

# NIGHT AND DAY

**Andrew Smith**  
**University of Miami School of Law**

1:3 And God said, Let there be light: and there was light.

1:4 And God saw the light, that it was good: and God divided the light from the darkness.

1:5 And God called the light Day, and the darkness he called Night. <sup>1,2</sup>

Since the beginning, Day and Night have always had trouble with each other. The two cannot exist in the same area without one struggling to overpower the other. Just as Night seems to fully take control of the skies in the evening, Day shows up in the east and wrests control from Night. And as Day demonstrates its control of the sky, Night seeps in until the sun is nothing but a glowing ember. Both parties desire complete control of the sky and its subsidiaries, which creates a Win-Lose situation.

The two parties are seeking mediation because, well, there is no court set up for this kind of action.

## The Mediator

The mediator selected for this process is God. This can be any God of any background. God's introduction would go something like this:

*Parties, we are here today to mediate a dispute between Night and Day. I will be your mediator today. Please understand that I am here to help facilitate an agreement between both parties, but I am not here to make any decisions for you or enforce any*

---

<sup>1</sup> Genesis

<sup>2</sup> This is not meant to put a Christian (or any other) tone to this paper, I just felt the Genesis quote fit in.

*judgment.*

*Further, there are a couple issues of note:*

*First, under the Florida Rules for Certified and Court-Appointed Mediators, Rule 10.340(b) requires me to disclose any potential conflict of interests. As has been discussed, I am responsible for both the creation of the Heavens and Night, and I am responsible for the creation of Light and Day. Because I am responsible for the creation of both parties, there is obviously the potential for one party to feel slighted. However, I feel that I have an equal interest in both parties coming to an agreement so that I can move on with the rest of my creating.*

*Second, under Rule 10.220, “the ultimate decision-making authority, however, rests solely with the parties”, and under Rule 10.310(b), coercion by the mediator is prohibited, and I am to allow both parties to come to a decision on their own, without leading them there. With that in mind, I will be using my Omnipotence to turn off my Omniscience, which will make it so I have no prior knowledge of what the end decision will be or what the end decision should be [to best provide for my creations to survive]. Further, I will not use my Omnipotence to push one party in one direction or another.*

*If parties are still amenable to these proceedings, then we will proceed with the mediation. Both parties will be given the opportunity to describe their position, what they hope to gain, and any other topics they desire to bring to light. Please remember, this is a non-adversarial process, and the hope here is to get a dialogue between the three of us that will allow all parties to leave here a winner.*

Problems

## *Night*

Well, basically, I was here first. The Light was only created after the Dark was everywhere. I just feel this is completely unfair. How would you feel if you were living in your home, and all of a sudden someone else shows up and says, “Okay, I’m living here too. Deal with it”? Every morning without fail, here comes the Day with its bright light. He stays for a little while, and eventually in the evening he leaves and lets me have the sky I again. I mean, everywhere I go, there’s the Light, taking up my darkness. It’s just completely unreasonable. Day never asks how I feel about it, never says thank you, and never asks for permission to invade my Darkness.

And that’s another thing, it’s not just the complete invasion on my realm every morning. It’ll be the middle of the night and all of a sudden there are spots of light all over. Sometimes on the Earth, sometimes in the Heavens. It’s like daylight is unable to be content with just taking complete control of the sky, he has to leave little tokens everywhere to remind me of its existence

Basically, I want the Day to quit already. I want it gone, in its own realm, or just completely destroyed. I just want things back the way they were.

## *Day*

Listen, I can’t help it if he was first. God made me and I am here for a purpose. You know, the sun comes up, and I’ve got to my job as Day. I just think it’s ridiculous for Night to have a monopoly on the Earth and the Heavens.

Also, I just cannot stand Night’s accusations that every morning there I am, taking over his territory. I could say the same for Night! Every evening, Night does everything it can to squash my essence and smother the sun. Luckily the sun is a resilient being and can rest up to

fight off the Night's advances.

Frankly, I just don't see why Night has any more right to the sky than I do. Why not banish Night to another realm and let me stay here?

## Discussion

There are a few key issues apparent immediately.

- 1) If we pursue an objective based solution, it is likely we will get no results. Both parties want the same thing, but for themselves. Obviously the mediation will not get anywhere if both parties pursue what they want. Both parties seek dominion of the sky and the banishment of the other party.
- 2) There is the exact same issue affecting both parties, and both see it as occurring differently. Each party thinks that it is the other party that invades the other party's space. Night kills the sun, while Day invades the Night. Here, it is necessary to separate the people from the problem.
- 3) There is the issue of small infringements (shadows, candles) that will need to be worked out.

Overall, the next step will involve trying to get the parties to realize there cannot be just one winner and hopefully the two can find common ground and understand where the other side is coming from.

## *Mediator*

*Well, the first thing that jumps out at me is constant conflict between you two that seems*

*to occur every 12 hours. My hope here is that we can try and determine why this occurs every twice a day. It is apparent that each of you feel slighted by other's intrusion.*

*Perhaps we could explore first what the physical cause of all this is...*

*Day:*

*Every day, in the evening, the Night tries to smother my light! He forces it slowly but surely, pushing the sun to the west and taking over the sky.*

*Night:*

*That's not true! Day pulls the sun behind it off in to the west. I only follow it because I know it's leaving the sky, and finally I can make it dark again. Besides, you do the same thing to me every morning! There I am, nice and peaceful occupying the Heavens and then out of nowhere here comes the Day pushing the sun in to my territory, forcing me off in to the west. There's nothing I can do!*

*Day:*

*Wait wait wait. I don't push the sun, I just follow the sun. It moves on its own, and where it goes, I go. I have no control over it.*

*Night:*

*Wait! You don't push the sun? Because I don't pull the sun. I just always assumed you pushed the sun in to the sky to take over.*

*Day:*

*And I assumed you pushed the sun out of the sky to get me out of there. So the sun is responsible for this every evening?*

*Night:*

*So let's get rid of the sun! The sun is the cause of my trouble. Get rid of the sun and*

*send the Day wherever you send the sun and we can be through with it all.*

*Day:*

*No! That's ridiculous. God created the sun just as he created the Light. Why doesn't God just put a second sun in the sky, and then we don't*

At this point, the mediator is essential. While the parties successfully discovered that there was an unseen underlying issue, created by assumptions by each party, they are close to creating further conflict.

*Mediator:*

*You've both made great progress so far. Let's try not to rehash further conflicts. If I can just try to restate things here to make sure I have everything understood correctly:*

*Night, you felt like you were getting bullied around every morning by the Day pushing the sun in to the sky.*

*Day, you felt as though the Night was trying to smother the sun and push you out when it could.*

*Both of you seem to have realized that neither is an act of aggression by the other. Let's look at the sun, but, let's not focus on removing it or adding another sun. Let's instead look at why the sun does what it does, and maybe this will 'shed some light' on the situation.*

The intention here is to show the parties that the cause of their problems is not removable, from one direction or the other. The key is to create the need amongst the parties to

compromise, but have them come to that conclusion on their own.

Further, a brief caucus seems to be pertinent at the moment. The purpose of the caucus in this situation is to determine if there are any other fears the parties want to make known without acknowledging them to the other party. In addition, they may make known some concessions they are willing to grant.

#### *Caucus with Night*

*Mediator:*

*I understand your point of view Night, you were there first, you feel you have the right to the sky. Is there anything else you would care to disclose to me in confidence?*

*Night:*

*Well, just that, it's not the loss of the sky half the time. I think what I'm really worried about is the Day completely taking over and relegating me to just an hour or two, or even none at all, and taking the sky for himself. I mean, I can't fight the sun, it's too powerful. I feel like the Day is at a much more powerful position here, and I have very little room to bargain.*

#### *Caucus with Day*

*Day: I just, well, I never meant to intrude. It's just, all of a sudden, I was Created, and had to serve my purpose being near the sun. I never meant to turn this in to a feud, but things just took off.*

What's apparent here is the parties feel like they are both backed in to a corner and are

forced to come out swinging. To them, it's a black and white issue: the other party is the cause of the problem, and they have to dig in and fight back.

### **Third Parties**

A big part of this mediation which has not been brought up yet is the issue of third parties. It seemed important to find a unique way to bring in the effects the two parties have on third parties without forcing them in to that role. The path chosen here is to bring in a third party, someone who can sit in on the discussion yet still allow the two parties the self-determination of solving the problem on their own. In this case, the third party being brought in is 8 year old Susie Derkins.

We did not talk too much about having a second mediator present, so it seemed prudent to find some of the benefits and see how they would apply here. In discussions on co-mediation, a common theme is the benefit of: "Two Personalities. The success of mediation relies in part on the relationship between the disputants and the mediators. Having two mediators creates a second opportunity for the mediators to connect with the disputants and build the trust necessary for successful mediation."<sup>3</sup> While the concept of someone so young may be unorthodox, she brings in a certain unthreatening innocence; she is someone that can ask questions, yet not be seen as forcing opinions or ideas on to the parties.

Further, "it is a recognized fact in the construction industry that if a mediator has technical knowledge of the major issues involved in the dispute, there is a greater chance that the mediator will be able to bring the parties together to reach an amicable settlement."<sup>4</sup> In this case,

---

<sup>3</sup> <http://mediationteamct.com/news.asp?ItemID=17>

<sup>4</sup> [http://www.constructiondisputes-cdrs.com/co%20mediation\\_and\\_multiple%20mediation.htm](http://www.constructiondisputes-cdrs.com/co%20mediation_and_multiple%20mediation.htm)



the intent of Susie is to bring in someone with first hand knowledge of the effects the two parties have on outside parties. As an 'authority' and actual third party, Susie may be able to lend significant insights.

*Mediator*

*I thought that at this point I would take the opportunity to bring in my co-mediator. Her name is Susie Derkins, and she lives on Earth. My hope is that she can facilitate the process by shedding some light on some of the issues here. Why don't you, Night, continue, and we can see where we get.*

*Night:*

*Well, I still think that even if the sun is the cause of all this, Day is still doing something to infringe on my darkness every night. Every night I look down on the Earth, and there are thousands and millions of pieces of Day everywhere I look. Big lights, little lights, bunches of lights everywhere. Now, you can't tell me that's the sun acting out down there.*

*Day:*

*I have no control over that! The people on Earth summon the light, and I must allow it.*

*Moderator:*

*Well Night, have you ever asked why there is always light even in the Night?*

*Susie:*

*You know Night, I often like to have a little light on before I go to bed so I can read and so I can make sure the monsters don't get me.*

*Night:*

*Really? I never knew. But what about all those moving lights and the really bright*

*lights? You can't need all that.*

*Susie:*

*Well, at night, when my daddy drives me around town, he needs the lights on his car and the lights on the street to keep me safe so nobody hurts me. It would be very scary out there in the dark.*

*Night:*

*Hmmm, I never thought that people were affected down below. Interesting.*

*Day:*

*See! People need the light. There's no need for the Night, and there's definitely no need for the bits of Night that sneak in when it's Day time. Oh, don't think I don't see those bits of darkness here and there.*

*Susie:*

*Well, you know Mr. Day, those bits of Night, we call them shadows on Earth. On a hot summer day, it's kind of nice once in a while to be able to curl up under a tree and rest for a bit. Sometimes the Day can be just too hot and people like to be in the shade.*

*Day:*

*Wow, I never knew I could be burdensome like that. But can't you people just go inside?*

*Susie:*

*Well, perhaps. But what about all the animals that graze outside during the day? And what about the farmers who have to work outside all day too? Both of them make all the food for the whole wide world. And I've seen a farm before, they can be so big! Sometimes there aren't any buildings for as far as you can see.*

*Night:*

*Well what about all those lights out in the Heavens?*

*Day:*

*Yeah, and what about those times the big dark fluffy things come in and block me? You can't possibly find that to be a benefit!*

At this point, the mediation has taken a further positive turn. Instead of arguing against each other, the parties are trying to understand all the aspects of their situation. They're asking questions, and while the questions are still directed about the actions of the other party, they are starting to realize there is more to the situation than just their preconceived notions. In case there is a massive third party class, all life on Earth, that would be affected by any unilateral actions.

The mediation would proceed from here in a similar manner. Susie would act as the go between, answering questions and expanding on various topics. "The clouds provide rain, which provides water, which helps animals live and makes food grow." "I read once that the sailors and people who are lost can use the stars in the Night sky to help find their way when they're lost. Also, the stars in the sky can even be used as calendars so people know when to grow food, or when winter is coming and when it is time to prepare."

The hoped eventual effect here is to have both parties realize that they are much more effective as the sum of two parts, and working in tandem they create a much more powerful process. Both parties support the other and those around them. In this case, the mediation would proceed until the parties come to the understanding that sharing the sky is the best course of action. Almost a joint custody action. Both parties would allow minor infringements in to their territory (fire, lights at night, shadows, etc), with the understanding it is done in good faith to overall act of creation.

## **Conclusion**

Obviously this topic is of a fanciful nature, but the concepts behind it are important. I found various comparisons to topics discussed in class. In moving past an antagonistic state, I found similarities to the case of New Jersey, where the day laborers were being subjected to deportation, yet the affluent people of the area did not want to lose their yard workers and street cleaners. When we did our role play for that, we brought out the fact that both parties supported each other. The workers needed jobs to feed their families, and the local people were not willing to take the tasks on themselves. In the role play, when we began to gauge this, we were able to understand the symbiotic role the two parties played, and worked to create a better functioning unit that would benefit both groups.

In a second arena, we tackled the issue of third parties. As seen in various examples of divorce mediations, it is often very easy to lose sight of the third parties involved and to seek to focus all blame on the party you consider your adversary. While not always possible to have a member of the third party involved in the mediation, if we can find a way to demonstrate to the two parties involved that there are others affected by their actions, they may loosen their chokehold on their position.

The final point here is simply that a mediation contains many different issues and angles often not perceived at the outset. What might seem like a simple dispute may instead flesh itself out as the effect of a completely unseen cause.