Hiring to Firing Podcast — Mediation Mayhem: Insights from TV's Quirkiest Conflicts
Hosts: Tracey Diamond and Evan Gibbs
Guest: Eric Max
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Tracey Diamond:

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond. I'm a labor and employment partner at Troutman Pepper Locke, and I'm here with a special guest co-host, Evan Gibbs. For those of you who have been with us from the beginning, listeners will remember Evan from the first few years of our podcast. And I'm thrilled to have him here with us today as a special guest co-host. Emily will be back with your normal programming with the next podcast episode. Thanks for joining us today, Evan.

Evan Gibbs:

Glad to be here, Tracey. Also, today, we are joined by Eric Max. Eric is a Senior Lecturer at the Wharton Business School at the University of Pennsylvania, where he teaches negotiation to MBA and JD students. Eric, why don't you tell us a bit about your background and how you got into the negotiation and mediation business?

Eric Max:

Sure. I started in law school and took a course in mediation and alternative dispute resolution many years ago, and fell in love with the field. Then went to a Wall Street law firm for a couple of years called Dewey Ballantine, which became Dewey LeBoeuf, which became defunct. I say because I left as a secondary associate, and they couldn't handle things without me. And after two years there, I became head of a state mediation office in New Jersey, where we mediated hundreds and hundreds of cases for the state and federal courts. About 25% of our cases were employment cases. And then I started teaching mediation as an adjunct at NYU Law School. I retired from the state and then started teaching negotiation, mediation, and arbitration at Wharton, and became a full-time faculty member about five years ago, and have thoroughly enjoyed it.

Tracey Diamond:

It sounds like a lot of fun.

Eric Max:

It is.

Evan Gibbs:

Some of our listeners, Eric, they may have sort of a fundamental question about the difference between mediation and arbitration. And for the attorneys listening, they may know all about this. But for our non-attorneys, could you explain the difference between those two things?

Eric Max:

Sure. And in fact, some attorneys, in my experience, and even some judges, are not always sure about the differences between the two. Arbitration is basically Judge Judy or Judge Wapner. If you've watched the TV judges, they're not real judges anymore, although some of them may have retired from the bench. They're private judges. And arbitration involves a private judge who basically acts as a judge would. Here's the evidence, makes a decision, makes a ruling that we can assume is generally binding on the parties. It's a pretty formal process. And that is basically arbitration.

By contract, arbitration is actually more binding than court decisions in that arbitrations can only be overturned for various narrow reasons, such as not hearing all the evidence or being biased. Arbitration is very formal, private judge. You get to choose your judge. Downside is, if your judge gives you a ruling you don't like, you tend to be stuck with it.

Mediation's a very different animal. Mediation is very similar to negotiation in that you have two parties or more who are in a negotiation trying to settle an issue. And the mediator comes in sort of as an expert negotiator who helps the parties try to work out a deal or a settlement that makes more sense for both of them than going to trial.

For us mediators, we have a great advantage because going to trial is such an awful alternative. And most of the time that mediators are often able to produce an alternative to trial that does make more sense for the parties. Unlike a judge that makes a decision, a mediator doesn't make any decisions. The role of the mediator is to problem-solve and see if a deal can be struck.

A classic example would be if you say to a mediator who has the better case, the mediator should answer, "That's not my role." And so very different approaches to resolving disputes. One is binding, very formal, the other is very informal. And if the parties don't agree to a deal through the mediator, there is no deal.

The last thing I'll mention is mediation, the hallmark of mediation is shuttle diplomacy, where the mediator can talk to each of the parties separately, which a judge or an arbitrator could never do because they're making a binding decision. Through shuttle diplomacy, a mediator ideally is able to gather information from both sides that allows a mediator to put together a framework for a settlement that would not have happened otherwise, because the parties generally hate each other by then and don't trust each other. Bringing in a neutral third party who everybody trusts allows additional information to flow so the mediator can hopefully assist the parties in getting a deal done.

Tracey Diamond:

Eric, if a mediator is not a decision maker, are there principles of an effective mediator? What makes a mediator successful or effective?

Eric Max:

The first thing is you got to be neutral. When I served as an arbitrator, people say to me, "Judge Max, who have whatever, can I bring you a cup of coffee when I'm arbitrated?" They're very nice to me. As a mediator, they say, "Eric, when you're out, can you bring me back a cup of coffee?" Because mediators have no ability to decide anything. Parties react accordingly. But mediators still have actually a lot of power.

The first thing is you got to be neutral. If the parties don't perceive you as neutral, then you're done. Even if you are neutral, even in your heart of hearts. But if the parties don't perceive you as neutral, there's no reason to proceed. Then the mediator is in charge of the negotiation. And the things mediators can do is first thing is let the parties vent, because mediation is the party's day in court or replacement for the day in court.

If parties don't have an opportunity to call the other side, and excuse my language, call the other side an asshole, it makes it very hard to resolve employment cases. The parties need to be able, privately – with the mediator, privately, not in front of the other side, to vent and tell their story.

Then and only then can a mediator start dealing with what we call pursuant to *Getting to Yes*, the famous book on negotiation, the distinction between positions and interests. A position is a demand. I want so and so fired. And an interest is why. What happened? Why are you feeling that you were treated unfairly? And you can go into the underlying interest. And then you can try to figure out a way to resolve the issue.

Well, one of the really important things mediators do is, again, referring to a phrase from *Getting to Yes*, is we've got to help the parties figure out what their BATNA is, which is your best alternative to a negotiated agreement. Especially in employment cases, a lot of parties come in with the I want number from either side, plaintiff or defendant. And the mediators really have to subtly guide them and say, "Well, at the end of the day, your alternative is to go to court, go to trial," and then walk them through that so they have something to compare what the proposal is on the table, too. So, they have a sense of whether it makes sense or not in terms of, "Well, do I settle at this number or do I go to trial?" Mediators have a really important role to play both psychologically and in terms of the parties evaluating their options.

Tracey Diamond:

Why should a company consider mediation instead of just trying to work out their dispute informally, or going to court, or going to a private arbitration?

Eric Max:

Mediation is something I would recommend to any company dealing with any employment case. The downside is that you spend relatively small amount of money in small amount of time. The upside is that you might be able to resolve relatively quickly, relatively inexpensively in terms of legal fees, something that could become very expensive and very time-consuming.

Because it's a problem-solving exercise with the mediator and it allows the parties to vent, what you're able to do is avoid sort of the snowball effect of disputes, which is they start small at the top of the hill. And then if you let them continue to flow down the hill, they become the size of something that could take out a small village. What you want to do is be able to manage the emotions of the situation, and you want to allow people then to try to problem solve after they've vented.

And mediation, depending on settlement rates, but the settlement rates are rather high. Mediation can be a huge way, a huge cost savings, and also a way to reduce the amount of ill will that employees might feel. It's actually a really effective technique. Also, for corporations, what's huge is it's confidential. That is huge for corporations because you really don't want to have your dirty laundry out in front of the public at a public trial.

And this becomes an interesting battle between plaintiff's lawyers and defense lawyers because you may have a plaintiff's lawyer who wants to actually go to trial because they may have what they view as leverage if they go or threaten to go to a public trial. While a corporation may say, "No, we'd much prefer to keep this in-house." And this sort of tension, which also impacts on arbitration, which is also confidential, is something that's being played out all the way to the US Supreme Court. And whether mandatory arbitration clauses, and contracts, and other types of contracts are enforceable, I think mediation – I would recommend that employers and employees, that everybody goes to mediation before arbitration. It is much more cost-effective. It is much more civil. As I said, it's much more problem-solving as opposed to adversarial. An arbitrator decides who's right and wrong, while a mediator is trying to make the peace.

And if mediation doesn't work, you can always go to arbitration. But if arbitration, you go to arbitration, that's it. You're done. I don't know why anybody would run to arbitration or court without first trying mediation. In fact, I have probably done 500 mediations, and I've only had one case where mediation did not benefit both parties. And that case was a constitutional question where the parties wanted law to be made regarding a constitutional issue. That was one out of 500 cases.

I'm a huge proponent of using mediation in every case. And as we know, the courts are now turning that way as well in that you're going – I tell my young lawyers that I train in the Northeast, I say, "You're going to be in 10 to 20 mediations before you get near a trial." It is absolutely the way to go in every employment case.

Evan Gibbs:

For our discussion today, Eric, as usual, we've pulled some clips from a few TV shows to illustrate some different mediation methods. And there are some wide-ranging methods in these clips. In our first clip, we've gone back to one of our all-time favorite shows, The Office. This is

season 2, episode 21 of the series. And Steve Carell's character, Michael Scott, he attempts to mediate a dispute between two co-workers over whatever, a poster, which is – since we're doing this via audio, the poster, it's two babies and diapers playing pretend saxophones, if you remember this. And the dispute is whether poster should hang in the office. Let's give it a listen.

(BEGIN CLIP)

Michael:

Okay, so this is the disputed poster. Now, one at a time, I want you to express your feelings using I emotion language, and no judging, or you statements.

Angela:

I got this poster for Christmas, and I feel I want to see it every day. It makes me feel like the babies are the true artists, and God has a really cute sense of humor.

Oscar:

Come on. Seriously. That? I don't like looking at it. It's creepy and in bad tasting. It's just offensive to me. It makes me think of the horrible, frigid stage mothers who forced the babies into it. It's kitsch. It's the opposite of art. It destroys art. It destroys souls. This is so much more offensive to me than hardcore porn.

Angela:

Oh, my God.

Michael:

Okay. Okay. Stop. Stop. Stop. Let's see if we can just brainstorm and find some creative alternatives that are win-win.

Pam:

Win.

Michael:

Yes. Thank you, Pam. How about Angela makes the poster into a t-shirt, which Oscar wears. That way, he can never see it. And whenever she looks at Oscar, she can see it. Win, win, win.

Oscar:

No.

Angela:

That's no.

Michael:

Okay. Well, brainstorm. Own the solution.

Angela:

How about I leave it up?

Oscar:

How about she takes it down?

Pam:

How about Angela can keep it up on Tuesdays and Thursdays?

Michael:

Okay, that is called a compromise. And it is style three. And it is not ideal. To sum up, win-win, make a poster and a t-shirt. Win-lose, take a poster down. Compromise Tuesdays and Thursdays. And the answer is make the poster into a t-shirt. Win-win.

Angela:

Win.

Oscar:

Fine.

Pam:

But –

Michael:

It is done.

(END CLIP)

Tracey Diamond:

Eric, what do you think about Michael Scott's methodology? What did he do right and what did he do wrong?

Eric Max:

I think I would answer it this way. The first thing that you want to do as a mediator in employment cases is you probably want to talk to the parties separately and allow them to vent. If you put parties that are mad at each other in the room together, you're going to get one of two responses. Either they're going to start yelling at each other again, or they're going arguing again, or one of them or both of them are going to shut down and they're not going to say anything. The first thing you want to do is talk to the parties separately.

The second thing you want to do, as we mentioned before, is allow the parties to vent. I cannot stress that enough. If parties are angry, they're not going to settle a case or dispute, even if it's great for them. They're not going to do it. You got to do that. And then the third thing is you really want the parties ideally to come up with their own resolution so the parties feel that they came up with it as opposed to it was imposed on them by the neutral mediator.

I think with the clip, you want the mediator to probably be more like a referee in a sporting event, where you don't know they're there, means that they did a good job. I think for this clip, you would want the mediator really to explore with the party separately ideas that they may have. You'd never want a mediator to try to impose a solution on the parties.

In fact, a rule for mediation would be similar to what you excellent trial attorneys already know, which is the saying, "You never ask a witness a question you don't already know the answer to." In mediation, you never propose a resolution that you don't already know the parties will say yes to after you've talked to them privately.

Evan Gibbs:

In your experience, Eric, I mean, do the parties typically walk away happy from a mediation? I know there's an old saying, I think, I'm not going to get the quote right, but it's if both sides leave feeling bad about it, but they got a deal, then that was actually a good deal because both sides had to compromise. I'm curious what your experience is with that.

Eric Max:

Yeah, you know, it's a really interesting question. And I think the answer depends on the type of case. One of the tough things about resolving litigation, I'd almost put it this way, pre-litigation, mediation does offer a greater opportunity to come up with, if not win-win situations, sort of a deal that both sides feel they're bought into. Once it becomes formal litigation – and we're talking number. And this is another reasons why I thoroughly recommend mediation for any employment case. Once it becomes formal litigation, lawyers are being paid, it becomes more about the money, and that makes it harder.

I'll give you two examples. I've done a number of cases in my career where the resolution was the party actually came back and worked for the state agency again because it turned out the state agency really didn't want to fire the employee. And the employee actually came back and worked again. That's rather unique, though. Otherwise, you're talking about numbers.

I would prefer to say not so much both sides are disappointed. But I would say both sides, after looking at their alternative, which is litigation, make a decision that's better for them. So, I'm hedging a little bit. As I've gotten older, employment cases, it's harder to come up with what's called a win-win. But you can come up with something better than litigation. I think that's sort of my way of answering that question. It's a very interesting question. In other types of cases, you can come up with really creative win-win. And I think we may talk about such a case later in our discussion.

Tracey Diamond:

Fair enough. Let's turn to our next clip. This clip is from the TV show Grace and Frankie, specifically from season 7, episode 8. This is a show starring Jane Fonda and Lily Tomlin. This scene, sisters Briana and Mallory, who work together in a company called Say Grace, are in a squabble. And they hire a mediator to help them resolve their conflict. However, what they don't realize until the mediator shows up is that the mediator turns out to be Mallory's ex, Dan. Let's take a listen.

(BEGIN CLIP)

Dan:

So, my goal here is to find a place where both parties feel resolved and can continue a working relationship.

Mallory:

Dan? Yes, Mallory. What the fuck are you doing here?

Briana:

I also have that question.

Dan:

I'm so glad you asked. I used to be kind of an angry guy, and I realized I had an issue when I found myself in a senseless argument with a waiter. And I ended up punching a slab of meat.

Briana:

Are you kidding me.

Mallory:

Dude, we were there.

Dan:

No, that was a separate incident.

Mallory:

Oh my.

Dan:

But look, it was a blessing in disguise because it led me to my calling. And when I heard there was a problem at Say Grace, well, I jumped at the chance. But I must say, I'm kind of surprised to find you here, Mal.

Briana:

Well, hold on to your hat, mediator Dan, because perfect little Mallory put me in a sleeper hold.

Dan:

I understand. I used to deal with my issues with my fists, too. Life is funny, isn't it?

Briana:

You staring deep into her soul right now?

Mallory:

Okay.

Briana:

Obviously, we need to get a different mediator in here.

Dan:

I assure you I will be fair. And when I feel you've resolved this conflict, I will tell Taneth as much. Now, who wants to try some fun exercises?

Mallory:

Do I have to move?

(END CLIP)

Tracey Diamond:

Eric, do you see an issue with a mediator who may have an outside relationship with one of the parties? Why is that a problem?

Eric Max:

Well, that would be a huge problem. Because, basically, as a mediator, since you have no ability to impose a decision on the parties, all you have is your neutrality and your good name to try to resolve the case. As I mentioned earlier, even if in your heart you feel you are neutral, if the parties do not perceive you to be neutral, then you have no business being the mediator in the case.

I train a lot of the court mediators in New Jersey, and I get some phone calls. Lawyer says to me, "Who's a mediator?" Says, "Should I disclose the fact that I'm in a social club with one of the party's lawyers?" Our kids play baseball together or something. And my rule is if you have to ask whether you should disclose it, you better disclose it. And if a party says to you, "I do not feel you're neutral," do not bother arguing. Just say, "I understand." And you say, "Thank you." And you recuse yourself from mediation.

The whole purpose of using a neutral third party is that both sides trust them, can talk privately with them, give them confidential information that they would not disclose to the other side. In mediation, never use a mediator who in any way suggests to you that they may not be neutral, because then they're going to not be effective.

Evan Gibbs:

In the show, Dan uses some rather unusual exercises. In the first one, he has them arm wrestle, telling them that the point of the exercise is not to win, but to work together to have an equal number of wins and losses. And he says that if they can refrain from competing against each other, they would both win. Do you think that's at all a useful exercise or goal? Do you ever use anything? You mentioned a minute ago about using some out-of-the-box solutions, particularly in non-employment cases. But are there any of those that you can share here?

Eric Max:

Well, I think the analogy of saying you're arm wrestling is pretty much what court is. When you go to court that you're arm wrestling or you're basically hitting each other over the head with a wooden stick continuously, and so one side or both sides goes, "Aww". Anything that produces more conflict is really the opposite of what you're trying to do in mediation. Mediation is all about trying to broker a deal and calm people down, let them have their day in court.

Compromise is another very interesting term. Because in litigation, once you're in the heat of litigation, compromise is used often. Mediators, retired judges as mediators, professors such as

myself as mediators, we often find ourselves, one party's at 100,000, one party's at 60,000. Undoubtedly, you wound up somewhere around 80,000 to get things done.

I think the promise of mediation is to do better than compromise. I think, again, it depends on the type of case. And I think employment cases can be tricky. I will leave you if we have time with this very interesting story that I do tell my MBA and law students about an actual mediation I did with the state.

We go into the room, and the plaintiff, who's a state worker says, "I demand an apology," which sounds really exciting. An apology, psychologically, you get it done out of the box, thinking everything is great. The deputy attorney general on the other side goes, "I can give an apology. That's an admission." We spend the day figuring out a way for the DAG to apologize. Not herself, but on behalf of the state, for what the plaintiff viewed as something that was done inappropriately, discrimination or something.

And after a full day, we craft language and the deputy attorney general presents this quasi-apology to the plaintiff. And I go, "This is fantastic." Everybody's excited, out of the box thinking." And then the plaintiff lawyer comes back in with their client and they say, "Thank you so much for the apology. Now we want $100,000."

The reality is it's generally, if not always, about the money. That's how our system is set up. You can try. And sometimes, as I said, you may have a situation where somebody is hired back. You may have a situation where they're terminated, but they get some additional benefits. There are creative ways to do it within the context of money. But at the end of the day, you're dealing with a situation in our legal system, which is the best in the world. It's not ideal, though, where we're really talking about financial issues.

Tracey Diamond:

Which is really the true result in a court case if they were to go to court or to arbitration as well. It would be any different if they battled it out to get to that result.

Eric Max:

Right. And the advantage of mediation is you get people that can resolve a case much faster, and less expensively, and with much less ill will than either arbitration or litigation. The benefits of mediation and employment cases I mentioned before are just huge as a way to managing conflict within an organization.

Tracey Diamond:

Eric, I want to ask you about the perception of bias. We talked a little bit before about how if a mediator is in fact biased, that that could be the death knell of a mediation. And if there's some kind of conflict of interest, a mediator has to disclose that upfront. All that makes total sense. But I have been – well, first of all, in the clip, Dan keeps complimenting Mallory. They had a past relationship. And actually, later on, Dan admits he wants Mallerie back. And that's the only reason he's there, right. Clearly, there's a bias there.

But I have been in several, lately, successful mediations where the mediator, whether sincerely felt this way or was play acting, in private caucus, in front of my client, would express frustration with the plaintiff, with the plaintiff's lawyer. Would say things like they feel that the plaintiff may be looking for pie in the sky. I'm kind of wondering whether or not sometimes using or creating that perception that, "I'm with you. I think you have the right end of the argument here," may build trust and enable the parties to get to a resolution where the company party may be a little reluctant to get there without that trust built in by hearing that the mediator thinks that they're really on their side and this is the best they're going to get.

Eric Max:

Yeah, it's a really interesting issue because retired judges have this reputation, whether it's true or not, depends on the judge, of coming in and saying to both sides privately, "Your case sucks." They like the reputation of some retired judges. Is that I find the opposite, just what you were suggesting, can be very effective both in terms of allowing the parties to vent and building trust, which is you go into the plaintiff, you talk to the plaintiff privately, and they trash the defendant. And you go, "Yeah, I totally understand what you're saying. That sounds pretty bad."

Then you go to the defendant, and they trash the plaintiff, and you say, "Ah, you know what? I understand what you're saying. That sounds like what they did was pretty bad. And I think that can be helpful both in venting and letting the parties know that you're sort of on their side. Although it must be followed up with a little bit of tough love, which is, "I totally understand where you're coming from. I know it sounds like you went through a lot," either from the individual side or the corporation side. But then you have to say, "However, we're here. Our situation is you've got two choices, to resolve it in mediation or go to trial."

And then you've really got to get them to focus on those two options. And inevitably, because going to trial is so expensive, so risky, destroys relationships. If it's a public trial, you have that issue. If you get them to then do that, then they feel, "Hey, Eric, he understood what I was saying. He was sort of emotionally supportive. Let me vent. But at the end of the day, he was like, "Look, we got to be practical about this." And I think that's the balance that good mediators have to get to.

Tracey Diamond:

Yeah. It's interesting to me that the building of the trust is sort of a necessary foundation to the tough love part of it and does make the mediation more effective.

Eric Max:

Yeah, it's hugely important. The psychology of mediation should never be underestimated. If you go into a mediation and you just put down a number or a negotiation, it will never ever get done. Human beings need to be heard, especially if they're in litigation or about to go into litigation. I should mention, mediation is even more effective pre-litigation. That if you have in your company the ability to identify disputes before everybody hires a lawyer, that can be even more cost-effective. Because then you're stopping that snowball even higher up on the mountain.

There's this huge opportunity pre-litigation and actually during litigation to use mediators to resolve disputes and, as I said, save a huge amount of time and money and also keep the morale of the organization much higher than it would be if you try to catch these snowballs at the very bottom, where they're basically unstoppable.

Evan Gibbs:

Yeah, I don't disagree with that analogy. Yeah, after a while in a lawsuit, as you very fairly characterized, at some point the snowball gets too big and it's really, really difficult to stop it. So, I guess we can turn now to our last clip, which is from season 2, episode 16 of the television show NCIS. In this clip, Kate is upset that Tony's been stealing her tuna fish sandwich. They demand that Ducky, who is elbow deep in an autopsy, mediate their dispute. Let's take a quick listen.

[BEGIN CLIP]

Kate:

Ducky, we need an unofficial mediator.

Ducky:

Did you try Gibbs? *(pause)* Oh, yes. I see your point.

Kate:

We thought of McGee.

Tony:

But we have no respect for him.

Kate:

And then we thought of you.

Ducky:

I see. Third on the short list. Well, at least I beat out Abby.

Tony:

Well, we just came from there.

Kate:

She turned us down.

Tony:

Oh, come on, Ducky. She's driving me crazy.

Ducky:

Well, I am busy. But –

Tony:

Yeah. Abby needs these blood samples, stat.

Ducky:

Yes, as I say, I am busy. But I'm flattered that you would entrust your relationship to me. It will be rather like marriage counseling.

Tony:

Oh, let's not use those words.

Kate:

Ducky. It is only a working relationship.

Tony:

So, you'll do it?

Ducky:

Of course, I would relish the experience. Yes, I studied psychology at the University of Edinburgh under Professor O'Donnell.

Kate:

Okay, so let's start. I left my desk for just a minute. And when I came back, Tony was eating half of my tuna fish sandwich.

Tony:

Okay. See? See? I'm hungry. We're buddies. It shouldn't be a big deal. It's not a big deal. But little miss tidy twisty pants blows everything out of proportion, and it becomes a major deal.

Kate:

All you left me was the crust.

Tony:

Ugh. Who is right here?

Kate:

Come on, Ducky. Please tell him.

Ducky:

We need to look a little deeper. I mean, there is clearly a latent sibling rivalry being expressed by your adolescent and sexually-charged bickering. It all stems from a desperate desire to please a father figure. And I think we all know who that is.

Kate:

What does this have to do with my tuna sandwich?

Tony:

There's no father figure, Ducky.

[END CLIP]

Tracey Diamond:

Ducky's response is interesting, and that he doesn't tell Tony he's wrong when he so obviously is. He basically stole Kate's sandwich. But instead, Ducky tries to get at the underlying issues between them, saying that they have a sibling rivalry filled with juvenile and "sexually-charged bickering", and that they both want to please a father figure. Is Ducky onto something here?

Eric Max:

This clip reminds me of an actual case that I heard of. I didn't mediate it, but it was actually involving a secretary at a big law firm in Newark who ended up suing because she didn't get a birthday cake on her birthday. I don't know if it's true, but it was making the rounds, maybe 20, 25 years ago, as a story. I think the idea that something is about more than what the parties are claiming, there is obviously this clip is a great exaggeration. But there is some truth to that.

In other words, if you're angry at a coworker, somebody's angry at a coworker because they open the window in the winter, or they wear perfume that you don't like, something, or you don't get a birthday cake on your birthday, there's oftentimes much more to it than that. But a mediator obviously is much more subtle about that and tries to talk to the parties separately and would never ever make a diagnosis, a psychological diagnosis as to what the parties' motivations are.

What mediators do is we talk to each side. Good mediators listen. We listen a lot, right? And let the parties get out what they need to get out and find out what's going on. A key to mediation is, again, this book *Getting to Yes*, by Fisher and Ury, talks about positions and interests. A position is a demand. And an interest is, "Why do I have it?" In many employment mediations, there is something more going on, but you would never ever do what this person did in the clip. That is way beyond what mediators do. Hopefully, a good mediation – mediators do a lot of work, but nobody really knows we're working as hard as we are.

Tracey Diamond:

Eric, this has been a super interesting conversation. We really appreciate your time today talking to us about the principles of an effective mediation and why employers and employees should use mediation as an alternative dispute resolution process. Thanks again to Evan for guest-hosting with me today, and also to our listeners for listening in. Shoot us an email. Let us know what you think. And we look forward to talking to you again soon. Thanks so much.