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PACE ENVIRONMENTAL LAW REVIEW

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INTRODUCTION

**Theodore W. Kheel:
An Exemplar for Alternative Dispute Resolution
and a Pioneer in
Environmental Interest Disputes**

JOHN D. FEERICK*

Theodore W. Kheel has enjoyed a long, and illustrious career as a mediator, arbitrator, and negotiator. Starting his legal career in 1937, he has been called on by presidents, governors, and mayors to resolve conflicts between determined opponents, and to settle thousands of labor, business, and civil rights disputes.¹ During World War II, he quickly rose to the rank of Executive Director of the newly formed National War Labor Board in 1944, managing a staff of 2,500 and hearing 150

* John D. Feerick holds the Sidney C. Norris Chair of Law in Public Service at Fordham Law School and is Director of the Law School's Social Justice Center. Professor Feerick is a graduate of Fordham University and Fordham Law School [1958-61] where he was Editor-in-Chief of its Law Review. From 1961 to 1982, he was an associate and then partner at Skadden, Arps, Slate, Meagher & Flom, before returning to Fordham Law School as its Dean from 1982-2002. Professor Feerick has had extensive experience in arbitration, mediation, negotiation and conflict resolution, has had wide experience in public service as a member or chair of many state commissions, and has served as President of the Association of the Bar of the City of New York and Chair of the Board of Directors of the American Arbitration Association. The author would also like to gratefully acknowledge the assistance of Elizabeth M. Shaner, Pace Law School, Class of 2011, in drafting this introduction.

1. *See, e.g.*, THEODORE W. KHEEL, *THE KEYS TO CONFLICT RESOLUTION: PROVEN METHODS OF SETTLING DISPUTES VOLUNTARILY* (1999).

disputes a week.² He later moved to New York City following World War II to assist Mayor William O'Dwyer in mediating many post-war labor disputes, especially those related to automation—the introduction of technologies that displaced workers.³ In resolving these post-war challenges, he and others formed the American Foundation on Automation and Employment, and as its Executive Director he realized conflict resolution was indispensable to industrial life.⁴

Throughout his career, Ted Kheel has shared his perspectives on dispute resolution through numerous publications⁵ including a book entitled *The Keys to Conflict Resolution*, which details the insights he gathered throughout his career and the techniques necessary to resolving disputes successfully.⁶ Since the 1990s, he has devoted himself to addressing fundamental conflicts between development and the environment, encouraging lawyers to apply alternative dispute resolution techniques to resolve environmental issues.⁷

In 2008, he made possible a generous donation to establish the Theodore W. Kheel Center on the Resolution of Environmental Interest Disputes; a unique center at Pace Law School dedicated to the practice of the emerging field of environmental dispute resolution (EDR).⁸ The Center's mission is to capture the skills and imagination of attorneys in resolving environmental interest conflicts.⁹ Communities, states, regions, and nations facing enormous environmental challenges cannot solely rely on traditional adjudicative forums to resolve these problems. Training lawyers to use their ability to explore facts, clarify issues, and

2. Cornell University, Catherwood Library Kheel Center, Theodore W. Kheel, <http://www.ilr.cornell.edu/library/kheel/about/history/theodoreKheel.html> (last visited Oct. 26, 2009).

3. KHEEL, *supra* note 1, at xv.

4. *Id.*

5. *See, e.g.*, THEODORE W. KHEEL, TRANSIT AND ARBITRATION A DECADE OF DECISIONS (1960); THEODORE W. KHEEL, THE PROS AND CONS OF COMPULSORY ARBITRATION (1961).

6. KHEEL, *supra* note 1.

7. *Id.* at 8-9.

8. Pace Law School, Theodore W. Kheel Center on the Resolution of Environmental Interest Disputes, <http://www.law.pace.edu/kheel> (last visited Oct. 26, 2009).

9. *Id.*

apply the principles of conflict resolution will enable them to find mutually beneficial solutions to environmental challenges.

I wish to salute Pace Law School and Ted Kheel for making such an extraordinary commitment to the resolution of disputes in an area that, from every account, will dominate the world landscape throughout the 21st Century.¹⁰

As the senior labor and employment law practice attorney at the firm of Skadden, Arps, Slate, Meagher and Flom, I experienced the incomparable Ted Kheel and his approach to the resolution of disputes first-hand in the 1960s and 1970s. During those years, I represented printing unions that faced serious issues in their dealings with the New York City newspaper publishers. Ted was a mediator in all of those disputes, as he was in many other industries, such as the New York City Transit negotiations. He was masterful in that role. Threats of strikes were ever present with all the consequences that would flow from such epic events in those industries. While working with Ted Kheel, I personally observed his keys and principles to dispute resolution in action:

1. The importance of finding ways to build trust among participants. Communication is at the core of trust-building.

I recall one collective bargaining negotiation when scores of people from different newspapers, unions and publisher representatives, were at the table with hundreds of proposals. He asked the parties to explain their proposals and the reasons for them and asked each of us to respond to one another and explain our response. It took time but we certainly heard and understood one another from a process anchored in civility.

Equally important to Ted was inspiring trust and confidence in his role as a mediator. He listened carefully to what you said, was patient in his dealings with you, and he invited your participation in all aspects of the process. He asked questions and made a commitment to the process, and if necessary used all hours of the day and night. It seemed to me that in public matters, he also had an uncanny ability to deal effectively with journalists who were covering these matters.

10. See, e.g., NYSBA, *Climate Change*, 10 GOV'T, L. & POL'Y J. 1, 1-97 (2008).

2. **Involving everyone with a stake in the matter in some meaningful way is another pillar of conflict resolution.** I recall one client I represented having a bargaining committee of nearly thirty-five members. It was not too large for Ted, however, as he created a number of subcommittees with representatives from both parties and assigned to each, a set of issues at stake in the bargaining. He asked each group to discuss its assigned issues and report back at different intervals on the results of those discussions. The reports would then be vetted with the bargaining leaders and helpful feedback would be sent to the group through Ted.

3. **The importance of each party putting themselves in the shoes, so-to-speak, of the other party.** Ted often emphasized what we would need if we were in the other party's shoes and he also asked how we would see ourselves in terms of our settlement posture. Would how we acted with regard to that party be supportive of a continued negotiation? Would it suggest a willingness to compromise?

4. **The importance of creativity and flexibility in dispute resolution.** On creativity, I recall one negotiation where he helped the parties avert an industry-wide strike in circumstances where they had reached an agreement but were not able to agree on an appropriate writing to embody it. Ted suggested that they orally synthesize the agreement in his presence so that he could make notes and put them in his safe in the event of a subsequent dispute on the subject; in that case, his notes would become available to the parties. We happily accepted and when twenty years later he called me to ask if he could get rid of the notes, I said that I saw no reason he could not do so. On the subject of flexibility, I recall another occasion of a strike being averted when Ted suggested to the parties a letter, with general language on a serious issue between them. None of us knew quite what the letter said, the language being somewhat fuzzy, but at the same time it gave us arguing room in the future, were the issue to present itself. That is all we needed to close the deal and I learned from Ted the role that fog and ambiguity sometimes can play in dispute resolution. Incidentally, the issue never reappeared.

5. **The importance of committees.** One did not have to resolve every issue arising in a negotiation to reach a satisfactory agreement. Often the final agreement would set up study committees consisting of members of both parties to examine and periodically report on a few difficult issues which, if pressed at the time, would have torpedoed the negotiation.

6. **The importance of not getting stuck on words that bring resistance and close the mind to reasoned persuasion.** I recall in the middle of the 1978 newspaper strike, my client, the Pressmen's Union, advised me that they did not want a mediator at that particular point in the strike. When Ted Kheel arrived, he said that he was not there as a mediator but as a facilitator, a role that the client could accept. In that role he helped end the strike. I am not sure that I ever learned the difference between a mediator and a facilitator!

7. **The importance of deadlines in moving a discussion along and building momentum to reach a successful conclusion.** I remember the final three days of the eighty-eight day newspaper strike in 1978. With no agreement in sight, Ted informed us all that there was no time left for sleep. You have to understand that we were at our twenty-mile wall in that twenty-six mile marathon. We were exhausted, our bones were aching, and there was nothing more we wanted than sleep. Ted kept us up for the last seventy-two hours during which all the parties found it possible, for the first time, to drop strongly-held demands, soften others, and reach out to the other parties to accept a number of their demands. In the process, we reached an agreement, ended the strike, and went home to get a good night's sleep.¹¹

Ted Kheel, as a lawyer and citizen, could make sense of, manage, or resolve just about any dispute known to mankind. I thank him for the memories and for being a larger than life exemplar in how to deal with problems. Of his many legacies, I have no doubt that this wonderful Center bearing his name at Pace Law School will be among the most lasting and helpful to the world at large.

11. See generally, KHEEL, *supra* note 1 (discussing in further detail Ted Kheel's keys and principles to dispute resolution).