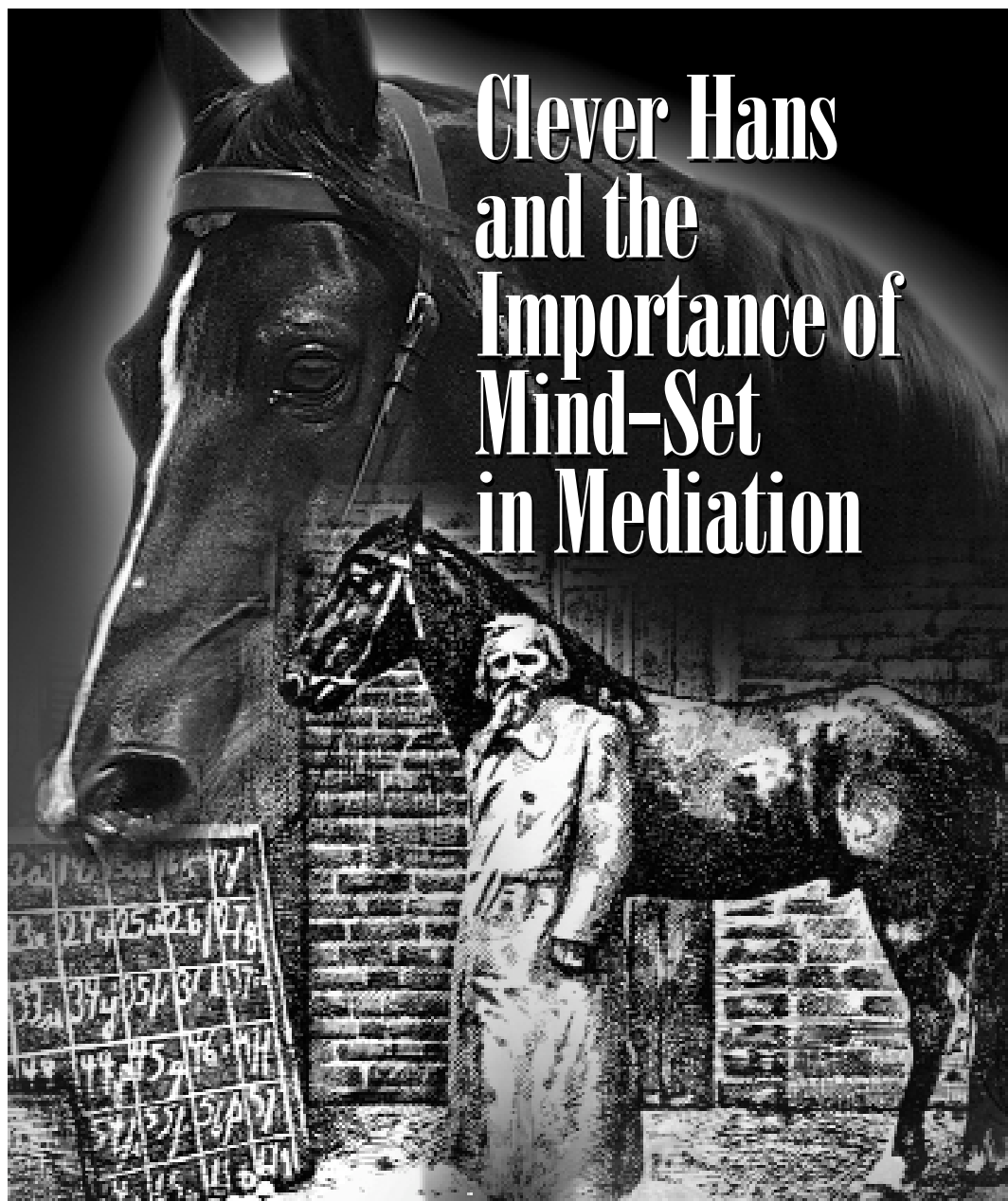


This article first appeared in *Orange County Lawyer* magazine in October 2009, Vol. 51 No. 10 (page 23). © Copyright 2009 Orange County Bar Association. The views expressed herein are those of the author(s). They do not necessarily represent the views of the *Orange County Lawyer* magazine, the Orange County Bar Association or its staff. All legal and other issues should be independently researched.

by Fred T. Ashley

Herr Wilhelm von Osten was a man of many occupations and interests. A math teacher, horse trainer, phrenologist, and mystic, von Osten also fancied himself a bit of an amateur scientist. Inspired by the writings of Charles Darwin, von Osten hypothesized that if humankind, with its innate intelligence, is the product of evolution, then lower animals must possess an ability to comprehend and solve problems that parallels, if not equals, that of humans. To prove his hypothesis, he initially undertook experiments with a bear and a cat, but the bear was a savage brute, and the cat had another agenda altogether. So, you can imagine his glee when he happened upon der Kluge Hans (“Clever Hans”), a black stallion that seemingly possessed the ability to perform a variety of arithmetic functions, not to mention other mental gymnastics. Proud of his discovery, in 1891, von Osten began displaying the remarkable horse at public performances. While standing in front of Hans, von Osten would ask a question that required mathematical computation. Some of the problems called for Hans to add, subtract, multiply or divide. Others necessitated calculations involving basic square root or fractions. To the amazement of his audiences, Hans tapped out the correct answers to these questions with his hoof approximately 90% of the time.

Perplexed by these performances, the German Board of Education established a com-



Clever Hans and the Importance of Mind-Set in Mediation

mission of experts to determine whether Hans possessed extraordinary intelligence, or was merely well adapted to learn tricks from a patient master. Impressed by the fact that Hans performed nearly as well when someone other than von Osten acted as the questioner, in 1904, the “Hans Commission” concluded that there was “no trickery whatever” in the performances. Moreover, it attributed the horse’s intellectual prowess to von Osten’s application of teaching methods similar to those used with children in elementary schools.

Not convinced by this finding, a psychologist named Oskar Pfungst carried forward with the investigation. Noting that Hans failed to respond correctly when the questioner did not know the answers or was out of the horse’s view, Pfungst concluded that Hans lacked the capacity to apply

to math problems the higher mental processes normally attributed humans. Pfungst found that the horse’s success was instead explained by its ability to discern subtle cues from the body language of a questioner. He observed that when asked a question, Hans would begin slowly tapping his hoof, which usually resulted in a minute increase in the tension displayed by the posture and facial expression of the person posing the problems. When Hans reached the correct answer, this tension was generally released, which was the signal to Hans to end the tapping. Significantly, Pfungst found that these cues were detectable by Hans even if the person posing the question attempted to suppress them. Like a professional gambler, Hans was highly skilled at reading the “tells” that reveal the mind-set of another.

The “Pygmalion Effect”

Years later, in the mid-1950’s, a scientist named Robert Rosenthal discovered that if he led experimenters from an introductory psychology class at UCLA to believe that some of the rats under study were bright, and others were dull, the rats would usually perform in accordance with the expectancy of the experimenters when required to run a maze or perform tasks in a Skinner box. This prompted Rosenthal to investigate whether teacher expectations similarly impact the educational performance of school-children, an inquiry he ultimately answered in the affirmative. Rosenthal found that teacher expectations act as a “self-fulfilling prophecy” in that they positively or negatively influence the manner in which teachers treat their pupils, and the resulting educational achievement of the children. Rosenthal labeled this phenomenon the “Pygmalion effect” after the Greek myth and George Bernard Shaw play. (Robert Rosenthal, *Covert Communication in Classrooms, Clinics, Courtrooms, and Cubicles*, (American Psychologist 2002), 840-843.)

Rosenthal’s selection of this name is perhaps explained by the following dialogue between Eliza Doolittle and Colonel Pickering in the final act of *Pygmalion*:

“LIZA: . . . But do you know what began my real education?

“PICKERING: What?

“LIZA: [*stopping her work for a moment*] Your calling me Miss Doolittle that day when I first came to Wimpole Street. That was the beginning of self-respect for me. [*She resumes her stitching*]. And there were a hundred little things you never noticed, because they came naturally to you. Things about standing up and taking off your hat and opening the door—

“PICKERING: Oh, that was nothing.

“LIZA: Yes: things that shewed you thought and felt about me as if I were something better than a scullery-maid; though of course I know you would have been just the same to a scullery-maid if she had been let in the drawing room. You never took off your boots in the dining room when I was there.

“PICKERING: You mustn’t mind that. Higgins takes off his boots all over the place.

“LIZA: I know. I am not blaming him. It is his

way, isn’t it? But it made such a difference to me that you didn’t do it. You see, really and truly, apart from the things anyone can pick up (the dressing and the proper way of speaking, and so on), the difference between a lady and a flower girl is not how she behaves, but how she’s treated. I shall always be a flower girl to Professor Higgins, because he always treats me as a flower girl, and always will; but I know I can be a lady to you, because you always treat me as a lady, and always will.” George Bernard Shaw, *Pygmalion*, Act V (1912).

Intriguingly, Eliza’s ultimate conclusion about what led to her transformation is less than fully accurate. What Eliza really cared about was not so much how she was treated, as how she was regarded, by Professor Higgins and Colonel Pickering. She merely looked to how she was treated as a cue that “shewed” the answer (in the mode of Clever Hans). It was her finding that, in contrast to Professor Higgins, Colonel Pickering really *did* think of her, not as a “scullery-maid,” but as a lady, that prompted her to act in a manner consistent with his expectancy. Correspondingly, it was that, despite his knowledge of her lowly upbringing, Colonel Pickering honestly perceived Eliza as a lady that prompted him to accord her the courtesies she was due. That is, the treatment followed the perception. Had Colonel Pickering held another view of Eliza, she would have recognized it from his unconscious actions, as she did with Professor Higgins.

The Importance of Mind-Set in Mediation

In the context of mediation, the import of the Pfungst and Rosenthal studies is that the internal attitudes, expectations and thinking of participants regarding themselves, others and the mediation process really do matter. Indeed, their mind-sets are frequently as determinative of the outcome of the mediation as the merits and complexity of the underlying issues to be resolved.

The Mediator and the Power of Positive Thinking

The best mediators have discovered that, in the face of adversity, it pays not simply to *act* in an optimistic manner, but to actually *be* optimistic about the prospect of success. Their optimism, which is reflected in their hopeful demeanor, rubs off on the participants, and frequently becomes a “self-fulfilling prophecy.” Imbued with the sense that settlement is achievable, the attitudes of the participants frequently change. They become more

flexible and creative in their proposals and tenacious in pursuing the process to prevent a settlement from slipping away. The favorable responses of participants, in turn, reinforce the propensity of these mediators to be optimistic.

Contrived optimism, however, will almost always be betrayed by nonverbal cues, if not its audacity — *e.g.*, “In my twenty years of practice, I have never failed to settle a case.” Moreover, once detected, it will undermine the mediator’s credibility and related ability to achieve a settlement.

It is, therefore, imperative that a mediator be honest in his/her optimistic disposition. Such honesty is best achieved by focusing on the many times he/she has been faced with equally great hurdles to overcome in mediation and has managed to surmount them. If this is done with sufficient regularity, it will become part of the mediator’s persona, and success will flow in accordance with the “Pygmalion effect.” That is, mediation participants will tend to react in a manner consistent with the mediator’s expectancy.

The Attorney’s Mind-Set

Perhaps because of the training they receive in law school, attorneys tend to think in a linear manner in fulfilling their roles as advocates and counselors at mediation. They generally expend a great deal of mental energy presenting the facts and law in a light most favorable to their clients. They also go to substantial effort to assess the settlement value of the case based upon their analysis of its merits, calculation of the alleged damages, view of the strengths and weaknesses of the opposing attorneys and witnesses, and judgment regarding the benefits and risks of proceeding with litigation. Finally, they give much thought to how best to posture their clients in the give and take of negotiations.

It is both appropriate and necessary that attorneys engage in these intellectual efforts, as they are the stuff around which discussions revolve in the mediation of a litigated dispute. Such efforts at rational analysis are also indispensable if the attorneys are to appropriately counsel their clients. However, given the attorneys’ goal of persuading others to their view, consideration should also be given to the subconscious elements of human behavior.

• The Six Principles of Persuasion

Applying over fifty years of psychological research into the factors that prompt human beings to say “yes” when compliance is requested of them, Dr. Robert B. Cialdini, a Regent’s Professor at Arizona State University, has identified six principles of persuasion that are effective in every human culture. Significantly, he has discovered that, while keeping the substance of a request constant, the probability of receiving an affirmative response to it can be greatly enhanced by a skillful application of these principles. (Robert B. Cialdini, *INFLUENCE – SCIENCE AND PRACTICE*, (4TH ed., ALLYN & BACON 2001).) This is not to imply that a person can be placed in a Svengali trance by an application of the principles. It is rather to observe that the principles appeal to the emotional and irrational triggers of human decision-making. Simply stated, the principles are as follows:

1. **“Reciprocity”** – We feel a sense of obligation to give back to others who have given to us.
2. **“Consensus”** – We decide what we should do by observing and duplicating the conduct of others.
3. **“Authority”** – We rely on those with perceived superior knowledge for guidance on what decisions we should make.
4. **“Consistency”** – Once we take a position or make a commitment, we feel compelled to behave in a manner consistent with it.
5. **“Scarcity”** – As opportunities become less available, they are regarded as more valuable.
6. **“Liking”** – We are disposed to respond positively to those we like.

The eminent mediator Myer Sankary has written about how these principles may be employed in mediation to persuade others to one’s positions. (Myer Sankary, *Using the Science of Influence to Negotiate Better Deals in Mediation*, (ADR Services, Inc. 2008).) The focus of his insightful article is on the application of the six principles to the individuals one seeks to influence in mediation, which he notes may include one’s colleagues and clients, as well as the individuals on the other side of the bargaining table. (*Id.* at 1-2.) Significantly, Cialdini and Sankary agree that ethical considerations arise when one contemplates engaging the principles. Most notably, they stress that the principles should not be utilized in a dishonest manner or in circumstances where their use is strained or unnatural. (Sankary, *Using the Science of Influence to Negotiate Better Deals in Mediation*, 6; Robert Cialdini, *PRINCIPLES OF PERSUASION – HARD SCIENCE*

FOR SOFT SKILLS 6, *INFLUENCE AT WORK* 2000-2006).

- **Applying the Principles of Persuasion to Oneself**

Beyond these ethical considerations, there is a practical reason why an attorney should avoid applying the principles in a false or manipulative manner. It is that his/her insincerity will likely be exposed by his/her involuntary, nonverbal behavior. It should be anticipated that, like Clever Hans, the other participants in the mediation will observe the cues that reveal that the attorney is being disingenuous, and the effort will backfire. The result will be that the attorney is regarded no better than a used car salesperson who is too ready to flash a wide smile, pat customers on the back and call them by endearing nicknames. To avoid such a consequence, an attorney who desires to apply Cialdini’s principles of persuasion in mediation should begin by applying them, not to the opposing attorneys and parties, but rather to himself/herself. This in no way requires the attorney to compromise his/her role as an advocate or sacrifice his/her client’s interests.

The first step is to focus on the likeability of opposing counsel. This requires that the attorney recognize that the lawyers on the other side of the case are not “opposing” him/her so much as performing their duty to represent their clients’ interests. Bearing in mind that nearly all human beings, including lawyers, have some socially redeeming characteristics, the attorney should give some thought to the things about opposing counsel he/she genuinely likes and admires. Because we tend to like people who are like ourselves, the attorney should also contemplate the interests of the opposing attorneys (*e.g.*, sports, music, books, hobbies, etc.) that are similar to his/her own. Finally, the attorney should undertake to create opportunities to cooperate with opposing counsel in the litigation to create a more harmonious backdrop for the mediation.

If these efforts to affirmatively like the opposing lawyers are less than successful, the attorney should at least commit himself/herself not to indulge the polar opposite emotions of anger or contempt. Not only will these feelings disrupt the attorney’s efforts at rational analysis and undermine his/her professionalism, they will prove dysfunctional with regard to the objective of persuading others. They will create conflict that is disruptive of the mediation process and a negative expectancy with which others will tend to con-

form.

To dispel such adverse feelings toward the opposing parties, the attorney should put himself/herself in their “shoes” and try to understand their side of the story. He/she should also look past the validity of their positions, and give thought to the interests and needs they seek to satisfy.

Additionally, the attorney should commit himself/herself to maintain an open mind at the mediation regarding the issues in dispute, and be the type of person who not only observes the reciprocity principle, but “pays it forward” by being the first to extend courtesies, benefits and concessions to others.

Finally, the attorney should recognize that the mediation presents a scarce opportunity to end the burden and expense of the litigation and bring peace to the parties. As such, it is too valuable to be squandered because of petty grievances between counsel, misplaced notions of principle or a desire to secure a fleeting tactical advantage.

If the attorney adjusts his/her own mind-set in this fashion, there will be less need to give thought to how to apply the principles of persuasion to others. While the attorney concentrates on his/her rational analysis, the principles will flow naturally from the attorney’s words and conduct. The attorney will: (a) smile, extend a hand, open a door or exchange pleasantries, not for the objective of manipulating others, but because he/she truly likes or respects them; (b) make others the gift of listening intently to what they have to say because he/she recognizes their words really are important; (c) underscore his/her own credibility and authority by acknowledging the legitimacy of points made by others, and then meeting them with observations of his/her own; (d) present his/her client’s case in the least inflammatory manner possible; (e) be the first to make concessions in negotiations to set the principle of reciprocity in motion; and (f) think outside of the box to fashion creative solutions to the dispute that meet the respective interests and needs of the parties.

As a result, the attorney will be far more persuasive. Moreover, the opposing attorneys and parties can be expected to react favorably to these cues by altering their own thinking and conduct to be more conducive to settlement. In the end, the attorney will usually achieve a better result for his/her client than he/she would have operating with the state of mind of a “hard nose” negotiator.

The Mind-Set of the Parties

At a speech he presented in Tempe, Arizona in 2006, Professor Cialdini reported that he is in the process of researching whether the notion of “We,” which possibly overlaps the principles of “Consensus” and “Liking,” should be elevated to a seventh separate principle of persuasion. The concept of “We,” he explained, is that humans tend to support and say “yes” to those they see as members of their group. The interesting point is that the boundaries of what one perceives as one’s group are highly malleable. Indeed, if one carries the idea far enough, one cannot escape the conclusion that we are all members of the same group – the human race.

Outside the area of personal injury, the typical law suit involves a once favorable relationship that somehow went bad. Unfortunately, once the relationship has ended, the parties tend to declare an end to the notion of “We,” and their desire to accommodate the other dissipates.

A major objective of an attorney in preparing his/her client for mediation, therefore, should be to get the client to work through the resentment and hurt feelings that arose from the breakup of the relationship, and think back to the time when the client regarded the opposing party as a member of his/her group. This can render the client more open to addressing the interests and needs of the other party, and making concessions toward the objective of reaching settlement. When the opposing party observes that one’s client thinks of him/her as included within the concept of “We,” he/she can be expected to respond with a comparable sense of conciliation and collaboration.

Conclusion

None of this is to suggest that a rational analysis of the merits of a lawsuit is unnecessary, or that the parties to a dispute can be expected to abandon their self-interests if they clasp hands and sing campfire songs. It is rather to note that the unconscious mental states of the mediator, attorneys and parties have a significant impact on the outcome of mediation. The thought processes of each of the participants impact those of the other involved individuals and render everyone more or less inclined to act in a productive manner. To have a positive effect on mediation, one must truthfully hold the appropriate mind-set, as any pretense will be detected by the other participants and negative consequences will ensue. Upon achieving the optimum state of mind, however, one may envision

Clever Hans slowly tapping his hoof and then stopping to signal that he has detected that one has arrived at the correct answer.



Fred Ashley is the Chair of the OCBA ADR Section and a full-time mediator with ADR Services, Inc. His biography and profile are available at www.socalmediator.com.