Criminal Mediations
Theory, Style and Strategy

Presented by:

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V. Michelle Obradovic, Esq., owner of Wise Resolution, LLC® and Court Mediator for the 10th Judicial Circuit, Jefferson County, Alabama has mediated over 2800 private practice commercial cases and co-meditated 145 complex cases, mass torts, class actions and MDLs locally, nationally and internationally.

She mediates hundreds of specially selected civil and criminal cases a year for courts throughout the State of Alabama. Michelle also serves as Special Master in complex litigation cases.

She has been an Adjunct Associate Professor of Law since 2002 at Samford University's Cumberland School of Law. She has lectured at Cambridge University, England and at Birmingham School of Law. Michelle teaches Criminal Law, Criminal Procedure I and II, Evidence, Mediation Advocacy, Mediation Practice, Justice Theory and Directed Research in Advanced Constitutional Law Topics. She is also the Coach of Cumberland's National Mediation Teams; including the 2005 National Champions who went on to successfully compete against France, Spain and Canada at the ICC in Paris, France.

Michelle created the Court Mediation Project in 1999 to provide dispute resolution training and experience to attorneys and judges and coordinates mediators with the needs of each court. The Project resolves in excess of 400 small claims cases per year, hundreds of criminal and tax cases per year and provides mentorship and externship opportunities to law and advanced degree students who earn academic credit for their work with the program.

She was educated by the Sisters of Notre Dame de Namur at Trinity College in Washington DC, is a graduate of Cumberland School of Law and has a certificate from Harvard University and an LL.M. from Pepperdine University, Straus Institute for Dispute Resolution.

Michelle clerked for Judge Michael F. Bolin, Probate Court of Jefferson County (now a member of the Alabama Supreme Court-R) and Senior Judge Edward S. Smith, (dec.) U.S. Court of Appeals Federal Circuit, Washington, DC and for the 104th Congress, United States Senate Judiciary Committee, Democratic Minority Subcommittee on Terrorism, Technology and Government Information, Senators Herbert H, Kohl (D-WI), Patrick J. Leahy (D-VT), and Dianne Feinstein (D-CA).

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RESOLUTION OF CRIMINAL MATTERS BY MEDIATION

Despite the fundamental importance of jury trials in the American legal system, very few matters, civil or criminal, are actually resolved by trial. In the criminal law context, alternatives to trial range from the decisions law enforcement officers make on a scene; to initial screening decisions by prosecutors with law enforcement officers; to charge selection within the prosecutor's office; to presentation to the Grand Jury; to charge bargaining and plea bargaining between the prosecutor's office and defense counsel; to diversion, specialty courts; and to blind pleas between the prosecutor's office, defense counsel and the judge.

Plea bargaining done well revisits the past relationship between all stakeholders so as to manage the present relationship in order to structure an appropriate future relationship. To be most effective as a resolutionist in a criminal matter, the mediator must fully appreciate the charges, the inherent philosophical and moral tensions, constitutional protections (or lack thereof), confidentiality, privilege and the specific political agendas and financial pressures relevant in the local jurisdiction. Resolutionist practitioners have to embrace all three modes of legal problem solving; judgment, consent and systems design, and understand the ways in which one bears upon the other and on the different stakeholders in the case.

When a plea bargain results in an acceptable and durable mutual agreement or an understanding, how do you know it's a good result?

- ✓ Needs are met.
- ✓ It is the best practicable combination of choices.
- ✓ The alternatives are not as desirable.
- ✓ It will withstand healthy scrutiny and attack.
- ✓ Resources have not been wasted.
- ✓ Appropriate relationships are formed.
- ✓ The commitments made can and will be honored.

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WHAT ALREADY WORKS AND WHY

Prosecutors and defense counsel can each tremendously influence the quality of the interaction with one another. Even though it is an adversarial system, it is a system. For the system to work as well as it possibly can, barriers need to be thoughtfully and persistently addressed.

For example:

- the prosecutor or defense counsel may determine that poor communication between the two of them is a barrier, either in quantity, quality or form. In this circumstance, someone has to step outside of the dynamic and into a role as an adapter;

- the prosecutor or defense counsel may determine that lack of information, unverifiable information or lack of agreed upon criteria to evaluate information is a barrier. In this circumstance, someone has to shift the focus to documenting, organizing, and examining the underlying assumptions and better articulating the relationship of available information.

- the prosecutor or defense counsel may determine that the lack of focus on the specific case is a barrier. In this circumstance, either can develop a schedule for further interaction and ask that the other observe it;

- the prosecutor or defense counsel may determine that assumptions or bias is a barrier. In this circumstance, either can try to reframe the issues to expose the bias and bring about a change in the emotional components of it or to logically address assumptions.

- the prosecutor or defense counsel may determine that risk evaluations or assessments of what will happen if a negotiated agreement is not reached differ so greatly that it is a barrier. In this circumstance, either may guide the conversations toward objective criteria and analytical exercises.

PROSECUTORIAL RESOLUTION SYSTEMS

Some prosecutors have designed systems in such a way as to de-emphasize the importance of plea negotiations with defense counsel. These offices rely on tools such as "early assessment" and "charge selection".

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- Early assessment is a structured conversation between the prosecutor, police and investigators about what information is sufficient for a charge to be brought and where deficiencies lie.

- Charge selection is a structured conversation within the prosecutor's office about a criminal matter that considers whether it is the type of situation where a conviction and punishment is desirable in the overall scheme of things and also what statutory provisions best apply to what is actually known about what occurred.

- Some prosecutors have also developed priority lists of particular types of cases to investigate and prosecute and rely on negotiated resolution systems to dispose of non-priority types of cases.

DEFENSE LAWYER RESOLUTION SYSTEMS

- The most beneficial defense lawyer resolution system is to be extraordinarily competent and effective and a zealous advocate, no matter what. By this I mean the defense lawyer communicates with the client, investigates the case, conducts thorough motions practice, negotiates with the prosecutor, can try a case artfully and preserves the client's right to appeal.

- The next most beneficial defense lawyer resolution system is to be a good negotiator, meaning master all theory, style and strategy combinations, then choose the most appropriate one for the circumstance and execute it precisely.

- The third most beneficial defense lawyer resolution system is to make a practice of always initiating a conversation about resolution at the earliest possible time in every case and revisit the subject often. This could be before a person of interest is formally charged, at the initial appearance, after formal charges have been brought, on direct appeal or even upon collateral attack. Only in rare situations where a prosecutor is strictly following a "uniform charging and no-plea-agreement policy" of its office is negotiation between defense counsel and the prosecutor not an option.

- The fourth most beneficial defense lawyer resolution system is to coordinate amongst each other to share carefully gathered, accurate information about the real time operation of prosecutor's offices: its constraints, personnel issues, priority lists, team assignments, individual performance statistics, informal leadership, trends in charging, trends in

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negotiation, any political aspirations and governance issues. This resolution system allows defense counsels to leverage information to combat the collective action problem of defendants that otherwise favors the prosecution. Also, any information about the tendencies and preferences of the Judge and jury trends would also be key, and of course sharing recent developments in criminal law and criminal procedure.

WHAT DOES NOT WORK AND WHY - OVERVIEW OF TYPICAL PLEA NEGOTIATIONS

The #1 most commonly heard statement in a direct plea negotiation is: **"We will just take it to trial"** usually said in a "whatever" tone accompanied by punctuating dismissive body language, followed by a purposeful pivot and a determined march to the bench or out of the courtroom. Inevitably, the reaction by opposing counsel comes in some form of an eye-rolling, head-shaking exasperated "do you believe that guy" walk-about. Both the action and reaction are intended to convey the "unreasonableness" of the other side's position to each other and to anyone who is watching or listening, especially court personnel, peers, victims and clients. This kind of strategic walkout comes with everyone knowing full well that, one way or another, there will have to be a resolution and it will have to occur sooner rather than later. In 'mediator speak' this is little more than impression management, expectation management and strategic use of emotion, in other words, outright manipulation.

Much like a classic car wreck negotiation by telephone between plaintiff's counsel and adjuster, plea negotiations typically take place in an iterated format and the vast majority of plea negotiations track a classic "hard bargaining" model of interaction that is well documented in the negotiation literature. They are a series of strategic stalemates followed by a quick horse-trade. Although "successful" because they ultimately produce a plea, hard bargaining in any context is the most personally, professionally and fiscally costly path to "success". However, hard bargaining in a criminal case makes it much more difficult for everyone involved to arrive at the fairly obtained and correct outcome and as a consequence undermines the entire criminal justice system.

Unlike civil disputes, liberty and even life are at stake in a criminal case. The currency is blame, shame and punishment and cost is measured in the impact on people's lives and in public resource dollars. The only potential legitimate opportunity for value creation comes from rehabilitation and restoration of the accused but knowing full well that relief and closure for the victim sometimes looks and feels a lot more like pure revenge. Fear is ever-present. Uncertainty is ever-present. The coercive power of the State can be overwhelming. Conflict

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escalation often occurs. The original dispute, whatever it was, had already escalated to the point that criminal charges against someone resulted in the first place and added to all of this is whatever adaptive and maladaptive cognitive mechanisms, addictions and behaviors have taken hold of parties and/or the practitioners themselves to manage the stress of it all, plus whatever policies and agendas the current political regime has set for its own gain; and as I said, escalation is almost a given.

Assuming good intentions and honest mistakes, the prevalence of hard bargaining can be explained from a systems design perspective in that plea negotiations are negotiations of opportunity (the opportunity being that the prosecutor and defense counsel find each other in the same place at the same time); they are poorly planned; they are constrained by factors that have nothing to do with the health of the negotiation (such as running late, being in a distraction rich environment, multi-tasking, communicating in verbal bullet points, not following up in writing, having to negotiate as quickly and quietly as possible in full view of the gallery or other attorneys or the bailiffs); and their purpose is frustrated by displays of dominance and resistance to submission. The natural conflict escalation cycle tends to take hold very quickly and people react in predictable ways. This explains why the #1 most commonly heard statement in a direct plea negotiation is: "We will just take it to trial" and resolutions occur as a series of strategic stalemates followed by a quick horse-trade.

FUNDAMENTALS

Recall that hard bargaining is a distributive approach, using a competitive conflict style with an overall strategy of aggression carried out with tactics and behaviors that are contentious.

Distributive Approach

+

Competitive Style

+

Aggression Strategy & Contentious Behaviors and Tactics

=

"Hard Bargaining"

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There are typically three easily identifiable patterns in hard bargaining negotiations - they are as follows: (1) Persuasion. (2) Force. (3) Trickery.

First is persuasion: Persuasive argument is a series of logical appeals designed to lower a counterpart's expectations or affect the counterpart's prediction of success. The two types of appeals that are generally used are: (1) The State and/or the victim have a right to a particular outcome (maximum punishment), and (2) That it is in the defendant's best interests to take the deal being offered. Prosecutors will attempt to persuade the defense lawyer (and in turn the defendant) to come over to their way of looking at the case by offering compelling arguments why the facts support the charge and why stacked charges are valid. If the prosecutor's persuasion strategy is not successful at this point, the strategy leaves the prosecutor with a fall-back position of reducing the charge to a charge that is still consistent with the information produced by law enforcement's investigation or to offer dismissal of a second or third charge to reduce resistance to accepting the plea offer. If, for example, the prosecution has established a "priority list" that is made known to a defendant, and if that defendant believes that his type of case really is a "priority" then it will reduce his willingness to hard bargain because an impression has been created that trial is more likely for his type of case than it is for other types of cases. To go even further, a prosecutor may convince a defendant that among all of the cases like his that are already a "priority", his specific case is ranked high within the group of similar cases as a top candidate for trial. All of the above are examples of persuasive argument.

Second is force: Prosecutors are very good at leveraging their resources and can effectively use them even when a prosecutor's office in actuality has almost no available resources to prosecute the case through trial. Examples would be a practice of charging death eligible and thereafter making only one concession: life without parole; also is a policy of stacking or overcharging when there is not even arguable probable cause to support the charges to build in "room to negotiate". In these circumstances, the prosecutor has effectively forced acceptance of a plea to a charge that would otherwise have been only the starting point by leveraging small amounts of resources and credibly stating a commitment of following through with the prosecution irrespective of the information produced in the investigation or in the preliminary hearing proceedings. Even though prosecutors cannot credibly threaten every defendant with a difficult trial or long sentence, the threat has an air of legitimacy because the prosecutor "might" be able to do so in the specific case. Warnings and coercive commitments, two other applications of force, can take the form of waive the preliminary hearing and I won't oppose bail, or don't waive the preliminary hearing and I will ask for a very high bond. Take the deal or I will amend the charges to a felony. Answer my questions so that you won't have to spend your birthday in jail. In these ways prosecutors can impose

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tremendous social and economic costs on defendants and can provoke pleas that will allow the defendant to avoid costs such as loss of employment and other disruptions to his family life.

Another 'force' pattern is an explicit threat. A threat is an if/then expression of an intention to hurt someone contingent on compliance with a demand. Some examples are, if you don't cooperate, I will have you transferred to the general population or if you don't cooperate, we will re-interview your spouse at her job or your sons at school. If you don't cooperate, we will call social services to get your children. An implicit treat may be that the prosecutor will not give disclosures without motions, hearings and motions to compel with administrative delays and technical glitches to follow if faced with a zealous advocate.

Yet another version of a 'force' pattern is in the form of promises which are the opposite of threats. Whereas the cost of a threat is born by the relationship, a promise may or may not be something tangible provided in exchange for compliance. Promises do not provoke resistance as threats do and may continue to yield future compliance if the thing promised is of value, even if no threat is overtly made to take it back in the event of future noncompliance. The prosecutor can promise rewards and then withhold those rewards to induce defendants to cooperate with other investigations. Promises are both a preparatory tactic and are also used to erode resistance.

Third is trickery: Ingratiation is a form of trickery in that it is impression management as a set up for future exploitation through flattery, displaying extraordinary support of the target's opinions and decisions, feigned similar interests, favors and gifts. Ingratiation is also a preparatory tactic used to erode later resistance. Shaming is also a form of trickery – An articulation of transgressions, failures or oversights that caused harm designed to produce disapproval from the group or someone in a position of authority. Even if shaming provokes an angry response, it is also likely to produce compliance when some opportunity is given to "do the right thing" now. An example would be an accusation that defense counsel has made some strategic or professional error in his representation and the only way not to be embarrassed and the client punished for his mistake would be to recommend the deal being offered. In some cases, prosecutors will promise to do or not do something, knowing that "their victim" will not agree or "their supervisor" has already said no. They may also "forget" to write an aspect of the deal into the plea agreement sheet or say something different to the Court than what is written down knowing the judge will correct it in their favor. Some prosecutors outright disclaim authority to be bound by an aspect of the deal at the last moment and revert to an earlier position less favorable to the defendant.

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MODEL FOR NEGOTIATING A CRIMINAL MATTER

1. Either the prosecutor or defense counsel confirms that a conversation about possible resolution of the criminal matter is desirable.

2. They discuss what information needs to be gathered first, any ground-rules, when and where the conversation should take place.

3. Prior to the agreed upon conversation, either will confirm with the other that preparations are being made for that conversation to be productive.

4. If possible, some sort of agenda for the discussions should be proposed by either or both.

5. Defense counsel meets again with the defendant to explain the situation, seek input and direction and documents it in writing sometime before the conversation with the prosecution occurs.

6. When it is time for the conversation, both are focused, both confirm the purpose of the conversation, and their understandings of how it is to occur, and commit to beginning.

7. During the conversation, demonstrate appreciation for the others effort and be focused on listening carefully to what the other is saying. Use pauses to consider the implications of what is being said.

8. If the pace of the exchange begins to quicken and show signs of escalation, such as talking over one another, negative feedback that conveys disrespect rather than disagreement, use intervention tools to stop the escalation cycle.

9. Manage the flow of information by: Sticking to one subject at a time, even if you want to move on to something else. Don't assume that repetition is a waste of time because repetition can be an unconscious indicator of importance or a cue that you need to give feedback that you have heard and have understood what was said and meant, even if you don't agree with it.

WHY USE MEDIATORS?

When resolving a criminal matter, having access to a thoughtful committed individual who understands the tensions inherent in the criminal justice system, but is neither a prosecutor, nor a defense attorney, and who places equal value on the victim's and the defendant's point of view and who draws insight from

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the victim's family as well as the defendant's family is an opportunity that merits consideration by all involved. Legitimate disputes always add value to the criminal justice system; however low-grade conflict dramas that have nothing to do with the underlying case and that undermine fundamental due process are a misdirection of public and private resources. Mediators strive for efficiency, while remaining mindful and reminding others that the integrity of the mediation process and the criminal justice system must be protected.

However "good" a case may be from the prosecutor's perspective; the lack of resources to pursue it frustrates the prosecutor's purpose, but prosecutors can easily leverage their scarce resources. At the same time, collective action problems are impossible for defendants to overcome and uncertainty works against individual defendants. Scarce defense resources thoroughly undermine defense counsel's ability to provide zealous representation because defense counsels cannot leverage resources in order to get the correct result that is fairly obtained. Mediators can address such systems design issues and can also counter interpersonal dynamics that emerge between particular prosecutors and particular defense counsels and their unproductive patterns of behavior.

Trust or lack thereof is also an issue. Even if counsel is absolutely correct that the "deal" being offered is "a bad one", the defendant may distrust his defense counsel's recommendation to refuse to plea because he believes defense counsel is using him as a meal ticket, wants the trial experience or is trying to build a reputation at risk to his wellbeing. And, even if counsel is absolutely correct that the "deal" being offered is "a good one", pressure to plea and the switching of roles from zealous advocate to salesman amplifies any distrust that is already present. A mediator can also address communication barriers that make it unclear whether the information is being conveyed to one participant by another and relayed to a third is being transmitted fully and accurately as to content and whether the response is in turn being conveyed accurately.

Mediators offer one additional system design benefit, and that is insight gained from repeated interactions with the people whose lives have intersected with the criminal justice system, all of the prosecutors in a jurisdiction, its judges and those defense counsels with active practices. Such experiences lead to a particular kind of understanding of the system.

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