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2-1-2004

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### Recommended Citation

William F. Lincoln, *First the Context, Later the Challenge: Commercial Mediators Interface with the Volatile International Sector*, 4 Pepp. Disp. Resol. L.J. Iss. 2 (2004)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/1>

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# First the Context, Later the Challenge: Commercial Mediators Interface with the Volatile International Sector\*

William F. Lincoln\*\*

Upon notification that I was to receive a recognition award from Pepperdine University's Law School and its Master Forum, I initially concluded the possibility that an error had been made. Why would such a prominent institution select a low profile generalist for such an award, and why present it before such a prestigious body of commercial mediators as is gathered presently in my midst? Where is the relevancy, the commonality?

You are successful specialists in a field in which of late I have only dabbled at rather modest levels with local Seattle area firms such as Starbucks, Boeing, Microsoft and Trendwest — and in the past with Ford, and several insurance companies such as Travelers, Hartford and Safeco. But I repeat, dabbled and at a modest level despite the significance of the work preformed.

Unless we talk of international commerce, the two respective sectors in which you and I each work appear to be very separate arenas that lack any commonality. But, if we permit, a common bond indeed yearns to be acknowledged and cultivated: You and I have willingly accepted the honorable mantle as stewards of integrity, competency, and credibility of the mediation process and the profession itself.

Mediation — a process which is neither pure nor scientific; a process complete with bastardizations such as *mandatory mediation* provisions as well as creative variations including *partnering* and *med-arb models*; a process which we regard as both mystical and sophisticated, but which is barely embryonic when compared to the development of future theories, processes and applications not yet even imagined.

Despite the commonality that we are at least professional colleagues, there are differences in our scenarios, approaches and practices. The distinctions which I shall offer are neither meant to separate us nor to regard one sector as more complex or more difficult, sophisticated, important, or more elevated above the other. By attempting to construct a fuller picture, however incomplete

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\* This presentation was made at Pepperdine University School of Law Master's Forum which was held October 17-18, 2003.

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or inaccurate, it may be that knowledge and acknowledgement will evolve — and that our profession as a whole will benefit, and even more so via the cross-fertilization of each sector's own distinct artistry.

### 1. The Affordability of Conflict

First, — and admittedly with some exceptions — you perform your services in arenas comprised of parties who can afford the costs of conflict. Many disputants have even budgeted in advance for error, “for the fight,” for litigation, for mediation and even for settlement. Whether it be insurance companies, manufacturers, the service industry, contractors, public utilities or other entities, we know that preparations have been made by them to endure pending conflicts including product liability, wrongful death, patent infringement, unfair competition, or even insidious malignancies within the human institutions of religion — but to which I unashamedly still adhere in my commitment to faith, action and reform.

For the most part I say, despite the seriousness of the case situations in which you find yourself, most of the parties with which you are involved will *not* suffer economic dislocation; but only perhaps some significant yet temporary set backs as well as logistical and operational adjustments. They will *not* suffer degradation, but only perhaps a tarnished image. They will *not* suffer violations of human rights; *nor* refugee status; *nor* the feared intrusions in the night; *nor* maimed bodies; *nor* the ravages of war; and *nor* the sufferings of innocent citizens due to unwarranted and unsuccessful sanctions that prove in the end to be of no real benefit to US foreign policy or humanitarian values. Such sanctions neither worked as intended nor had any moral value in Nicaragua or in Haiti or in Iraq; are not working in Cuba or Iran; and will not work in Syria. Too many of the peoples with whom CRI<sup>1</sup> works in the international sector suffer beyond endurance levels ever imagined or believed possible. Thus, our two sectors — the commercial and the volatile international — are dramatically different.

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1. CRI is a non-profit corporation which develops training and consults on the prevention, management, and resolution of complex, multiparty conflicts. Its scope is worldwide. In addition to the project in Russia, CRI has ongoing projects throughout Central America, Cuba, and other Eastern European countries such as Poland, and is considering future projects in Asia and Africa. In addition, CRI is involved in collaborative planning, corporative problem solving, developing cross cultural competencies, and establishing public involvement forums. 3 HARV. NEGOT. L. REV. 123, 149, n.1.

## 2. Point of Entry

Your point of entry in commercial mediation is usually by invitation due to your specialization, experience, proven competency, and deserved reputation.

On the other hand, CRI and I most often have to develop our own point of entry. True, we were invited to be the lead trainer in the first comprehensive negotiation training conducted in the Soviet Union where most of our course participants were striking Ukrainian coal miners. True, we were invited by Solidarity to go to Gdansk to work for more than a week with a fractionated governing board and all its regional vice presidents. True, we were invited by Pakistan's Judicial College to go to Islamabad.

But in Nicaragua, we developed our point of entry by working through former Costa Rican President Rodrigo Carazo,<sup>2</sup> then with the office of Nicaraguan President Daniel Ortega,<sup>3</sup> and then with the political opposition UNO<sup>4</sup> after which we prepared key advisors and negotiators from all sides for the transitional government negotiations. We replicated a similar process in Guatemala — right to the very top — and then worked with political advisors and negotiators of all parties — the civilian government, the military and the URNG<sup>5</sup> armed revolutionaries — in preparation for the peace process moderated by an ap-

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2. Dr. Rodrigo Carazo was president of Costa Rica from 1978 to 1982.

3. Daniel Ortega Saavedra was president of Nicaragua from 1985-1990. As one of the leading commanders of the Sandinista forces that ousted Nicaraguan dictator Anastasio Somoza in July 1979, he became head of the ruling junta in the subsequent leftist regime. In disputed elections in November 1984, he was elected president. During the 1980s Ortega led the Sandinistas in a long and bloody civil war against the U.S.-backed Contras — a coalition of dissatisfied peasants, former Sandinista allies and Somozistas. A peace arrangement led to national elections in 1990, and Ortega and the Sandinistas were defeated by a right-centrist coalition led by Violeta Chamorro. Ortega relinquished the presidency in April 1991. Ortega lost the elections in 1996 and 2001.

4. Originally formed as the Nicaraguan Democratic Coordinating Group in 1982, UNO was a loose coalition of political parties formed as an opposition to the Sandinista government in Nicaragua. <http://countrystudies.us/nicaragua/48.htm>, March 16, 2004. From both inside and outside the government, these groups increasingly vocalized their opposition to the Sandinista government. *Id.* Although initially fractionalized throughout the 1980s, the group unified into an electoral coalition in September 1989. *Id.*

5. Unidad Revolucionaria Nacional Guatemalteca, also known as the Guatemala Revolutionary Unity, reached agreements between 1994 and 1996 to finally conclude a costly civil war with the Guatemalan government. United Nations Verification Mission in Guatemala, <http://www.un.org/Depts/DPKO/Missions/minugua.htm>, March 16, 2004; *see also*, Chronology of Guatemala's 36-Year Civil War, <http://www.hartfort-hwp.com/archives/47/161.html>, March 16, 2004. The government and the URNG began a cease fire on March 19, 1996 and formalized final arrangements in December 1996, including reintegration of the URNG into the political life of Guatemala. United Nations Verification Mission in Guatemala, March 16, 2004.

pointed United Nations envoy. A drama professor in Khartoum found us, CRI, on the internet, but after being on the ground in Sudan for less than a week we developed a programmatic entry with the Ministry of Peace, the President's Peace Advisory, and the Foreign Ministry, which later resulted in a summons to Washington to meet with Sudan's official negotiating team. And now we are working at high levels with opposition leaders of the SPLM/A<sup>6</sup>, Sudan Council of Churches<sup>7</sup>, as well as Afghanistan's Minister of Planning.<sup>8</sup> Our points of entry usually require proactive behaviors, patience, and lots of dodging and weaving. Our two sectors are quite different, aren't they?

### 3. Intervention

Many of you in your role as mediator serve as the "host" of the process while CRI and I always serve as its guest(s) in order to better emphasize process equity and process ownership. We can intervene in appropriately assertive ways, but we cannot intrude because our sector is both volatile and fragile. Most often our intervention causes us to resemble an "impartial eclectic," i.e., the trainer as intervenor, the process coach, the conciliator/negotiator, the assertive reality tester — so many different role functions borrowed, modified and integrated into a practical and usually effective whole. We are neither manipulative nor strong-armed, but neither are we anemic. And through our work we are always subject to a leery observation because our identity is forever "American" as was fully realized by those entities who did not look upon the US

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6. The Sudan People's Liberation Movement/Army is a resistance organization operation in Southern Sudan for control of Sudan. Southern Militia Merges With SPLM/A, Agree to Fight LRA Together, <http://allafrica.com/stories/200403050071.html>, March 16, 2004. In September 2003, the SPLM/A negotiated an agreement with the Sudanese government, and several military groups backed by the government known as South Sudan Defense Forces (SSDF), on various security arrangement in southern Sudan. *Id.*

7. The Sudan Council of Churches in a non-governmental organization that works with other organizations and the media to encourage peaceful resolution of human rights violations. CRIN: Organisations, <http://www.crin.org/organisations/viewOrg.asp?ID=719&name=New+Sudan+Council+Of+Churches>, March 16, 2004. The SCC has been active in seeking peaceful resolution between the Sudanese government and the SPLM/A in the south of Sudan. Sudan Council of Churches Mission for Peace, <http://www.christian-aid.org.uk/news/media/pressrel/020213p.htm>, March 16, 2004. The SCC is particularly concerned about continued bombing of villages by the government, oil exploration without a comprehensive peace agreement in place, and respect for church property. *Id.*

8. The current minister of planning for the interim government in Afghanistan is Mohammad Mohaqiq. Afghanistanland.com, <http://afghanland.com/history/interim.html>, March 16, 2004. He has led several successful attacks against the Taliban government and is currently a vital member of the Islamic Unity Party. Afghanistan Online, <http://www.afghan-web.com/bios/today/others.html#Mohaqiq>, March 16, 2004. He currently chairs the political committee within the Islamic Unity Party. *Id.*

government with favor such as Nicaragua's Sandinistas<sup>9</sup>, by Guatemala's URNG<sup>10</sup>, by Cuba's Foreign Ministry<sup>11</sup>, by Sudan's Khartoum based Islamic government<sup>12</sup>, and by various competing entities when we arrive in Kabul.<sup>13</sup>

#### 4. Costs of Failure

I introduce this aspect of my address by noting how strange it is to me when the news media reports "the mediation failed" instead of attributing any cause or fault to the parties. Well, that's another story for another time, and perhaps for a different audience such as news reporters themselves.

What is more important for me to note are the consequences if your mediation sessions fail compared to the impacts of failure in the sectors in which CRI works. *Pain* in the commercial sector is real — absolutely no doubt about it. Pain, whether it be related to negative economic consequences, damaged reputations, feelings of being treated unfairly, rise to disillusionment, or uncontrolled negative impacts on employees or the broader community. Pain hurts.

The consequences in the commercial sector may be torturous, but not torture itself, as inflicted by the tentacles of war or civil unrest. If we fail in the international sector the negative consequences of a protracted conflict or actual impasse may mean real horror and the likelihood of death for soldiers and civil-

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9. The Sandinistas were the left-wing Nicaraguan governing party in the 1980s led by Daniel Ortega Saavedra. Sandinistas (Nicaragua History), <http://reference.allrefer.com/encyclopedia/S/Sandinist.html>, March 16, 2004. The Sandinistas were opposed by United States-supported guerrillas known as *contras*. *Id.*

10. URNG, *supra* note 5.

11. The Ministry of Foreign Affairs was founded on December 23, 1959. <http://www.cubaminrex.cu/English/Ministry.htm>, March 16, 2004. The purpose of the ministry is to carry out Cuban foreign policy and promoted and sustain the Revolution within the international context. *Id.* Cuban's condemnation of interference, coercive unilateral measures, and threats of use of force has led the Foreign Ministry to view American Foreign Policy negatively. *Id.*

12. Khartoum is the capital of Sudan. It is also often used to refer to the governing party in Sudan. <http://www.arabicnews.com/ansub/Daily/Day/040315/2004031508.html>, March 16, 2004. The government of Sudan has accused American officials of being biased towards rebel groups in Sudan. *Id.* In addition, the Sudan government has accused the United States of attempting to rush the peace process in Sudan and undermining the interests of the government. [http://www.news24.com/News24/Africa/News/0,,2-11-1447\\_1497948,00.html](http://www.news24.com/News24/Africa/News/0,,2-11-1447_1497948,00.html), March 16, 2004.

13. The current transitional government has left the country fragmented and political organization in a state of flux. CIA- The World Fact Book: Afghanistan. <http://www.cia.gov/cia/publications/factbook/geos/af.html#Govt>, March 16, 2004. Various groups have organized in hopes of participating in the new elections. *Id.*

ians alike — but mostly, it is the children who suffer. Our two sectors are different.

## 5. Conflict Aftermath

One of the haunting variables of CRI's work is the hovering threat of *conflict aftermath*,<sup>14</sup> due to premature settlements in which not all issues have been resolved, lasting residual emotions, uninformed constituencies, misinterpretations of terms and conditions, unrealistic expectations, procedural dissatisfaction, or the absence of a future dispute resolution clause. Any of these elements could cause peace accords to unravel to a point of resumed armed conflict.

And when CRI is involved in environmental issues, we are aware of a further complication. What initially may be believed by all disputants to be an acceptable agreement might very well have latent negative impacts which are *not* realized, either in extent or severity of damage to health and safety standards as well as to the environment, and that such unintended consequences may be irrevocable due to expense or the lack of an appropriate technology to rectify the situation. CRI thinks of such possibilities in the context of our work with Trendwest's MountainStar<sup>15</sup> destination resort in Roslyn,<sup>16</sup> Washington, the picturesque film site of *Northern Exposure*,<sup>17</sup> as well as our involvements with the Hanford Nuclear Reservation in Richland, Washington.<sup>18</sup> There may be no option for mid-course correction or recourse of any kind — except apology, litigation and prayer!

## 6. Systems Change

Your settlements in the commercial sector often lead directly or indirectly to a change in policies or practices by one or more parties. And while I always

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14. Conflict Aftermath is the "fall out" from the dispute, or the process used to settle the dispute. Quick Quiz, *available at* <http://www.cri.cc/pages/criframes.html>. It usually occurs after the dispute has been resolved. *Id.* It can be due to the dispute, the procedure used to end the dispute, or the resolution of the dispute. *Id.*

15. CRI helped mediate a dispute between the local environmental group RIDGE and the MountainStar Resort concerning the land development by the resort. National Experience, *available at* <http://www.cri.cc/pages/criframes.html>.

16. Roslyn is a small town in Washington, with about a 1,000 residents. City of Roslyn, *available at* <http://www.mrsc.org/cityprofiles/cityprofile.aspx?id=200>.

17. Northern Exposure was a television show that aired on CBS from 1990 to 1995. Northern Exposure, *available at* <http://www.retroweb.com/nexp.html>.

18. CRI, along with National Center Associates, provided process coaching and training to the Hanford Nuclear Reservation. They also created a negotiations primer for them, which contained intra-organizational standards for negotiation. National Experience, *supra* note 2.

applaud the parties for having moved themselves in such directions I commend you for having the skills that prompted such activity or hindered it not.

CRI's work in the volatile international sector mandates a reconciliation of parties, yet always coupled with a shift in power — enforcement of human rights; laws, regulations, policies, and practices related to employment, housing, education, the environment, land use and natural resources; access to information; public involvement; inclusion into a political system; etc. Thus, in an impartial non-intrusive way we are focused on the transformation of cultures of conflict into cultures of peace with justice that can be sustained; and all this is based on perceived fairness and working relationships that also have to be sustained through what we call the *pastoral functions* of the mediator/intervener.

### 7. Cross Cultural

Unfortunately, time will not permit me to either address or celebrate such complexities. Corporate cultures or community cultures can succinctly be described as “*it's just the way we do things around here*” — and “things” are different! Nor have I addressed the element of *time* — I think our cases consume a lot more time than do yours.

Before I continue, let me state that despite how famed mediator Tony Pizazza encourages me I currently do *not* feel comfortable or confident to do what you do. Presently, I feel only comfortable in what I do, where I do it and how I do it.

Clearly, we are in different sectors doing different things in different ways, and that's precisely why we should be talking to one another candidly, regularly and frequently. Why? Because of three elements:

- The compelling fact that conflict is a rapid growth industry.
- The compelling problem that conflict prevention, management and resolution are *not* increasing at a proper pace. Within the international sector there is an unacceptable gap between war technology and peace technology.
- The compelling challenge is “How do we close the gap?”

How? I'll address that question later, perhaps next year somewhere in a similar forum.



But in the few moments I have remaining with you I shall address a favorite topic of mine which I have labeled “*In Pursuit of Promises*”<sup>19</sup> <sup>tm</sup> to embrace a series of training courses which CRI teaches as well as being the description of the general approach we take in addressing conflict prevention, management and resolution.<sup>20</sup> The copyrighted material below appears in our negotiation training manual, “*The Spirit and Skills of Negotiation*”.<sup>21</sup>

First we have to re-establish the integrity of the concept itself.

“*Promises*” are absolute as certainty itself: There are no such things as bad or broken promises — only mere intents, lies, and utterances made callously, carelessly or prematurely without complete thoughts regarding the availability of all necessary resources, priorities, capabilities, and the cost of commitments. And, what of negotiations? Simply stated, it is a valued and proven process of developing, exchanging, and maintaining promises — essential, practical, achievable, dependable, and absolute as certainty itself. We may fondle or fumble with nomenclature as we wish — oath, vows, pledges, memorandum of understandings, settlement agreements, contracts, treaties, or covenants — as long as we acknowledge the results to be nothing less than “*promises,*” and thus still absolute as certainty itself.

### THE TEN COMPONENTS OF A PROMISE\*

If negotiations is a “pursuit of promises” then some attention needs to be focused upon *what constitutes a legitimate promise*.

A “promise,” by definition, is “a declaration assuring that one will or will not do something; to afford a basis for expecting.” The synonyms offered include “pledge, word of honor, vow, assurance, warranty, guarantee, covenant, contract, and compact.” “Promise” has an undeniable tone of *absoluteness*.

Thus a promise, by definition, cannot be made in “bad faith” for such an ill-conceived utterance or action would be a mistake, perhaps even a lie, but not a promise. Nonetheless, it is possible for people to make promises either prematurely or carelessly, i.e., without profound thought being given to what conditions must be met or the intrusion of variables which could have been anticipated, and then addressed and perhaps mitigated.

First, a promise is meant to fulfill a void or to make something happen that would not otherwise occur or, in the converse, to prevent a happening. The substantive content of the promise needs to be specific. Thus the first ingredient is

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19. Information on *In Pursuit of Promises* can be found on CRIs website at <http://www.cri.cc/pages/criframes.html>.

20. Conflict prevention is the most frequent purpose and use of mediation, and is essentially “planning.” Negotiation Tip: Negotiation Myth 2, available at <http://www.thelincolninstitute.cc>. Conflict management is the second most common purpose, it involves keeping bad situations from getting worse. *Id.* Conflict resolution is the least used form of mediation. *Id.*

21. Information on *The Spirit and Skills of Negotiation* can be found on The Lincoln Institute’s website at <http://www.thelincolninstitute.ccl>.

an explicit statement ... explicit understandings ... as to what will or will not occur.

Secondly, the statements by the person making the promise simply cannot be regarded as a sincere intent, but s/he needs to be committed to the fulfillment of what was pledged. Something specifically will change — or not change. *Uncertainty is replaced with certainty.*

Thirdly, the promise maker must have not only commitment, but the *capability including resources* to fulfill the promise. Time, necessary competencies, the staff, the tools, the money, the personal contacts, et cetera, may be some of the many resources which need to be identified as both adequate and available to be utilized for the fulfillment of the promise.

Fourthly, a promise must contain an *explicit time frame* as to when the happening will commence and what will be the duration of the pledge. To say “as soon as possible” or “as soon as I can” is not a promise but a concept free of specific terms and conditions ... including the time frame ... required in a promise.

Fifthly, the promise maker needs to be aware of the full scope of the promise as well as its limits; the parameters, if you will.

Sixthly, the promise must include *under what circumstances, i.e., terms and conditions, will the promise be fulfilled and maintained* with regard to items such as the nature of the relationship; the availability of goods and services; matters of accessible quality and quantity; the governance of structure such as laws, policies and regulations; and the identification of possible variables which could intrude upon the promise, i.e., unanticipated work stoppage, changes in or by government, natural disasters, death, or even the weather — “*I said if It didn't rain!*” — and under what conditions can the promise be legitimately declared either fulfilled or made null and void.

Another component, the seventh, is that the entity which is to benefit from the promise clearly understands the promise in total as well as the limits, parameters, terms, and conditions of fulfillment. This item and the three components which immediately precede it do much to monitor the compliance process. Confirmation of full and accurate comprehension of both the procedural and substantive aspects of the promise is essential.

Eighthly, the promise maker must be aware of the *consequences for non-compliance*, namely, the *penalty of breaking the promise* which may result in a blemish on credibility, damage to the relationship, negative impacts on innocent others, or jeopardy of one's own interest whether they be personal, professional, social, economic, or political.

Ninthly, *the format of the promise must be obvious* ... verbal, written, or behavior such as a handshake or one having *given his/her word* or provided a

sworn oath — *Now before those assembled before me ....., or So help me God, or I swear on the graves of my ancestors that ....*

And finally, the tenth component: the promiser and promisee individually and perhaps collectively will evaluate the fulfillment of the promise with varying criteria, i.e., fullness, timeliness, quality, quantity, effectiveness, attitude, et cetera.

Obviously gender, generational, and cultural mores and customs influence the particular mode of any or all of the ten (10) determinants provided above. And, then too, we are faced with the realities of circumstances which create *situational ethics*.

So, whether we are talking about labor contracts, international treaties including those entered into with the sovereign nations of Indian Country, memorandums of understandings, vows, oaths or pledges made in the commercial sector or the volatile international sector, it's all about helping people in developing, exchanging, and making promises. It's about helping people sitting across from one another to see that the counter-force before them is indeed the partner each other seeks to prevent, manage and resolve the situation.

No wonder we — you and I — are here together. We have so much in common, and still so much to offer one another via the cross-fertilization of our separate but not estranged fields of involvement.<sup>22</sup>

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22. In Pursuit of Promises™ 1995, 2001. The Spirit and Skills of Negotiation.™ Products Copyrighted by the Lincoln Institute for Collaborative Planning and Cooperative Problem Solving, Inc.