

# *It's About Time – “Real-Time” Conflict Solutions Are Here*

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By Tracy L. Allen

“What do you mean ‘there’s a problem?’ We don’t have time for a problem. This has to be resolved ASAP.”

This type of conversation is heard everyday. It matters not whether you are the in-house attorney, the general counsel, the employer, the provider, the supplier, or the complainant. With the increasing pace of global communication, the luxury of time has long passed. We are inundated with communications requiring immediate response. Business leaders dread being distracted from the focus of profit making. Understandably, they resent being thrown into conflicts. Unlike attorneys who are (often wrongly) presumed to thrive on conflict, clients thrive on staying competitive, keeping a quality productive work force in place, and satisfying customers.

## **So Little Time; So Much to Do.**

Time has increasingly become a commodity. In the world of economics, it is now a bargaining chip as well as a tool. In his best selling book, *Blink: The Power of Thinking Without Thinking*,<sup>1</sup> Malcolm Gladwell introduces us to the concept of “thin-slicing.” It relates to the brain’s ability to shortcut information and process data flowing into the brain with rapid response. The “fight or flight” mentality rooted in the brain’s neurological system is a prime example of how our own physiology supports Gladwell’s contention.

The ability to “thin slice” has significant implications for use in analyzing and resolving conflict.<sup>2</sup> By activating the ability to make quick decisions based on selective data, one may avoid considerable unnecessary effort and achieve acceptable (or better) outcomes. The increasing need for speedy and effective interventions in the business world invites a wide range of strategies into very different circumstances. Understanding the role and value of time in business has led to the integration of multiple methods of dispute resolution into the world of commerce.

Ironically, the emergence of alternative dispute resolution (ADR) mechanisms to resolve conflict may reflect, in part, Gladwell’s

concept of thin-slicing. Rather than submit to the often laborious and expensive traditional litigation path of massive information exchange and sorting, mediation, for example, in and of itself is a forum for processing an appropriate volume of information necessary to reach a negotiated agreement. It usually comes before the trial, and thus, by definition, “all” the information has not been presented.

Today, “less is more” is no longer a negative notion. Whether it is in the midst of a long term information technology (IT) contract, a prevention tool in risk management, or a first step toward maintaining an employment relationship, many creative models and methods for engaging people in learning negotiations emerge because swift resolution is now a business necessity.

## **Real-Time Interventions**

The twenty-first century market refers to these techniques as “real-time interventions.” Many of these interventions incorporate a neutral, unrelated third party into the resolution process. This person usually has no stake in the outcome. Specifically designed to address an issue at its birth, a variety of objectives can be met with real-time interventions. The specific issues or concerns raised by the dispute are met head-on. There is the opportunity to avoid the fallout from the dispute, the ability to prevent repetition of the problem in the future, and the chance to solidify or improve communications while supporting or reinforcing (contractual) relationships. All of these avenues enhance the likelihood of meeting the ongoing needs of the affected parties while working through the problem with the assistance of the intervener.

Real-time interventions are many but they embrace a common theme—attention to the rights and interests of the affected parties.<sup>3</sup> Each is intended to be applied in immediate, real time, and not, for example, six months from now. By agreeing to enter into dialogue with a neutral “at the moment of impact,” the affected parties are far more capable of analyzing their own individual rights and

interests as well as those of others in the relationship because the history of the dispute has yet to be written. More importantly, depending upon the type of real-time intervention selected, the process can be entered into without risk to future rights if full resolution is not achieved.

### Creative Interventions

When trouble arises in a business relationship, it would seem logical that business solutions should be the first source of resolution. The original “Customer Complaint Department” was and remains a simple, elegant method for first attempts. In more sophisticated structures, customer complaint and customer service teams have replaced the company ombudsman. They are poised with knowledge of the corporate needs and methodologies but seek ways to sustain the relationships that drive the business model, which sometimes go awry. They find ways to balance the present circumstances of the problem with the future of the relationship.

When the trained “inside” third parties fail to achieve full resolution, the next step for many companies is frequently the “Legal Department.” In small organizations, the Legal Department is outside counsel. In larger entities, the Legal Department is a more structured arm of the business team of the organization. Whether in or out, once an issue rises to this level of organizational attention, these newer real-time interventions can come into play.

### Real-Time Mediation

Growing in popularity with the construct of real-time interventions is “real-time” mediation. Created in part out of necessity, a variety of industries are incorporating it into their business operations, negotiations, and third-party relationships. Uniquely designed to fit each particular contractual or relational situation, real-time mediation can be a “one size fits all” concept.

In its simplest form, real-time mediation is comprised of three ingredients: i) the recognition by all affected parties that if conflict arises in the course of the relationship, resolving some or all of it sooner than later has large economic and non-economic benefit for the disputants; ii) a system for immediate notice, action, and resolution that frequently includes privacy and confidentiality with respect to non-participants and third parties; and iii) agreeing in advance to the use of a neutral person (sometimes specifically iden-

tified), who will be promptly available to direct, manage, identify, and aid the interested parties in negotiations intended to reach resolution of the problem *now*.

### Construction Industry Application

Real-time mediation makes sense in many industries but is perhaps most familiar to the construction industry. All over the country, construction law experts seek cost effective methods for preventing and resolving disputes, especially in the presently declining real estate market and construction industry. Anyone who has ever hired, sued, defended, or been a building contractor or subcontractor has a litany of stories to share with those in similar circumstances. The project was delayed, the materials weren’t right, the workmanship was faulty, it’s the other guy’s fault, the waiver of lien is a complete defense, the notice of lien wasn’t filed properly, they used the wrong materials, we shouldn’t have to pay twice, etc. All of these complaints and defenses usually come at the onset or on the heels of legally intensive and expensive litigation. Sadly, lawyers often hear an owner saying, “I just wanted it right. If only the project manager had come to me and asked me...” Or, “they did it without asking.”

Imagine the complexity of restoring an historic government building. The construction contracts were years in the making due to the public nature of the project. The aesthetic challenges to bring the 1800s back into the twenty-first century were significant and uncertain. Someone on the drafting team had the wherewithal to insist on “real-time mediation” provisions in all the contracts. As matters of conflict arose throughout the two-year restoration project, one of the three already identified and trained mediators headed to the job site to put out the fire. There were no lawsuits or arbitrations. There was no withholding of payment. No one walked off the job. Some items were “parked” to the side for further negotiation later in the project, but in the end, the change orders and alterations to the original specs were done by (mediated) agreement “on the spot,” and no one sued for delay, mistake, wrongful payment, violation of Builder’s Trust Fund, breach of warranty, treble damages, or attorney fees. Best of all for those involved, the challenges and solutions remained out of the public eye.

Real-time mediation was used in the Hong Kong Airport development over ten years ago. At that time, the project was touted

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as the largest civil engineering project in the world. A detailed set of procedures was put in place to anticipate and then deal with disputes as they arose, with pre-appointed dispute resolvers. A similar concept was used in building the Channel Tunnel between England and France.

Real-time mediation in construction cases is no longer a novel notion or unique proposal. Standard form AIA contracts now frequently include not only provisions that define the real-time mediation process and what matters will be submitted to mediation, but also the identity of the neutral problem solver(s) who may be called on to aid in identifying and negotiating the solutions. The benefit of continuity that comes from using mediators familiar with the project, the efficiency of selecting persons knowledgeable in construction matters, and the ease of having already agreed upon persons readily available enhances the effectiveness of real-time mediation and significantly furthers the interests of the true stakeholders.

### **Other Forms of Real-Time Mediation**

The good news is that real-time mediation has now made its way into many other relationships such as long term IT outsourcing contracts, employment disputes, healthcare, and risk management. The real-time strategies span a spectrum of approaches depending on the players. Certainly a quick evaluation by a neutral expert may go a long way in "educating" decision makers, but it does not always address the underlying motivations or needs of the affected parties. Guidance from the expert may only be a small part of what an aggrieved participant may be seeking. The human condition expects recognition, validation, acknowledgment, and respect. Real-time mediation has space for all of these aspects as well as the opportunity for the experts (be they lawyers or subject matter specialists) to participate. It is a methodology that has room for integrating multiple layers, or not. In some respects, a real-time mediation proposal is limited only by the creativity of the drafters and users.

In the field of healthcare, and risk management specifically, real-time mediation could be viewed as an outgrowth of the ombudsman. Working within an organizational framework, historically the ombudsman was seen as only slightly independent of the organization. His or her attention to the prob-

lem, while perhaps welcome, was viewed with a skeptical eye. In real-time mediation, the intervener or mediator is independent of all the participants and brings a very different role to the situation. An unhappy patient and a nurse practitioner, sitting down with a mediator only two days after an unexpected surgical result, has proven to be a risk worth taking for many medical facilities. National Naval Medical Center in Bethesda, Maryland developed a prototype for swift conflict resolution in 2001. Kaiser Permanente Medical Group, already a leader in creating alternative forums for resolving potential medical malpractice complaints, followed the lead. Rush Presbyterian Hospital in Chicago, Illinois has also developed a multi-step immediate response system that incorporates matching dispute resolution trained physicians and lawyers with patients and their families.<sup>4</sup>

The introduction of real-time mediation processes into the medical field has brought a more open forum for communications between patients and the health care system. The University of Michigan has discovered that using trained nurse-legal practitioners to communicate in real time with patients and physicians has expanded the quality of their risk management performance in significant and measurable ways.<sup>5</sup> An immediate response and attention to problems by trained listeners has created a new environment in the delivery of health care at the University. The real-time program has not only led to swifter and smaller financial resolutions but also been of benefit in dealing with the often more important aspects of a patient's complaint such as providing an immediate explanation, an apology, and an improvement in the systems and procedures within the medical facility.

### **Employment Arena**

Using a similar humanistic approach, a number of employers have developed a multi-step, integrated conflict management protocol for employee complaints. Modeled in part on grievance procedures in labor union contracts, many of these systems are designed to come into play quickly in the life of the employee's dissatisfaction. In many instances, a disgruntled employee must take advantage of the opportunity for a neutral intervener as a pre-condition to filing any formal or legal complaint. These systems are grounded in due process, freedom from retaliation, and fairness. They are usually

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multi-step processes beginning with a “go to” person or department for a first dialogue. Often they are designed to use internal and then external resources, with all steps of the process aimed at communicating and understanding displeasure and seeking resolution.

In employment matters, real-time mediation often comes at a second or third step, after an “open door” policy dialogue fails to solve the complaint. The program will have a pre-defined methodology for the selection and payment of the neutral intervener. The neutral may come from within the organization but be so distant from the source of the problem that he or she is perceived to be more of an ombudsman. Alternatively, the neutral may be entirely unrelated to the organization. In some instances, the neutral may be required to be a particular ethnicity or gender. He or she may also be required to be an employment law specialist. All steps have defined timelines intended to require action and reaction in “real time.”

In exploring the success of such programs within the workplace, it is evident that a variety of diverse and creative real-time systems have emerged that give credence to the notion that “now is better than later.”<sup>6</sup> Shell Oil<sup>7</sup> and Giant Foods<sup>8</sup>, for example, have discovered that moving from a company conflict-averse culture to one that encourages active problem solving *now* is an economic investment worth making.

### **Information Technology: The Unpredictability of the Long Term**

Whether it is the ever changing nature of intellectual property or the length of many IT contracts, the IT industry has embraced real-time mediation. The legal drafters’ challenge in creating an outsourcing agreement, for example, is complicated by the very factor of time. It is virtually impossible to draft an agreement that includes every possible situation that may arise in the course of the engagement, let alone how to control or manage each potential conflict. Historically, such issues and clauses were addressed in generalities and couched in vagueness within the written agreement. Even though huge sums of money were being spent over long periods of time, often everyone just signed the contract documents and held their breath.

Today, with virtually every business heavily reliant on IT, there is much at stake if something goes awry. Thus, it is not surprising that parties take extreme positions on

contestable issues. The result, however, takes them further from their goals of maintaining a satisfactory relationship essential to the smooth functioning of each party’s business. There is no luxury of time in many of these disputes, and the party with the greatest leverage often gains the undue economic and, perhaps, procedural advantage.

The alternative is to adopt mechanisms for dealing rationally with the disputes as they occur, in real-time mediation. The application of such a process creates a more balanced playing field for each party to the IT agreement. In the IT world, the initial engagement contract frequently identifies one to three persons with subject matter expertise who will be available on very short notice to help resolve technical and business issues as they arise. The intervention team may be comprised of an IT engineer, a financial analyst, and/or a design consultant. Depending on the nature of the dispute, the intervention may involve only one person from the team of experts. Team members may be called in to facilitate dialogue or to go even further and provide an evaluation or proposal for resolution that may or may not be binding on the parties to the agreement. They may even agree to use such recommendation in future legal proceedings, if resolution is not achieved, or to do just the opposite—not use it in litigation.

In IT matters, the advantages of using real-time mediation are many. It fosters problem resolution in a timely manner.<sup>9</sup> A forum can be created for voicing positions and proposals for immediate solution. It recognizes rights, duties, and positions in the context of a desire to preserve a relationship. It probably reduces costs of the conflict and yet, depending on how it is crafted, can leave open the usual other ADR processes or legal forums if real-time mediation fails to resolve all the issues.

### **The Lawyers’ Challenge**

In the face of conflict, there are many avenues back to the business of profit making. These opportunities exist because the interested parties know how to practice good business judgment and preventive, creative, and collaborative law. A true understanding of the clients’ business interests and needs is the catalyst behind the inclusion of real-time intervention concepts into a contract. An appreciation of the carnage that can come from litigation, and a mindset to maintain

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an efficient and economical attorney-client relationship, silences the notion that lawyers only create conflict to earn fees.

The advent of these real-time interventions should not be viewed by the legal community as an invasion of the client's right to sue or to seek justice. Real-time strategies will not be appropriate in every instance. There are times when a rights-based process is not only necessary, it may be the only methodology for preventing irreparable damage. Notwithstanding this obvious fact, however, there are lessons to be learned.

Instinctively, lawyers realize that most clients, while interested in their legal rights, have a greater interest (and need) in furthering their business and personal goals. As counselors, we must strike the appropriate balance between the legal rights and the driving interests of our clients. Real-time interventions exemplify the fact that low cost, efficiency, and relationships are most important to our clients.<sup>10</sup>

Real-time intervention, by definition, can be designed to explore and develop effective systems for clients that further their ability to maintain their competitive advantages, to engage a satisfied workforce, and to enhance their ability to provide high-value services to their customers. The time has come for the "real" dialogue between lawyers and clients to keep pace with 21st century practices and technology.

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## NOTES

1. Gladwell, Malcolm, *Blink: The Power of Thinking Without Thinking*, Little Brown & Company (2005).

2. Stipanowich, Thomas, "Real Time Strategies for Relational Conflict," IBA Legal Practice Division Mediation Committee Newsletter (July, 2007).

3. Positional or rights based abbreviated processes (not being discussed here) are also an option where there is need for quick, binding or evaluative adjudication or decision making.

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5. Boothman, Richard, The Institute for Continuing Legal Education "The Role of Extreme Honesty in Settling Claims: The University of Michigan Center Experience" (March, 2008).

6. CPR Institute for Dispute Resolution, "How Companies Manage Employment Disputes - - A Compendium of Leading Corporate Employment Programs." (2002).

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9. Bent, Paul and Furton, Matthew, "Managing Conflict in Outsourcing - -The Application of Real Time Dispute Resolution in IT Outsourcing Engagements" (Parts 1 and 2), Outsourcing Journal at www.outsourcing-center.com. (October and November, 2003).

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