discussions about mediation, she posed the problem of “ghosts” when mediating—that is, persons with influence over the outcome, but who are not physically present at the mediation session.

We engaged in a dialogue, remarkable for its common ground on the strategies and techniques to address this recurrent mediation problem. I explained my view of what I call “Phantom Negotiators”—decision-makers or those with influence who are not only absent from the table, but often are not identifiable until late in the mediation process. Every mediator has faced the daunting challenge of having worked long hours to obtain a tentative agreement, only to hear from one of the participants “I have to call to . . .”

- (a) get authority.
- (b) run this by _____.
- (c) get advice from professional person _____.
- (d) obtain written approved by email or fax.

- (e) be blessed.
- (f) all of the above.

Of course we learn in basic mediation training that each party must have persons with full authority at the table. This is usually easily arranged with the plaintiffs or claimants, since they are often individuals or small businesses. They are a “real party in interest” participating at the table. It is much more difficult with corporations, insurers, nonprofits and governmental entities.

What is more problematic is reconciling the tensions and interests among multiple defendants, their executive bureaucracies, departments, and insurance carriers. It is rarely possible to engage all the true decision makers in person in an all-day mediation session. Barriers to participation include:



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