

Using Time Scarcity in Mediation to Its Best Advantage:

An Alternative Paradigm of Mediation

To every thing there is a season, and a time to every purpose under heaven; ... a time to keep silence, and a time to speak; a time to love, and a time to hate; a time of war, and a time of peace. Ecclesiastes 3

A rare coin, a limited edition print, an afternoon with your favorite person; all are difficult to possess and our irrational minds tell us because they are scarce they must be worth more than items that are easy to possess. As mediators and lawyers, we sell our time and so time is a very limited, precious commodity to us. There is never enough time to fit in all the things we want to be and do. How do we find the time to be a loving spouse and parent, a good friend, a committed and successful professional, a caring and philanthropic individual and still have time for ourselves? Scarcity as an economic principle is about using the limited means available to us to achieve our limitless desires.¹ In terms of influence or value, scarcity is the risk of loss or unavailability which causes us to value more highly items or opportunities when their availability is limited.² This is a result of our weakness for mental shortcuts where scarce equals valuable.³ In addition, we hate to lose something we once had because losing the freedom and security associated with the scarce thing impinges on our autonomy.⁴ Dropping from an abundance to a scarcity will make the lost thing more attractive. So it is with time.

We all have had days crammed with meetings one after another and a day with no set schedule. We somehow still find ways to fill in the free day with finishing 'guilt' projects, running errands or just catching up with officemates. There are the same number of hours in each day, but in the meeting filled day we feel time is scarce. That feeling of scarcity is not a

¹ Sendhil Mullainathan & Eldar Shafir, Scarcity: The New Science of Having Less and How It Defines Our Lives, 11 (2013).

² Robert B. Cialdini, PH.D., Influence: The Psychology of Persuasion, 238 (rev. ed. 2007).

³ Id. at 244.

⁴ Id. at 245.

physical reality in the unscheduled day but it is for the scheduled day when we feel the pressure of the schedule. In our profession, time is scarce and precious; how do we make the most of it in mediation?

Mullainathan and Shafir in their book, Scarcity: The New Science of Having Less and How It Defines Our Lives, believe scarcity is a mindset and that the way we think about things and approach decisions is fundamentally different when we are faced with abundance and with scarcity. For the time example, we have all been faced with an abundance of time to complete a project and been unable to make any progress until faced with the deadline.⁵ There are so many difficult choices to be made to complete the project, but it is not until the deadline is looming that the choices become easier to make. They must be made or we will miss the deadline, suffer the consequences and fall even more behind. There are factors associated with the scarcity of time that make up our mindset and allow us to make the tough choices. There are ways we can use the leisure of an abundance of time and the pressure of deadlines and the scarcity mindset of the mediator and the parties to make us better and more successful mediators.

Scarcity Affects our Mindset

We make wise and thoughtful decisions and resolutions in the calm and relaxed state of an abundance of time, but we can give up our long term goals in the heat of the moment and surrender to immediate gratification. Deadlines make us focus; there is no more time for dawdling. We become attentive and efficient as to the immediate goal at hand. We stop

⁵ Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decision (2009). In Chapter 7 entitled The Problem of Procrastination and Self-Control, Why We Can't Make Ourselves Do What We Want to Do at 139, Ariely found, not surprisingly, that students procrastinate, restrictive deadlines are the best cure for procrastination and merely offering an opportunity to pre-commit to interim deadlines improved grades. Deadlines focused the students and the interim steps requiring focus led to better results.

procrastinating and get down to business.⁶ Other goals and desires that would have distracted us are now outside our urgent need to stay focused on the task at hand. We are less likely to make careless errors because we are laser sighted on what needs to be accomplished. This focus dividend is a positive result of scarcity demanding our attention, but it is impacted by the tunneling tax.

When we are focused, we do a much better job of attending to our current and pressing needs, but we fail to make a careful cost-benefit analysis of our other wants and needs.⁷ Focus on our immediate goal and the looming deadline also creates a tunnel and we become less able to address other important concerns. We become less effective and less efficient in the parts of our lives outside the focus tunnel. Scarcity shapes how we behave because it rearranges what is important into what is important and urgent today and what is important but not urgent today. The urgent items are within our tunnel and get our focus. Other merely important items, however, are left outside the tunnel to be dealt with at another time. We can't consider the longer term benefits that might impact our short term horizon when we are focused inside the tunnel. We can't be neutral, we are less insightful and forward thinking, less controlled. Should I go to the grocery store to have healthy food on hand while I work late or should I eat the stale donut sitting in the office kitchen? If I am focused on meeting my deadline, I won't be able to consider the importance of the competing important but not urgent issues. I will likely eat the donut. Healthy food and eating right are outside my tunnel, while meeting the deadline is inside

⁶ Daniel Kahneman, *Thinking, Fast and Slow*, 37 (2011), time pressure is a driver of effort.

⁷ Mullainathan, *supra* note 1, at 19-31. *See also*, Kahneman, *supra* note 6, at 20-21, describing our two systems of thought. System 1 is the effortless, automatic way our brain thinks and System 2 allocates 'effortful' mental activities associated with our experiences, including choice and concentration. System 1 thinks it and System 2 puts it in order. Kahneman also talks about the limits of attention and focusing intensely can make people blind to distractions, even big ones like the gorilla walking through the basketball passing experiment. We can be oblivious to obvious distraction and be completely unaware of what we have missed. This is another way of expressing the focus dividend and tunneling tax of Mullainathan and Shafir.

the tunnel. Single-mindedness of focus leads us to an effective result, but one that neglects other important things about which we care.⁸ This is the tunneling tax.

Compounding the tunneling tax is the bandwidth tax. Everyone has an amount of attention and brain power which can be called ‘bandwidth’. This is fluid intelligence and is our internal resource for how we process information and make decisions. Executive control is a resource affecting how impulsively we behave. The more we are concerned about scarcity, the less bandwidth we have available to avoid impulsivity and make proper decisions within our tunnel. The result is we don’t buy the healthy food and we choose the stale donut. We are so focused on the scarcity of time to complete our goal that we can’t deal with other decisions that might help us in other ways and even in ways that impact the scarcity of our time. This is the bandwidth tax created by our focus and tunneling.

The scarcity trap is when we take actions that increase our scarcity. For example, we don’t have time to properly finish a project and we tunnel on getting it done. We become myopic about another project we should have started today, keeping it outside the tunnel and adding to the scarcity of time for next week. We have borrowed today for a project due later, but even though that time debt is an abstraction today, it will come due with that next project. We think with a free afternoon, we could catch up, but that doesn’t happen. And if by some miracle, we do catch up, we are just one emergency project away from being behind the proverbial eight ball again. There isn’t enough slack in our time to allow us to finish everything timely. Scarcity doesn’t just create a shortfall in time, it causes us to waste mental resources worrying about the scarcity leaving us further handicapped in dealing with the scarcity.

⁸ Mullainathan, *supra* note 1, at 38. Kahneman, *supra* note 6, at 41, when challenged by a demanding cognitive task and a temptation, we are more likely to yield to temptation.

One specific example of how scarcity makes us focus on what is scarce (and what we don't want to focus on) is the person in a situation of calorie restriction. Victor Frankl, in Man's Search for Meaning, tells of how residents of concentration camps on starvation diets were obsessed with thoughts about food and especially of their favorite dishes.⁹ In a study on starvation by Ansel Keys on how to best feed those liberated from concentration camps, American conscientious objectors were starved for ninety days. They were completely preoccupied with discussions of the restaurants they would visit, the foods they would make and eat and with food scenes in movies.¹⁰ They were consumed by the thing they did not have. It is the same with time; anxiety over not having enough time increases the bandwidth tax by distracting us from the goal at hand.

Using Time Scarcity Mindsets in Mediation

Mediation can be divided into stages,¹¹ each with an expected abundance or scarcity of time. Applying the scarcity mindset to these stages gives guidance on the feelings of the participants and where obstacles to resolution may exist. The time scarcity mindset offers a different paradigm for mediation. The comments of Wayne Brazil in Thoughts about Spiritual Fatigue: Sustaining Our Energy by Staying Centered and Alain Lempereur in Identifying Some

⁹ Victor E. Frankl, Man's Search for Meaning, 31 (2006).

¹⁰ Todd Tucker, The Great Starvation Experiment: Ansel Keys and the Men Who Starved For Science, (Minneapolis: University of Minnesota Press, 2008).

¹¹ Dwight Golann and Jay Folberg, Mediation The Roles of Advocate and Neutral (2011) in Chapter 6 Stages of Mediation; Alain Pekar Lempereur, Identifying Some Obstacles to a Successful Mediation Process, (on file with author), available at <http://ssm.com/abstract=1949463>.

Obstacles to a Successful Mediation Process figure heavily in this paradigm.¹² The basic thesis is as follows.

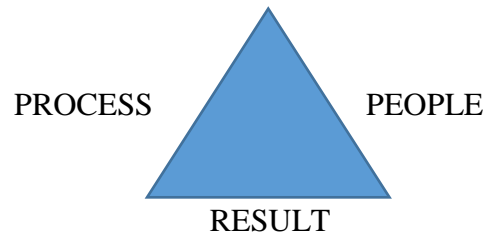
Mediation starts with an introductory stage, which may include a pre-mediation meeting and the opening session the day of the mediation. Time is abundant at this point. After the mediator sets the stage for the mediation, the parties can use their opening comments to tell their story exposing facts and identifying interests. The day is still fresh at this point and time does not yet seem to be a pressure and all options can still be in broad focus. After the parties make their opening comments, often there is a joint discussion followed by separate caucuses. Perhaps the parties have become stuck in their narrowing tunnels of focus trying to convince the other side of the 'true' facts. At this point, time is becoming more of an issue as the day is wearing on and the parties become more focused on finding a solution. The mediator can remind the parties of their longer term goals and guide them to the next step of looking for options and solutions jointly or in caucus. Once it is late in the day, the deadline is nearing and the parties have moved on from arguing the facts and finding fault and are trading proposals and making progress. The conclusion is near and they have become quite serious about getting to the printer, but their focus dividend is becoming more limited by the tunneling and bandwidth taxes. Reminding the parties of their relevant long term goals can help the parties reach a wise and durable agreement. Knowing where the parties are on the continuum of time scarcity during the mediation can be used to increase the likelihood of a resolution of the mediation.

¹² Wayne Brazil, Thoughts about Spiritual Fatigue: Sustaining Our Energy by Staying Centered, 2008 J. Disp. Resol. (2008); Lempereur, *supra* note 11. I limited the sources for comparison to keep the scope of the paper manageable.

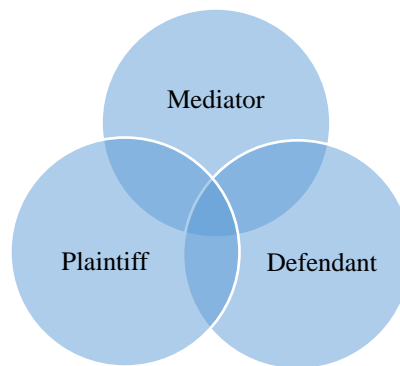
A New Paradigm for Mediation –

Viewed Through The Lens of Time Scarcity

The three legs of the standard mediation triangle are process, people and result.

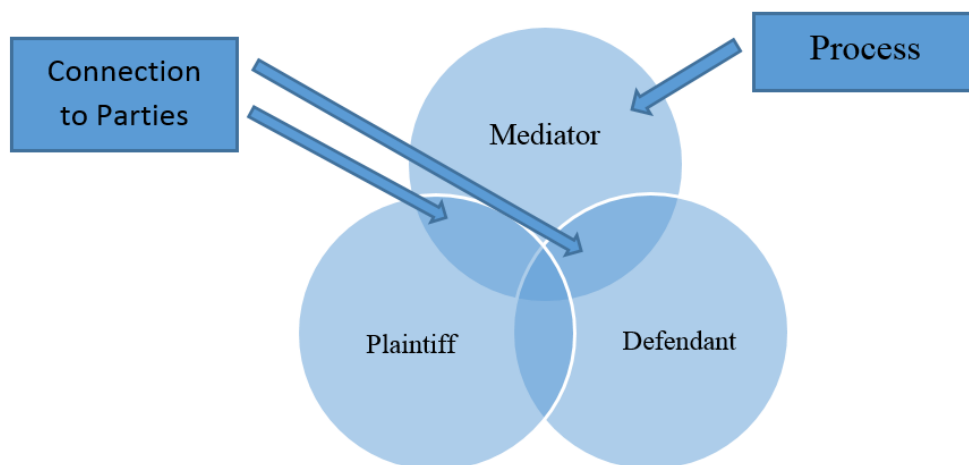


Focus and Tunneling. Based on the scarcity of time in mediation and the concept of focus, tunneling and bandwidth, mediation can be viewed, not as three parts of the triangle, but as three intersecting circles, each circle representing the focus dividend and the resulting tunnel tax of the mediator and each participant:



A scarcity mindset can be used to explain different aspects and intersections in this diagram.

The Mediator's Focus Tunnel Contains Process and Parties: The highest duty of the mediator is not to secure a settlement but to host a process that the participants respect and the deepest obligation is to the integrity of the process.¹³ The mediator's focus then primarily should be on process so it will be the basis of the mediator's tunnel. Building trust and rapport with the parties is key to successful mediation.¹⁴ In the diagram, the mediator focus on process is supplemented by the intersection of the mediator's tunnel with the tunnel of each party individually to establish trust and rapport. Staying connected to the people makes the mediator more authentic and not an unfeeling referee of the conflict. Being neutral means remaining detached from the conflict, but it does not mean being detached from the people. We must still become emotionally connected to the parties and the desire for resolution.

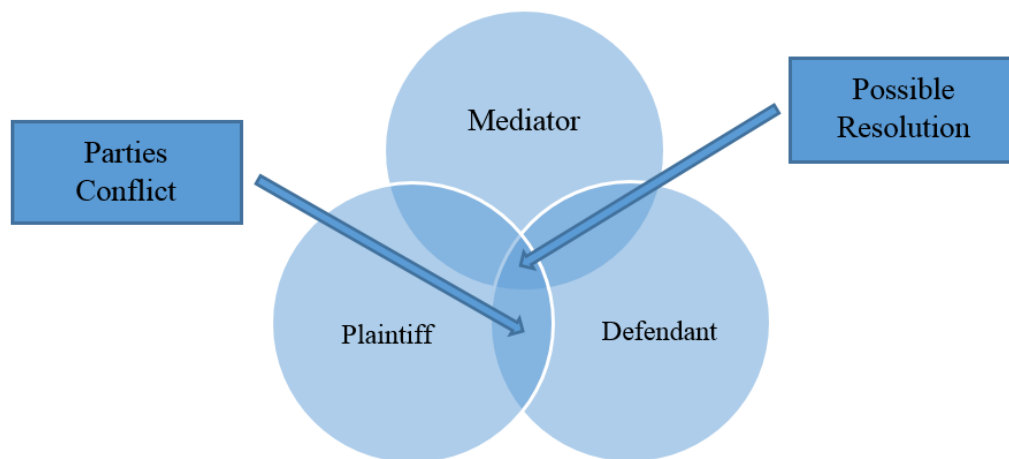


¹³ Brazil, *supra* note 12, at 412, mediators and participants seeks integrity of process; Golann, *supra* note 11, at Chapter 7 entitled Process Skills.

¹⁴ Golann, *supra*, note 11 at 155.

The Intersection of the Parties' Focus Tunnels is the Conflict: There can be a tendency of the mediator to want to make the conflict his/her own problem.¹⁵ The conflict, however, is the parties' responsibility and they must claim it as their own.¹⁶ Since the conflict is the responsibility of the parties, it is located where the Plaintiff and the Defendant focus tunnels intersect. Placing the conflict solely in the intersection of the parties' tunnels enables the mediator to remain focused on process and the parties and not become embroiled in the parties' conflict. This exemplifies the principle that being connected to the parties is possible without making the problem personal to the mediator.

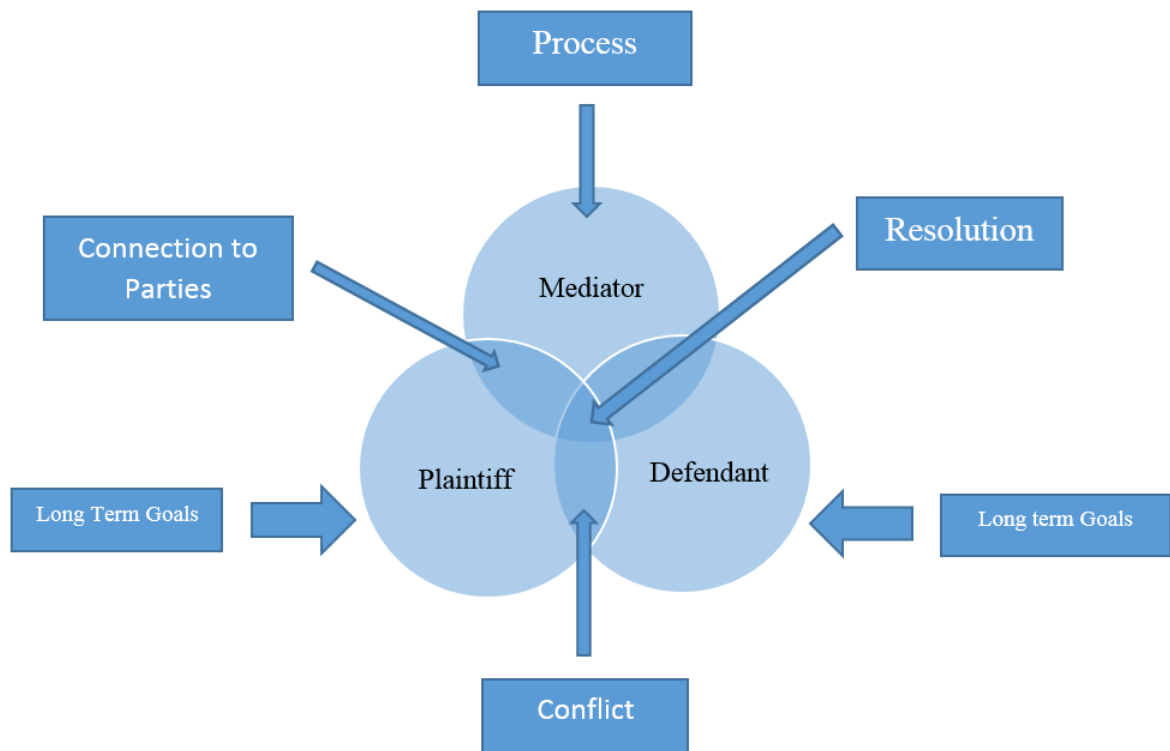
The Possible Resolution is at the Intersection of all Three Focus Tunnels: The mediator's tunnel intersects with the parties' tunnels on a process level and on a personal level but not as a part of the conflict. The intersection of all three tunnels, where the mediator focus and connection with the parties intersects with their conflict, is where resolution is possible.



¹⁵ Lempereur, *supra* note 11, at 8.

¹⁶ Golann, *supra* note 11, at 126 quoting Gary Friedman & Jack Himmelstein, Challenging Conflict: Mediation Through Understanding, XXV (American Bar Association, 2008).

As the scarcity mindset grows and the tunnels of focus narrow, long term goals must be reintroduced into the parties focus to help the parties enlarge their view and resolve their conflict. The full diagram can be applied to the mediation stages and scarcity of time.



This time scarcity model of mediation is consistent with the suggestions of both Brazil and Lempereur and this paradigm has been applied to several examples from their articles to demonstrate this connection.

Time Considerations in the Introductory Stage

The parties are paying for the mediator's time, so it is reasonable to believe that they would want to economize and get down to business as quickly as possible. Our mindset of

abundance and lack of focus at the beginning of the mediation means substantial progress may not occur early in the day. In the interest of saving time, a mediator's intuition might be to skip explanations of mediation basics that generally would be part of the introductory comments on the day of mediation, but that might not be the best course in many situations.¹⁷ Feelings of time scarcity invite cutting corners.

Roderick Swaab, in his article, Face First: Pre-Mediation Caucuses and Face in Employment Disputes,¹⁸ proposes that mediators take the time to have an in-person meeting with each party to build trust and rapport, but not to discuss content. His theory is that early and separate 'face time' decreases conflict and increases settlement possibilities. Finding time for a pre-mediation meeting with each party requires looking at the intersection of the mediator's tunnel with the parties' tunnels to bring a more personal relationship with the parties inside the mediator's tunnel.

Knowing the experience level of the parties will enable the mediator to determine what information should be explained to each party. Taking the time to fully explain mediation to an inexperienced participant can pay dividends during the process. Obtaining the parties' commitment to the mediation process is an important issue that can be addressed quickly and specifically with each party, with more basic explanation for an inexperienced party. Fully addressing introductory issues in a pre-meeting without the expectations and time pressures of the mediation day allows the mediator to get down to business faster on the day of mediation

¹⁷ Lempereur, *supra* note 11, at 3, discussing a mediator's intuition to skip discussion of what mediation is, what the relevance of mediation to the parties' issues are, what the mediator's job is and his/her approach, the specifics about mutual respect and not interrupting the other party and the confidential nature of the communications.

¹⁸ Roderick Swaab, Face First: Pre-Mediation Caucuses and Face in Employment Disputes (June 15, 2009 (on file with author) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493514).

with the knowledge that s/he has confirmed that all parties have the knowledge, ground rules and commitment necessary to make the mediation as successful as possible.

The cynicism of experienced parties about the mediation process can impact the mediator and the mediation. Parties to many commercial mediations are not concerned with anything other than the distributive issues of how the dollars will flow. Parties who have participated in many mediations and are no longer starry eyed about the process and the potential results, knowing that it may take several tries at mediation to make any progress. Brazil calls this ‘gaming’ of mediation and suggests naming it and explaining the impact.¹⁹ A discussion of the principal barriers to resolution with experienced parties and obtaining a commitment to the mediation in the pre-mediation meeting while time is still plentiful may enable progress more quickly on the day of mediation.

Time for Exploring Facts and Interests

In order to get to a resolution of the conflict, the parties need to talk about the facts and share information and interests. Their tunnels intersect with their stories. Telling their side is very important to each party and early in the day, time is not yet scarce. Curiosity by the mediator helps draw out the information that needs to be shared. The mediator can ask leading questions to try to move the mediation along more quickly. However, this may rush the parties and make them feel they are being cross-examined or not getting an opportunity to ‘say their piece’. Feeling hurried may cause the parties to feel they are not sharing in a collaborative process or may make them feel the mediator is being too supportive of the other speaker. Active listening, at the pace of the speaker, will reveal information with the help of the mediator rather

¹⁹ Brazil, *supra* note 12 at 415.

than with the mediator as an adversary or as a supporter.²⁰ It will show the mediator is listening and understanding what is said without showing favoritism. The mediator is modelling the respectful communication discussed in the pre-mediation meeting and facilitating the exchange of difficult issues through the mediator repeating the tough issues. This honors the process and keeps the mediator's relationship with the parties and their feelings about process inside the mediator's tunnel and the conflict in the intersection of the parties' tunnels.

Leading the mediation process requires much of the mediator. It takes a great deal of energy to be at the center of a mediation and amidst the high emotions of the parties. Maintaining the necessary energy and bandwidth to be supportive of the process and the parties is challenging. Brazil suggests "cognitive rearrangements" to avoid fatigue which can be achieved by redirecting focus during the mediation.²¹ In a similar vein, Cialdini notes that cognitive processes are suppressed by emotional reactions to scarcity.²² Focusing on the process and keeping the conflict outside the mediator's tunnel will help keep the mediator in a safer place emotionally and help the mediator avoid taking sides in the conflict or showing favoritism in the unfolding of the day. Maintaining passion, commitment and positivity for the process will be infectious and keep the parties interested in following the lead of the mediator, but will keep the mediator insulated from the emotional roller coaster of the parties.

In addition, being realistic about the possible outcomes of the mediation and the limitations of the parties to a conflict by creating a 'no judgment zone' will allow the mediator to stay centered and connect with the people without judging them or their actions in the conflict and in the mediation. A mediator can permit multiple versions of the facts to coexist without

²⁰ Lempereur, *supra* note 11, at 10.

²¹ Brazil, *supra* note 12, at 412.

²² Cialdini, *supra* note 2, at 267.

determining who is right.²³ The mediator must use his/her bandwidth for the process s/he is hosting without becoming embroiled in the parties' conflict.

Time Pressures Mount While Searching for Options and Solutions

With the parties talking in circles about their own version of the events, bandwidth limits become apparent. Helping the parties enlarge their focus and the myopic tunnel of their version of the facts to include important long term issues outside their tunnel will enable them to see a bigger picture. It is late in the day and the deadline for the end of the mediation is becoming a reality. The leisure of the early part of the day to discuss positions and try to convince the opponent of the 'true' facts is now over. The parties begin to focus even more on the resolution of the conflict and their own individual issues.

By bringing long term considerations back into the parties' tunnels, the mediator can help the parties identify their common and different interests in order to look for paths to resolution that they otherwise would not have been able to imagine.²⁴ Resolving the conflict does not require the parties to reconcile their versions of the facts, but it does require them to look at options outside the conflict intersection of their tunnel and decide to live with the past, accept their sunk costs and look forward to a joint resolution without proving anyone right.

At this point, the mediator is also feeling the scarcity of time and the high expectations of the parties. It continues to be very important for the mediator to avoid being sucked into the maelstrom of the parties' emotional tunnel²⁵ and to keep his/her focus on the process.

Remaining separated from the emotion of the conflict and focused on the progress of the process

²³ Lempereur, *supra* note 11, at 12.

²⁴ Lempereur, *supra* note 11, at 13.

²⁵ Brazil, *supra* note 12, at 414.

will help the mediator keep from expending too much energy in trying to get the parties to the printer. S/he must be patient and not lose sight of the process still being a success to the parties. The focus tunnel is closing in on the parties. Small steps can break an impasse and the mediator can encourage the parties to keep looking at considerations outside their tunnels. While it continues to be important to connect with the parties as the deadline approaches, this does not require the mediator to take the burdens of the conflict on personally.

The mediator has kept his/her focus on the process and encouraged the parties to look outside the tunnel and they are discovering points of agreement and nearing potential solutions. The process has been honored and the parties are taking responsibility for their part in the conflict and in finding a settlement. They are talking effectively together and the mediator can watch them progress toward the intersection of process and conflict where resolution can be identified.

Time is Most Scarce When Concluding the Mediation

Mediations can be divided into two types, those that have been settled and those that have not yet been settled.²⁶ If the right things are said at the right times, an agreement can be made and the parties move on to memorialize it in writing. Without an agreement after a long day, however, it is tempting to concede defeat. But, the parties have talked with each other and they have considered, or at least heard, the other side of the story. The mediator has elicited much information and conveyed difficult information to each side. If they have made a serious effort, the parties can move forward to litigation knowing they tried their best to settle and could not come to agreement. The mediator had hosted a process, not a single event, and it is still possible

²⁶ Steve Rottman, Advanced Mediation Lecture, April 15, 2015.

that an agreement may be made after the parties leave the mediation and have the opportunity to again leisurely consider issues outside the focus and tunnel of the time scarce mediation.

CONCLUSION

Despite everybody's best efforts, negotiations generally take until the deadline (and perhaps longer) before an agreement is reached.²⁷ Thinking about the phenomenon as limited by focus, tunneling and bandwidth changes the dynamic of the aimless-bantering-to-frenetic-closing timeline of a transaction to an understandable process from leisure to focus. We know intuitively that the parties must reach the appropriate mindset before they can make tough decisions, but knowing that time has consistent impacts on the parties and a framework of intersecting interests can enable us to be more at peace with the path to agreement. Knowing the process takes time and looking for indicators of the impact of time can relieve pressure to try to move a negotiation or mediation along faster than the parties are ready to progress. We can be at ease with the pace of the mediation and focus our bandwidth on the process and not on what is or is not being accomplished. For a mediator, it is easy to agree with Judge Brazil that focus on providing the parties the best process possible will allow them the space to make their journey to a wise agreement or an informed decision to continue with litigation.

²⁷ Deals close, for example, minutes before the fed wire deadline, with airplanes flying on low fuel in international waters, with rating agencies identifying last minute concerns, on Friday just before the filing window closes.