

Vol. 73 / No. 4
2018



DISPUTE RESOLUTION JOURNAL



AMERICAN ARBITRATION ASSOCIATION®



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®



AAA Mediation.org™

SPEAK FIRMLY AND CARRY A NATIVE AMERICAN TALKING STICK: CALMING TURBULENT HEARINGS USING AN ANCIENT TRADITION

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As a former litigator and now full-time ADR professional, I serve as a court-appointed special master from time to time. I have recently presided over a complex business dispute involving multiple parties that has been dragging on for years. The case has been hotly litigated and there have been motions to compel, for sanctions and to disqualify counsel. The hearings before me were often heated, with the parties regularly interrupting each other and using incendiary language. This conduct was not only rude, but disrupted the flow of the hearing and made it difficult for the court reporter to produce a clean record.

Casting about for a means to remedy this situation, I remembered a suggestion from one of my mentors and colleagues made during our local mediator breakfast group (something I highly recommend to reap the benefits of cross-pollination). He told us that from time to time he uses a talking stick as a tool to calm the waters in contentious mediations. While I did not believe I needed the stick for my mediation practice, it struck me that this might be just the device to employ in my contentious special master matter, albeit with a twist.

At my next hearing, I deployed a Native American Talking Stick (“NATS”). Giving credit to the author, I quoted the following piece from an article I found online:

The Talking Stick is a tool used in many Native American Traditions when a council is called. It allows all council members to present their Sacred Point of View. The Talking Stick is passed from person to person as they speak and only the person holding the stick is allowed to talk during that time period. ... Every member of the meeting must listen closely to the words being spoken, so when their turn comes, they do not repeat unneeded information or ask impertinent questions

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. . . this is not to say that they may not disagree, but rather they are bound by their personal honor to allow everyone their Sacred Point of View.

Traditional Talking Stick,

<https://www.firstpeople.us/FP-HTML-Legends/TraditionalTalkingStick-Unknown.html>.

After some further discussion about the NATS with counsel, I added a per-interruption fine policy. That is, I announced that if someone without the NATS interrupted the speaker holding the NATS or otherwise spoke without the NATS, I would impose a \$5 per-interruption fine. These fines would be paid to the Court's favorite court-related charity. Unveiling an easel with a pad containing each attorney's name, I told them I would use my sharpie to record every interruption by counsel to track the fines I would be imposing. I also told the group that the foregoing would be set forth in my next Report & Recommendation to the Court.

The effect of this change in procedure was remarkable. During the hearing prior to introducing the NATS, there were approximately 80 interruptions; at the hearing in which I first deployed the NATS, there were only two (I suspended those fines and did not publish the lawyers' names in my Report & Recommendation, as the interruptions occurred as the lawyers were adjusting to the new system and were not repeated). At the next hearing, there were none.

Certainly it was not the money that induced the good behavior. One can assume it was the fear of being cited in a public Report & Recommendation subject to judicial review. Perhaps this experience will assist others in managing their unruly hearings, whether as a special master or otherwise.