Choosing the "Expert" Mediator

by Norm Brand

When a dispute is truly ripe for mediation, who you choose to mediate is unlikely to affect the outcome. When both parties go into the mediation willing and expecting to settle, any competent mediator can help them reach agreement. Frequently, however, who you choose to mediate can be critical to making mediation work for your client. To choose the right mediator you must consider the mediator's skills, expertise, and stature.

Mediators bring different approaches, which emphasize different process skills, to the mediation. Their training, or experience in resolving certain types of disputes, may predict the specific skills they bring to mediation. For example, some family mediators avoid caucuses and may be skilled in mediating with the parties face-to-face. Community mediators may emphasize a transformative approach and be skilled at helping parties see their dispute in a larger context. Labor-management mediators may be skilled in group dynamics, while retired judges may bring persuasive skills they developed in settlement conferences. Knowing the general approach and process skills of different types of mediators is useful in selecting an appropriate mediator for your case.

Process skills differ from the expertise or substantive knowledge you may want in a mediator. One form of expertise often thought to be important is substantive knowledge about specific areas of the law, such as ERISA, Title VII, or intellectual property. Legal expertise can also involve knowledge about current verdicts, settlements, and jury trial results in a specific trial court venue, for a specific type of case. Most sophisticated users of ADR already consider whether their case requires a mediator with specific legal expertise. But they should also consider other kinds of expertise, such as industry, scientific, or technical expertise, which can make a difference in the outcome of a mediation.

The mediator's stature – the respect and confidence the parties place in the mediator -- can go a long way towards ensuring that the parties will resolve their dispute. When Jimmy Carter offered to mediate a peace agreement between Egypt and Israel, he was highly likely to succeed. A mediator's stature can be based on success in resolving similar disputes, or the impartiality of a mediator who is a religious leader, or the mediator's high achievement in the professional field in which the dispute arises. The mediator's stature increases the parties' belief in the likelihood of settlement, which increases the possibility of success. In order to discuss mediator choice cogently, it is helpful to examine mediator skills, expertise, and stature separately, and examine an example of how these elements were involved in choosing the mediator for a specific high profile case.

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Skills

Knowledge about the process of mediation, and the ability to use that knowledge to affect behavior, are the mediator's "skills." All mediators know that an aggrieved plaintiff must be permitted to tell his story, and many are able to listen actively. If the mediator demonstrates the process skill of "active listening," the client will be satisfied that he has been fully and fairly heard.

Different approaches to mediation emphasize different skills. For instance, some psychological approaches to mediation emphasize the primacy of improving communication between the parties. This approach is used by conciliators and family mediators to help the parties to a divorce involving children. While resolving some of the child custody issues, they attempt to open the lines of communication between the parties. A mediator demonstrates skill in this setting when the parties can effectively resolve the day-to-day problems that arise in implementing their child custody agreement.

Since the parties will have to deal with each other about their children for many years, improving communications is an approach that is well suited to this type of dispute. The skills used in family mediation, however, would not necessarily be useful in an automobile accident mediation. In most cases, the parties to the accident are strangers who hope to have as brief a relationship as possible. Moreover, the issue in dispute is strictly financial. The plaintiff wants as much money as possible; the defendant's insurer wants to pay the smallest amount possible. There are rarely other issues or opportunities for mutual gain. A skilled mediator knows this is a zero-sum game and will frame the dispute so that both parties can begin to appreciate the value of their time and the transaction costs that can be avoided by settling the dispute out of court. The mediator demonstrates skill, in this setting by getting both parties to focus on a number that is within the range of possible settlement for each of them. If the mediator can focus them on that number, the parties will almost inevitably settle.

Expertise Experienced lawyers generally know the advantages of having a mediator with legal expertise. When this expertise is in a specific area of law – such as employment law—you can reasonably expect the mediator to quickly grasp the legal nuances of each side's position. For instance, the mediator will know if there is a substantial chance of summary judgment, and may privately convey that information to each party. This legal expertise allows the mediator to make an independent legal judgment that both parties respect. The mediator's judgment may enable the parties to adjust their demands to reflect a more realistic estimate of the legal outcome, and thereby resolve the dispute.

Similarly, a mediator's familiarity with jury trials and jury verdicts in the pertinent area of law and venue, may help create an anchor point for settlement. The parties may rely on the mediator to evaluate their case and ask the mediator for an opinion on what the case is worth. This opinion represents an expert judgment that is likely to influence the opinions of both parties. If the mediator's assessment of the value of the case is within the current range of settlement for each party, it will become an anchor point around which the parties will bargain to reach an agreement.

Some mediators possess expertise in non-legal areas that can be critical to resolving a dispute. For instance, if the dispute involves the alleged copying of an automated staining device that employs capillary action or surface tension in a unique fashion, a scientific background would help the mediator quickly grasp the factual nature of the dispute. Many lawyers recognize that simplifying a technical dispute so that a person uncomfortable with science will understand it distorts the dispute in a way that favors their opponent. They can avoid this distortion by choosing a mediator with either specific scientific expertise (as in materials science for a case that involves computer chip manufacturing), or a solid scientific background that makes the mediator easily educable in scientific matters. In some instances, a high level of scientific expertise in an area may be associated with a commitment to a

specific school of thought which can interfere with the mediator's ability to see both sides of the issue. In those cases, scientific educability is more important than scientific credentials.

The expertise desirable in a mediator may be industry specific. For instance, in the computer industry there is often a complex relationship between hardware manufacturers and "other equipment manufacturers" (OEM). An OEM may make a product (such as a medical imaging device) that could become a market leader if it incorporates a new, more powerful chip the hardware manufacturer is developing. Suppose the OEM wants to beat its competitors to the marketplace and makes promises based on both its development schedule and that of the hardware manufacturer. When product development or manufacturing milestones are not met, there may be fertile ground for disputes. A mediator with industry expertise brings an intellectual framework for understanding whether the reliance that is alleged in a complaint comports with industry reality. As a result of this expertise, the mediator may be able to help the parties develop a creative solution that works because of industry-specific considerations.

Industry expertise is not limited to the private sector. A mediator may have expertise in public education, public safety, or government that can be useful to resolving a particular dispute. For instance, if the case involves allegations that a police officer used excessive force, it may be desirable to have a mediator with expertise in police matters, gained through work as a neutral or on a public board. Since the case will often turn on how judgment was exercised, it can be extremely useful to have a mediator who is familiar with the borderline between reasonable police judgment and brutality. How close the specific facts of the case are to that border affects the range of settlement.

In a case involving public entities, another kind of expertise may be important in the mediator: political sophistication. The plaintiff may use the media to promote a particular point of view and motivate public officials to settle. That can be a successful strategy. A mediator with political expertise can evaluate the potential damage that might motivate a settlement and bring a keen sense of what is politically feasible. There may be potential settlements that are in the range of litigation outcomes but outside the range of political outcomes. For example, an otherwise reasonable settlement may put public officials in so bad a light that they will be compelled to reject it. The political reality is that they would rather have a court or arbitrator impose the settlement (perhaps after they have moved on to other office), than be thought to agree with it. And if a vote on a settlement is necessary, taking a position against known opponents may have too high a political cost for a public official to support a specific settlement. The mediator's expertise in political matters is important for another reason. In many highly charged public – as opposed to private -- disputes, mediation is chosen simply to take the heat off the parties. The parties want a politically savvy mediator to propose a settlement (informed by what the parties have said they can live with) that is identified as the mediator's settlement. Both sides can publicly disclaim the settlement while begrudgingly accepting it as the alternative to a long and difficult fight. The mediator becomes the "lightning rod," -- the person that attracts the criticism of people who are unhappy with the settlement (including politicians who tacitly agreed to it). A recent example of this type of high profile mediation is discussed below.

Stature

Stature, like charisma, is intangible. It is a quality the mediator brings which affects his or her ability to move the parties to a settlement. It is made up of the parties' and the public's perception of the mediator. It is difficult to quantify, but it is significant, and consequently worth analysis. When parties choose a mediator, personally or through their lawyers, they confer stature on the mediator by their choice. Their choice expresses confidence that this mediator has the ability to successfully resolve their dispute. Although they may not have any experience with this mediator, they want to believe that this person can and will bring them to agreement. Consequently, they are willing to engage in a settlement process directed by this mediator.

High achievement and professional respect are often the basis for an individual's stature within a particular professional and social community. Parties may choose a religious figure –a priest, rabbi, or minister – as mediator because they are themselves religious and look up to a spiritual leader and trust this individual to be neutral. Parties who belong to the same profession may choose someone with high status within that profession as their mediator. For instance, feuding doctors may choose a medical college dean to mediate their conflict. They choose the dean because of his stature in their profession and their understanding that to be successful the dean must possess a high degree of skill at dealing with fractious doctors. Lawyers involved in the dissolution of law firm partnerships often call upon colleagues with stature to help them avoid litigation.

Stature is what leads some lawyers to choose retired judges to mediate a dispute, regardless of the judge's specific dispute resolution skills or legal expertise. Lawyers sometimes say they want the gray hair and robes for their effect on the client. Some believe their client needs to hear the judge say: "This is not a ten million dollar case," before agreeing to settle. While retired judges may not have gray hair or conduct mediations wearing judicial robes, they have the stature which most lay persons accord the judiciary. This stature may make the client willing to believe the mediator's view of the dispute is meritorius, and to adjust his or her view accordingly.

Some mediators have the stature to actually focus public attention on the mediation before it begins. In New York City during the 1960s, when Ted Kheel was called in to resolve an impasse in negotiations between the city and a union, his stature generated media attention, which focused public awareness on the dispute. Because he was widely respected as a neutral, his statements affected the public's perception of the dispute. If he were to characterize either side as being inflexible or unreasonable, it could generate a loss of public support that would make it difficult for that side to prevail through a strike. His stature with the public enabled him to move the parties from extreme positions to agreement.

Choosing a Mediator: An Example

Here is an example of how a mediator was selected in a politically sensitive public dispute. The facts come from articles which appeared in the Los Angeles Times. While this type of case differs considerably from private mediation, it nonetheless illustrates a great deal about choosing a mediator with the proper expertise and stature for the dispute.

This dispute arose out of the decision by the Los Angeles Police Commission not to reappoint the police chief, whose contract was to expire in six months. The chief threatened suit, alleging racial discrimination. The City Council, which had to approve any monetary settlement, was divided among those who were unwilling to pay anything to the chief and wanted him to serve out his term, those who were willing to make a small additional payment after he served out his term, and those who wanted to give him a large amount of money regardless of whether he served out his term. The mayor, who appointed all of the members of the Police Commission, played a public role in the decision not to reappoint the chief. What skills, expertise, and stature would the lawyers for the Police Commission and the chief look for in a mediator?

The mayor's first choice was former Secretary of State Warren Christopher, who chaired the commission that created the plan for civilian control of the police under which the chief was appointed. The chief's lawyers, however, would not accept Christopher as mediator. The mayor reportedly rejected the mediators suggested by the chief's lawyers because "they were insisting on a private-style mediation." The mayor described the mediator's task as figuring out "what is fair," so that the settlement could be recommended to the City Council. The parties ultimately agreed on a retired Superior Court judge who reportedly belonged "to a California judicial dynasty." Why this choice of mediator?

Warren Christopher has high level mediation skills and expertise in both police matters and politics. Nonetheless, the chief's lawyers probably made a sensible decision in rejecting him as mediator. While his skills are significant, from the chief's point of view he may have too much substantive expertise. Christopher could make an independent judgment about whether the stated reason for not reappointing the chief – that he failed to improve the Police Department – was real or a pretext for discrimination. Christopher also has the stature to orchestrate a public campaign in support of his "finding," which might undercut the chief's position. His notion of what was "fair" could be decisive in any public debate. The retired judge was likely chosen because of his expertise in Los Angeles politics and his public stature. His skills as a mediator were probably irrelevant. The mayor's public statements indicated that he would "accept" the mediator's recommendation and propose it to the City Council. This took responsibility for the settlement off of the mayor, created pressure on the City Council to accept it, and made the mediator a lightning rod for any public anger. For the chief's lawyers this was an opportunity to deal with a mediator whose political expertise could ensure that the mayor would propose the agreed-upon figure. They may well have determined there was a better chance for an acceptable compromise figure through this type of mediation, than through other political means. Once the mediator's recommendation was announced, the chief could further affect the Council's deliberations by saying he wanted to end divisiveness by accepting the settlement – if the Council approved it.

Not surprisingly, the parties agreed to the figure proposed by the mediator and the City Council approved it. The choice of a mediator with the proper skills, expertise, and stature was probably decisive in enabling the parties to resolve this highly-charged public dispute.

Conclusion

The skills, expertise, and stature of the mediator can all be critical to resolving your dispute. It is possible, however, to overemphasize specific expertise, since it is often the easiest attribute to discern from a resume or professional listing. It is worth remembering that professional mediators sell curable ignorance. They ask questions that engage the parties in teaching them about the facts and business setting of the dispute. This questioning creates a cooperative endeavor in which the parties can agree on many points, which can signal the beginning of settlement momentum. By quickly comprehending the dispute, the mediator gains in stature with the parties, making settlement more likely. Thus, a professional mediator who is a quick study, and has well-developed process skills and the stature that comes from successfully resolving many disputes, may provide all the expertise you need.

Biography

Since 1983, **Mr. Norm Brand** has been engaged full time in dispute resolution. A former negotiator and law professor, he has a varied national practice, ranging from arbitrating high profile individual disputes – such as hockey player Petr Nedved's eligibility to play in the IHL, to mediating high stakes public disputes – such as the nation's first "pay for performance" contract in the Denver City School District.

Mr. Brand has arbitrated and mediated cases involving complex issues of law and large dollar amounts. His largest arbitration award resulted in payments of approximately $40 million.

He has served as sole arbitrator in a $50 million biotech case,

and in many multi-million dollar pension cases. He mediated the model annual maintenance agreement between Sacramento Delta Reclamation Districts and the California Department of Fish and Game and a dispute over remediation of 9 Superfund sites involving 19 parties. He mediates discrimination claims for the EEOC and has mediated and arbitrated executive compensation, discrimination, and wrongful termination disputes involving Fortune 500 companies.

Mr. Brand has engaged in med-arb under statutory procedures involving state and federal entities, as well as in trust fund and trade secret cases. His primary practice has been in labor and employment law, but he has also served on specialized panels requiring scientific literacy in biochemistry, medicine, and psychiatry, as well as an understanding of research and laboratory procedures.

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Mediator Neutrality: How is it possible?

by Rachel Fishman Green, Esq.

March 2002

How could a mediator be neutral about your situation when you are getting divorced? Surely one of you is right and the other is wrong! If you know in your bones – and all of your friends agree – that you are right, you may think that mediation would not make sense for you, because you don't want to compromise.

First of all – let me reassure you that you won't agree to anything in mediation that you don't want to agree to! But something happens in mediation that changes people's goals and outlook. I don't ask my clients to agree with each other – just to make an honest effort to understand each other. And to accomplish that, it turns out that mediator neutrality is one of the most valuable and powerful tools I have.

If I really understand how you are feeling, what this experience has done to you, what this means for you, the challenges that you are facing as you try to restructure your life – then I can help your spouse understand these things. And I can also make sure that the agreement that we put together takes care of you and your needs.

The theory underlying our adversarial legal system, is that each person will hire a bright, skilled warrior who will see the situation completely from the perspective of the client, and then present the strongest case possible to the judge. The judge will get the best information from each side, but will be neutral. The judge will see the situation from above and will render a decision which metes out justice and wisdom.

Sadly, because of our over-loaded and burdened court system, most judges do not have the time to get to know the people behind the case-load. People who go through the court system often end up feeling that they did not have their story heard by the judge, and that they were not given a chance to speak.

Mediation will give you that chance – and you are the best person to speak about your life and your needs. No expert knows your life as well as you and your spouse do. In truth, no hired expert will care as much as you do – because only you and your family will live with the agreement you make. You are the people who are in the best position to decide what should happen with your family, your possessions, and with your divorce.

As a mediator, I will not act as a judge, in that I will not make

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decisions FOR you – but I will act as a judge in that I will remain neutral. I will do my best to listen to everything that each of you needs to say, and I will ask questions to make sure that we have all of the information we need. If one person needs additional information, I will help to brainstorm to figure out how to get the information to that person. He or she might need the assistance of an accountant, a financial planner, or an attorney, before feeling confident enough to evaluate offers that are on the table or have enough background information to make decisions.

I will use all of the tools I have to make sure that each person HEARS the other. There is always miscommunication between divorcing people, but a neutral mediator can help to improve the communication to make sure that you understand where the other is coming from, and why you believe the proposed result is right. You don't have to agree with each other – but it helps to understand why you disagree.

That is the theory. How does it work in practice? How is it possible to be on both people's sides, when they are in a conflict?

Anice and Marshall came to me for divorce mediation. Anice expressed her thoughts clearly. She loved Marshall passionately and still believed that he was the love of her life. She had made a commitment to him which, to her, meant that she would stay with him no matter what. She told me that Marshall had had other affairs in the past, and had always returned to his commitment to her. "How do I know that this time you are serious?" she asked him. "What makes you think that, 3 months from now, you won't change your mind again and come back to me?"

The couple had recently purchased a house. Anice said, "Why did you buy this house with me if you wanted to get out of the relationship?" The couple had greatly disparate incomes, and although Anice had been the motivating force behind their buying their home, she was not at the present time able to figure out how to pay the expenses of the house by herself.

I could have felt that Anice was "right," and Marshall – a lousy toad. She was the one with commitment and vision, she felt sure that this marriage was the right thing and was able to stick with her husband through thick and thin. She planned and worked to enable them to buy a home. And after this loyalty, what was her reward? Constant betrayal, multiple affairs!

Then Marshall told me about his experience. He spoke eloquently about his need to move on from a relationship which felt stagnant to him, and from which he could no longer derive any sense of intimacy or romance. He was very grateful to Anice for all the love and support he had gotten from her, and the achievements he accomplished because of her support. But for a long time he had felt that there was something missing. This feeling drove him to seek outside relationships, even though he had derived from Anice love such as he had never before experienced in his life.

At the present time, he felt stifled by the relationship. He felt responsible for Anise. He was aware that she wasn't able to earn as much money as he could earn, and he felt trapped. Although he felt platonic love and respect for Anice, he had a new girlfriend. For Marshall, the 12-year relationship had evolved into a friendship.

After hearing Marshall, I felt his pain. I felt how Anice's willingness to stay in a relationship with a man who was sleeping with another woman made Marshall feel trapped. He saw her as a crazy woman who had no self respect, who would live with him even though he rejected her.

In truth, I felt great empathy for both Anice and Marshall. Through my understanding of them, I was able to sympathize with Anice, who felt deeply committed to this man, and hurt every time he told her that he still loved her – and who felt that she would have stayed with him no matter what happened, even if he had outside relationships.

I felt empathy for Marshall, who expressed that this marriage, though it had endured for 12 years, had never completely fulfilled him. He felt an excitement at the change to break free and try again in a new relationship for something that felt more healthy and fulfilling and less co-dependent and suffocating than his relationship with Anise.

My job, now was to do my best to increase their understanding of each other. Marshall had a better understanding of how Anice felt than she had of his point of view. Once understanding is improved, they would be ready to negotiate the fairest way for them to divide their house and their possessions.

Anise had to confront the reality that Marshall wanted a divorce. When I helped her to accept this, she was able to negotiate alimony for a period of time, so that she could keep the house and eventually become self-sufficient. Marshall saw the alimony as a way to buy his freedom, and it was a great relief to him to be able to do that. They were both satisfied with the terms and their divorce agreement was completed.

Children perceive their parents neutrally during a divorce. As much as you might want your child to side with you against the other parent – it won't happen – and it shouldn't happen. A child will never thank you for taking away his mother or father. The children each contain a little bit of each parent, and they are able intuitively to understand both parents' points-of-view. The children understand the limitations and strengths of both their parents and love them.

I can think of many cases where I had deep empathy with both people, and could see both their sides. I had a case where the marriage was breaking up because the woman was a lesbian. I empathized with the husband, Allen, who, in his early 50's had to leave his beautiful house. He had to rethink his whole life with Marge, in light of these changes in her outlook. He had believed he'd had an OK marriage. He didn't want a new life, but the old one had been snatched from him.

Marge was able to communicate to me the excitement and liberation she felt as she embarked on her new life. She showed me that something had always felt "wrong," in her life, and now, for the first time she didn't have that feeling.

Marge came to mediation believing that she had embarked on a course of self-discovery. But during our sessions, she came to a new understanding of how this journey had affected Allen. She ended up giving him a more generous financial settlement, partly to assuage her guilt, and partly to help Allen to also feel that he was getting an opportunity to embark on a new life – that might hold some promise, excitement, even happiness not present in their old one.

The truth is that it is never simple to determine why a marriage ends. Something was probably always lacking in Allen and Marge's marriage. Why didn't Allen see that? Why didn't Marge know earlier? The end of the marriage is created by both, as the beginning was created by both.

My challenge is always to understand both people. In another case the husband, Brad, went out to get a newspaper one Sunday morning and did not come back or call for 3 days. He left Helen with 2 young children, without even a note. I could imagine her anguish, and the fear of the children. But during our sessions, I could see that Helen never let Brad speak!! I'm not saying that what he did was right, only that I understand that he did the best he could and that something drove him to do this terrible thing. Something that he felt had been equally awful had been done to him or he would not have done this to her.

And that is probably the crux. I do believe that most of us are trying the best we can to make our way through this life. We try not to hurt the people we love, or have loved. And we do our best. But we are imperfect creatures, so we do not always succeed. We

are hurt and we lash out – and the other may not know that he/ she has hurt us. Through my understanding, I can often help people to forgive themselves and each other – which will help them to move forward into their new lives post-divorce.

Divorce raises all kinds of hurdles, as you restructure and begin to figure out your new life – and also raises all kinds of complex emotions. When you are navigating the maze of these changes, the last thing you might want to hear is that your spouse's position has some validity. (And that is one of the appeals of the adversarial system. When you are hurt, angry and shaken up, who would not want to hire an experienced warrior, who will tell you that you are right and that your evil spouse should make amends – usually monetary – to avenge these wrongs?)

These feelings are especially intense where the impetus for the break-up of the marriage is a situation with deep emotional effect – for example, where one person has a new lover, or where one person walked out on the other very suddenly and without warning. The "right" spouse might find that the new identity as a wronged person becomes intensely compelling and attractive.

The answer is that neutrality will bring you closer to the truth, and the truth will help you to move on with your life.

Biography

Rachel Fishman Green, Esq. is an attorney with six years of experience as a divorce mediator, and the director of Legal Mediation Services in Park Slope, Brooklyn. She has helped divorcing couples resolve conflicts concerning all aspects of divorce, including division of homes, time with the children, dividing small businesses, fair distribution of pension assets, child support, division of health and child care expenses for children, tax aspects of divorce, how to bring new girlfriends/ boyfriends into children's lives.

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Thom , Rockwall TX **08/18/04**

Assurance of third-party neutrality is a foundation of mediation, yet, the question always arises with every party. As a professional mediator, I refuse to take sequential case assignments from attorneys and I refuse to accept any cases involving a resident or business party within the County in which I live. Most but not all ADR case-management organizations assure neutrality by verifying first that the mediator has had no prior business or contact with any of the parties or their attorneys. I always verify at the mediation and directly with all individuals present that I have had no prior contact with anyone and assert that I have no interest in the outcome of the

mediation. Many companies and government agencies that utilize internal mediation processes attempt to assure neutrality by swapping mediators with other agencies, companies or divisions often located in other major cities. I acknowledge that mediator empathy with each party's position may occur during a mediation, particularly during caucuses, however, as the mediator makes no decision I'm most doubtful that such empathy is of any negative effect upon the outcome. Conversely, a certain degree of mediator empathy with each party is likely necessary to elicit trust, openness, cooperation and earnestwhile willingness to look at the total perspective and compromise.

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Misty , Harrisburg PA **04/11/02**
Idea

How can someone going through a mediation or custody evaluation be assured of neutrality in any given case? How can a forensic examiner be certain they have gathered accurate data? They rely on honesty from parties on each side to come up with the best possible resolution, while working inside an atmosphere of adversity. On top of all that, how can the system guarantee integrity and a non-biased outcome? It would make sense to me to have some sort of system of checks and balances in both the legal end and the mediation end of the process. Maybe even videotaping of mediation or custody evaluation conferences, and even on what happens in the courtroom. That way noone has more power than they should over a given situation. That way nobody's integrity needs to be in question.

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Choosing The Right Mediator: A Guide To Effective Mediation Styles

by Michael Roberts

Mediation is a settlement process where a third-party mediator assists the parties in negotiating a voluntary settlement of a dispute. While mediation is far more cost effective than traditional litigation (usually one day versus years for litigation), it is not inexpensive. Some experienced mediators charge several thousand dollars for a day of mediation, not to mention the cost for attorneys, experts and the value of the parties time away from their own businesses. The market demands a mediator who will give the parties the best chance of settling their dispute. So, how do you choose that mediator? Here are one mediator's views after having mediated thousands of disputes over the past fourteen years.

In my view there are two important things that must happen in every mediation. First, there must be a realistic evaluation of the most probable outcome of the dispute if it is not settled in mediation. Second, the negotiations must continue until such time as each side has put their best offer on the table. Without these two things happening, the chances of settlement are significantly reduced.

In order to obtain a "realistic" evaluation of the most probable outcome, there must be a full discussion of the issues, preferably in an joint session, where all parties are present and exposed to the other side's point of view. This helps educate the parties and gives them a more realistic view of the dispute. What is learned in this forum is often different from the impressions gained when information is filtered though the attorneys. Furthermore, a joint discussion often provides the parties with a realistic understanding of the issues in dispute and the intensity of the opposing parties position. By directly observing the other party's reaction to factual and legal theories, the parties begin to understand the chances of persuading the other side as to the validity of their own position.

After the joint session, the mediator often meets privately with both sides. During the first round of private meetings, I generally explore a number of issues designed to educate the parties as to the most probable outcome if the dispute does not settle in mediation. These issues are generally addressed to the attorneys in order to insure that the client is fully aware of the attorney's "real" view of the case. The issues discussed include the following: strengths and weaknesses of the case; the most probable outcome if the case proceeds to trial; the cost of litigating the

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case through trial; the attorney's opinion as to what the other side is willing to do; and in fact, what the attorney is willing to recommend to settle the case. At the end of the first round of private meetings, I seek to insure that each party has a realistic assessment of their best case scenario if the case does not settle in mediation. As negotiations proceed, I will continually test the validity of the party's positions arrived at during that first private meeting. Often, assessments change based on negotiations that take place in subsequent meetings, particularly with respect to a party's willingness to accept the risks of litigation.

It is essential in any mediation that negotiations continue until such time as each party's best position is on the table. Settlement is most often achieved when the parties are convinced that they have seen the other side's best offer. The mediator's job is to keep the negotiations going until this point is reached. If the mediator does not have the skill or experience to keep the negotiations going, the chances of settlement are significantly reduced.

Successful mediators are tenacious. They have the skills to break impasse and keep negotiations going notwithstanding obstacles to settlement. The marketplace demands mediators who will not give up and adjourn the mediation merely because the parties are too far apart. While not every case can settle in mediation, research and experience indicate that over 80% will settle in the hands of a skilled mediator.

So what skills does a mediator need to have in order to keep negotiations moving forward? A brief discussion of mediation styles is helpful at this point. Not all mediators employ the same style. Some mediators use an evaluative approach and some use a facilitative approach. The best mediators use both. The evaluative mediator tends to evaluate the issues presented and offer his opinion of what the parties should do to settle the case. This approach is best exemplified by a retired judge who advertised that his settlement conferences are done the old fashioned way: "We beat up on everybody until we make a deal!" The facilitative mediator is less inclined to offer his opinion, but rather, wants the parties to come to their own conclusion as to how the case should be settled. The classic example of this type of mediator is "the frustrated therapist." In my view, the question is not which approach is best but when should each be used. An opinion offered too early in the mediation is less likely to be accepted and may result in the early termination of negotiations. Likewise, efforts to facilitate an agreement without commenting on a party's clearly unreasonable or unrealistic expectations has little chance of success. Different types of disputes call for different styles and both styles may be necessary in the same mediation in order to keep negotiations moving forward.

In the early stages of a mediation, I tend to use a facilitative approach to help the parties work through the issues on their own and reach their own conclusions. Evaluative techniques are reserved until the later stages of the mediation when a rapport has been established between the mediator and the party. At this point the mediator's opinions as to the validity of a party's position and suggestions for settlement are more likely to be accepted. Most experienced mediators do not hesitate to evaluate the validity of a party's position and offer suggestions for settlement at the appropriate time. Indeed, most parties expect it. The skill is in the knowing how and when to use both approaches.

In order to keep negotiations moving forward, a sense of timing is imperative. The right answer at the wrong time is the wrong answer. Generally, negotiations commenced before the parties have a realistic assessment of their own case are less likely to be successful. I prefer to delay specific negotiations until the parties' expectations for settlement are realistic and the parties positions are within a reasonable range of one another. To start specific negotiations when one party demands $100,000 and the other party is only willing to offer $1,000 may cause the negotiations to bog down before any real progress is made. On the other hand, if the parties' initial positions are grounded on a realistic assessment of their claims, negotiations are far more likely to be successful.

For the best chance of success, look for a mediator who has a track record in getting cases settled. Usually you will find that these mediators have the process and legal expertise to insure that the parties have a realistic view of the probable outcome of their case and the negotiation skills necessary to keep the parties talking. While not every dispute is destined for settlement, a tenacious mediator will always "go the extra mile" to reach settlement every time.

Biography

Michael J. Roberts is a full-time professional mediator involved in resolving disputes throughout the United States. He has 28 years of major law firm experience as a senior litigation partner. Since 1985, Mike has served as a mediator and special master in more than 1,000 cases with aggregate settlements in excess of $500 million. Mike's mediation practice consists primarily of major financial controversies and complex multi-party matters with emphasis on business, real estate, construction, employment and insurance. Mike's clients include real estate developers, contractors, publicly held companies, institutional lenders, health care providers, educational institutions, governmental agencies, insurance companies and the like. He is a frequent speaker at professional and industry seminars throughout the United States on various topics involving alternative dispute resolution.

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Desiree **dugdes@yahoo.com** **05/03/02**

My disagreement stems from the author's beliefs that mediators need legal expertise and his statement "the best mediators use both" in referring to style. The article feeds into the misguided belief that "good" mediators are attorneys and/or retired judges. A prime example of this not being true is community mediation centers. The center I am involved with only practices the facilitative approach. We receive referrals from the court, community, attorneys, State's Attorney and a wide range of government agencies. As a whole the Center has an 85% - 90% success rate. Very few of the mediators have a legal background. Individuals interested in mediation should ask questions regarding the approach, training and success. One style or combination of styles does not guarantee the disputants will reach an agreement. The author used the term settlement and this gives the impression that the participants will not have all their needs met. Mediation should be about helping the participants identify the issues and have an open discussion about what his/her needs are. During moments of impasse the mediator should do reality checking and ask questions about what the

future may hold if the conflict is not resolved. I do not necessarily agree that this includes the mediator guessing as to what may happen in court. In court there are no guarantees. The types of disputes mediated by the author may involve legal teams on both sides and mountains of evidence. This has not been my experience when assessing the needs in my community. The majority of community referrals involve individuals not represented by council and who simply want to be heard. My goal is to open the lines of communication for the present but also for the future. The cases referred from the court normally involve attorneys and the most want their client to represent himself or herself. Their attorney has already discussed the strengths and weaknesses of the case. In mediation it is important for both sides to tell their perspective of the problem and to truly feel heard. It is one's perspective of the situation that tends to be root of the conflict. A good mediator will help the participants identify common ground and then the issues that need to resolved. As a community we need to recognize not every approach will work for every situation. We need to identify those quality assurance items that will help individuals make informed decisions. As mediators we need to be upfront with disputants about the type of service we offer. There is a wide mix of individual mediator styles and services provided. I would love to read an article that truly informs the public about the various mediation styles and yet does not say this is how it should be done every time. There is even great debate about the physical setting. It is misleading to say this is how it should be done and this is what one should expect.

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Five Steps to Choosing a Qualified Mediator

by Alaska Judicial Council

The information on this page has been excerpted from the Consumer's Guide to Mediation published by the Alaska Judicial Council, with funding from the State Justice Institute.
target="blank">www.ajc.state.ak.us/Reports/mediatorframe.htm

August 1998

Because no easy formula can predict mediator competence, the consumer must do some groundwork before selecting a mediator. First, you must understand the mediation process. After you understand the basics, you can use the following process to choose a mediator:

Five Steps to Choosing a Mediator
1. Decide what you want from mediation
2. Get a list of mediators
3. Look over mediator's written qualifications
4. Interview mediators
5. Evaluate information and make decision

These steps are described on the next pages. Remember during your search that a mediator should remain neutral and treat both parties with equal fairness and respect.

1. Decide What You Want from Mediation

Think about your goals for the session. Do you want a mediator who suggests options in order to help move the parties towards agreement? Or, do you want a mediator who resists offering opinions so the parties feel responsible for their agreement? Think about past attempts at negotiation and problems with those attempts. What are your choices if mediation does not work?

Think about your abilities. What are your strengths and weaknesses as a negotiator? What are the other party's strengths and weaknesses? What are your emotional limitations? Do you expect the mediator to help you stand your ground if the other person negotiates better than you or has more "power?" Thinking

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about these issues is especially important if there is a power imbalance between you and the other party. If there has been abuse and or violence between you and the other party, please read the Domestic Abuse section.

Think about the dispute and the context in which you must resolve it. What is the time frame? Is this a commercial dispute between experienced insurance company representatives, or is it a divorce involving an emotional child custody decision? The approach or model that commercial disputants might prefer may differ greatly from the one preferred by a mother and father.

Consider your budget. How much you can spend might limit your choice of mediator or mediation program.

Many mediators and dispute resolution firms or services can help you understand what services would be best for your dispute. Some will contact the other party to the dispute to introduce the concept of mediation.

2. Compile a List of Names.

You can get a list of mediators from the Locate A Mediator database.

Word of Mouth. Ask a friend, your attorney, your therapist, or another professional. Describe your case to a mediator and ask, "Other than yourself, who are the most skilled mediators in this kind of case?" Talk to people who have been in a mediation with the mediator (you can ask the mediator for names of clients). What was their case about and what were their impressions of the mediator?

Written Lists. Check local listings in the Yellow Pages. Many local mediation organizations maintain directories of member-mediators.

Referral Services. Many national mediator membership organizations and trade organizations keep lists of practitioner members and offer referral services. Some may charge for the referral services.

3. Evaluate Written Materials.

Call or write several mediators on your list and ask them to send you their promotional materials, resume, references and a sample of their written work. These materials should cover most of the following topics.

Mediation Training. How was the mediator trained? Some mediators receive formal classroom-style training. Some participate in apprenticeships or in mentoring programs. While training alone does not guarantee a competent mediator, most professional mediators have had some type of formal training. How many hours of training has this mediator had? How recent was the training?

Experience. Evaluate the mediator's type and amount of experience (number of years of mediation, number of mediations conducted, types of mediations conducted). How many cases similar to yours has the mediator handled? A mediator's experience is particularly important if he or she has limited formal training.

Written Work. Some mediators will write up notes about agreements or even draft agreements for the parties. Other mediators do not prepare written agreements or contracts. If your mediator will prepare written work, you may want to review a sample. Samples could include letters, articles or promotional materials. Any sample of the mediator's written work should be clear, well organized, and use neutral language. Agreements or

contracts should have detailed information about all items upon which the parties have agreed.

Orientation Session. Some mediators offer an introductory or orientation session after which the parties decide whether they wish to continue. Is it offered at no cost, reduced cost, or otherwise?

Cost. Understand the provider's fee structure. Does the mediator charge by the hour or the day? How much per hour/day?

Other Considerations. Find out whether the mediator carries professional liability insurance which specifically covers mediation. Is the mediator certified, and if so by whom? While certification usually shows the mediator has completed a specific amount of training or education, training and education do not guarantee competence.

Does the mediator belong to a national or local mediation organization, and is the mediator a practicing or general member? Cost may prevent some competent mediators from joining organizations, becoming certified, or carrying liability insurance.

4. Interview the Mediators.

Talk to the mediators in person or by phone. During the interview, observe the mediator's interpersonal and professional skills. Qualities often found in effective mediators include neutrality, emotional stability and maturity, integrity, and sensitivity. Look also for good interviewing skills, verbal and nonverbal communication, ability to listen, ability to define and clarify issues, problem-solving ability, and organization.

During the conversation, you also may want to ask questions about matters covered in the written materials and other topics. Some topics to discuss in the interview include:

Training, Knowledge and Experience.

Ask the mediator, "How has your education and experience prepared you to help us work out this specific dispute?" If the mediator had formal training, did it include role play and observations of skilled mediators? While training and education do not guarantee competence, training is most effective when it includes practice-oriented segments such as role play and observation.

Ask "Do you participate in continuing education, on-going supervision, or consultation?" Many professional mediation organizations encourage or require their members to participate in ongoing education or other professional development.

People often ask whether a mediator should be an expert in the subject of the dispute. For example, should the mediator in a commercial mediation be an expert on industry standards and practices? The answer depends on the type of dispute, the mediation program (for example, court-referred or administrative agency), and the parties' expectations and needs. Ask the mediator if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not.

In some cases, the parties may prefer a mediator with no special knowledge of the subject. Benefits of this approach include avoiding a mediator's preconceived notions of what a settlement should look like and letting the parties come up with unique or creative alternatives.

In other cases, for example where the subject of the dispute is highly technical or complex, a mediator who comes to the table with some substantive knowledge could help the parties focus on the key issues in the dispute. Or, parties may want someone who understands a cultural issue or other context of the dispute.

Style.

Ask "What values and goals do you emphasize in your practice?" For example, does the mediator encourage the parties to communicate directly with each other, or does he or she control the interchanges? The mediator should be able to describe his or her style of mediation and his or her role in the mediation process. Remember that different mediators may practice their craft in different ways, although some mediators can change their style to suit the parties' specific needs.

Another stylistic difference is the use of caucus. A caucus is a meeting between one of the parties and the mediator without the other party present. Some mediators caucus frequently during the mediation, while others seldom or never use this procedure. Ask the mediator whether he or she uses caucuses, and if so, when.

If the mediator works for or is associated with a mediation program or organization, ask what values and goals the program emphasizes. For example, the style or requirements of a mediator who practices in a court program designed to reduce court caseloads may differ from the style of someone whose practice does not involve the same time pressure.

Ethics.

Ask "Which ethical standards will you follow?" (You may ask for a copy of the standards). All mediators should be able to show or explain their ethical standards (sometimes called a code of conduct) to you. If the mediator is a lawyer or other professional, ask what parts of the professional code of ethics will apply to the mediator's services. Ask the mediator, "Do you have a prior relationship with any of the parties or their attorneys?" The mediator should reveal any prior relationship or personal bias which would affect his or her performance, and any financial interest that may affect the case.

Confidentiality.

The mediator should explain the degree of confidentiality of the process. The mediator may have a written confidentiality agreement for you and the other party to read and sign. If the mediation has been ordered by the court, ask the mediator whether he or she will report back to the court at the conclusion of the mediation. How much will the mediator say about what happened during mediation? How much of what you say will the mediator report to the other disputants? Does the confidentiality agreement affect what the disputants can reveal about what was said? If the parties' attorneys are not present during the mediation, will the mediator report back to them, and if so, what will the mediator say? The mediator should be able to explain these things to you.

Logistics.

Who will arrange meeting times and locations, prepare agendas, etc.? Will the mediator prepare a written agreement or memorandum if the parties reach a resolution? What role do the parties' lawyers or therapists play in the mediation? Does the mediator work in teams or alone?

Cost.

Ask "How would you estimate costs for this case?; How can we keep costs down?" Are there any other charges associated with the mediation? Does the mediator perform any pro bono (free) services or work on a sliding fee scale? If more than one mediator attends the session, must the parties pay for both? Does the mediator charge separately for mediation preparation time and the actual mediation?

5. Evaluate Information and Make Decision.

During the interviews, you probably observed the mediators' skills and abilities at several important tasks. These tasks, which mediators perform in almost all mediations, include:

- gathering background information,
- communicating with the parties and helping the parties communicate,
- referring the parties to other people or programs where appropriate,
- analyzing information,
- helping the parties agree,
- managing cases, and
- documenting information.

Ask yourself which of the mediators best demonstrated these skills. Did the mediator understand your problem? Understand your questions and answer them clearly? If the other party was present, did the mediator constructively manage any expressions of anger or tension? Did the mediator convey respect and neutrality? Did you trust the mediator? Did the mediator refer you to other helpful sources of information? Understand what was important to you? Pick up on an aspect of the conflict that you were not completely aware of yourself? Did the mediator ask questions to find out whether mediation is preferable or appropriate? Understand the scope and intensity of the case? Of course, not every orientation interview permits the mediator to demonstrate all these skills, and every mediator has relative strengths and weaknesses. But you should be satisfied that the mediator can perform these tasks for you before beginning.

Review the other questions on this checklist. Make sure that the mediator's cost and availability coincide with your resources and timeframe. The other parties to the mediation must agree to work with this person, too. You may want to suggest two or three acceptable mediators so that all parties can agree on at least one.

Finally, consider evaluations of others who have used this mediator or your own previous experience with this mediator. If applicable, consider the goals and procedures of any organization with which the mediator is associated.

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Learning To Use The Mediation Process - A Guide For Lawyers

by Norm Brand

September 2000

Mediation is changing law practice. It is the cheapest, lowest risk, and most under-utilized form of alternative dispute resolution. And the demand for it is rapidly growing.

Public pressure for making the legal system more accessible is responsible for some of the increased demand. Hard-pressed businesses looking for ways to control their legal costs are also responsible for mediation's rise in popularity. Corporate counsel increasingly choose outside lawyers on the basis of the outsider's commitment to ADR, according to a recent article.

You cannot ignore this impending change -- and it makes good sense to prepare for it sooner, rather than later. There are three good reasons for introducing mediation into one's practice immediately.

PREPARING FOR THE INEVITABLE

First, you may as well make a virtue of necessity. Exploration of ADR alternatives is likely to be legislated for every civil dispute. California's State Bar Task Force on Access to Justice has proposed legislation which contemplates having the parties in every civil action meet to choose appropriate ADR processes, or having courts require ADR assessment conferences. A legislative proposal embodying much of the state bar position (AB 3011) failed in this legislative session, but the issue will be raised again. It is cheaper to require ADR than to build new courts, and the idea of "privatization" has been popular for some time. Additionally, the state bar may decide that lawyers have an ethical obligation to explore alternatives to litigation with their clients. You can learn new techniques now and develop a reputation for skilled, cost-efficient resolution of client problems, or wait until ADR is mandated by statute.

BUILDING ADR SKILLS

Second, lawyers are dispute resolvers. We counsel clients on avoiding potential disputes, manage and resolve small disputes before they can grow, negotiate resolutions to disputes before and after filing suit, and litigate to resolve the most intractable disputes. All of this dispute resolution requires skillful lawyering, learned in law school and practice.

Mediation is another form of dispute resolution. Using it requires

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skillful lawyering, new knowledge, and real-world practice. But using mediation effectively isn't part of what most lawyers learned in school, and few have had much practice at it.

Even if an attorney is regularly engaged in settlement conferences, this only scratches the surface of mediation.

Mediation is a variety of processes, which can be employed at different times in the progress of a dispute. From pre-filing "facilitated good faith bargaining," to post-filing "managed discovery," to the wide variety of post-discovery mediation alternatives, mediation offers many options to traditional litigation. Certain mediation processes are most likely to be effective for particular disputes, or at specific times in a dispute. Different processes require different approaches, both by the mediator and lawyer. As a client's dispute resolver, a lawyer helps determine whether a dispute is appropriate for mediation, when mediation might be most effective, and what type of mediator is needed. The lawyer must prepare a client for mediation and help the mediator bring the client's dispute to a rapid, successful resolution. It is a truism among mediators that nothing kills the prospects for resolution more surely than a lawyer who doesn't understand the process.

BUILDING A PRACTICE

Third, these are tough economic times for lawyers. Success in a competitive environment requires mastering a variety of techniques to help clients achieve a cost-effective resolution of their disputes. A lawyer who is adept at skillful, cost-effective dispute resolution may be assured of client loyalty. There are, of course, clients who only want an "attack" lawyer. Psychological limitations narrow the options for dispute resolution which may be offered such clients.

You may be concerned about the cost of client loyalty. A common belief is that mediation relies upon avoiding legal fees to achieve a settlement. That is, the parties figure out how much it will cost them to continue litigating and use those dollars to bring their "bottom lines" into a range where compromise is possible. The only one who loses -- according to the theory -- is the lawyer who expected to bill for further work. Cynics cite this as a reason lawyers will only talk about mediation, or pretend to support it to avoid other proposals for reforming the legal system. But this cynical view is inaccurate because it relies exclusively upon the settlement conference model of mediation, and misunderstands case dynamics. An example of a non-settlement conference model may be helpful

At the early stages of a dispute, mediation can help develop alternatives to a "zero sum" game. A mediator can help the parties identify their real interests. Then, the parties may discover that there is a deal to be made, a contract to be written, property to be transferred. All of these generally require legal assistance. What might have been a dispute in which a suit was filed and eventually dismissed, becomes an opportunity for the parties. The success of this form of mediation does not rely on avoided legal fees providing a fund for settlement.

TRANSACTION COSTS

But there are cases in which avoiding transaction costs provides the impetus for settlement. Transaction costs, however, are more than just the legal fees that will be expended if a dispute continues. Transaction costs include the time clients devote to the dispute, the emotional price paid by the parties for continuing the dispute, and foregone opportunities for more profitable endeavors because of the mental energy devoted to the dispute.

If these transaction costs -- exclusive of legal fees -- become too high for one or both parties, the case will settle. Where offers of compromise have been made, the transaction costs get weighed against the additional dollars thought to be available. Again, if the price in transaction costs (exclusive of legal fees) of the last "x"

dollars is too high, the case settles. In fact, this may be why so few cases are actually litigated.

If the vast majority of cases are going to settle anyway, then the idea that the "fund for settlement" comes out of legal fees is wrong. The fees that parties focus on are unlikely to be incurred. While a good mediator will certainly direct the parties to look at these "potential savings," you should not misunderstand the reality. Most cases settle: this one may or may not. There may be very few additional legal dollars expended before the dispute is resolved, although the additional transaction costs can still be quite high.

TYPES OF MEDIATION

Before you can introduce mediation into your practice, however, you need to consider some basic differences in types of mediation, their uses, and your role as your client's dispute resolver in the conduct of a mediation. There are no rigid categories in mediation. Mediators try to be flexible in anticipating and meeting the needs of the parties to do what will work in resolving a particular dispute. But we can identify two broad categories of approach that are sufficiently different to merit an initial choice and require different lawyer approaches: Information Centered Mediation and Process Centered Mediation.

Information Centered Mediation (ICM). This type of mediation relies upon the mediator possessing superior information gained through formal study, experience, or both. For instance, a retired judge may have decided 100 personal injury cases. That experience, plus the judge's perceived neutrality, permit the judge to say -- implicitly -- "I can predict, with a relatively high degree of accuracy and within a fairly narrow range, what the award would be in this case if it goes to trial." Similarly, a litigator who has tried 200 personal injury cases may make relatively high probability predictions about the outcome of a case. In areas where the law is changing, the leading academic expert in that area may make highly informed predictions about where the law is likely to go in a specific jurisdiction. Alternatively, the academic expert may have well informed views on the likely success of each party's theory of the case, which could lead them to reassess their own views of the probability of success. Finally, where the dispute turns on a technical matter (for example, is this emission reduction valve essentially the same as the patented one), the opinion of a neutral technical expert may help the parties reach a settlement.

Choosing a Mediator. In each instance, the choice of a mediator is dictated by perceived expertise. The expertise may be in legal processes, as with the retired judge or experienced litigator, or in a specific subject matter area, as with the academic or technical expert. ICM relies upon perceived stature in the field to help resolve a dispute. The nature of your dispute determines the degree of stature you need -- and are willing to pay for. A business dispute which turns on arcane matters of international law may justify engaging the leading expert at the United Nations, while a dispute about a fast food franchise might well be mediated by a local lawyer with significant franchise experience.

How ICM Works. The information centered mediation process involves the parties assenting explicitly or implicitly to the judgment of the mediator. The mediator begins with the stature gained through experience and training. This initial stature is increased by the parties having chosen that mediator for their dispute. That is, each side has an investment in the belief that it has chosen exactly the right person. When the mediator first enters the dispute, it is with an aura of impartiality and expertise. The mediator enhances this aura by careful listening, judicious questioning and skillful exploration of the nuances of each side's position.

There comes a point, however, when the parties want to know what the mediator thinks is the likely outcome and value of the dispute. That is a critical point in ICM. While delivering an opinion can be delayed, it eventually is given. How the mediator makes an opinion known may affect its acceptability. Another second critical

point comes when the mediator defends the opinion. In most cases, both sides are less than delighted with the opinion, although there are cases in which one side is right and the other wrong. The mediator must defend the position and gain substantial acceptance of it without alienating either party. In that process, the mediator may alter an opinion, within a limited range, as a result of additional information, or previously unknown arguments. The mediator often engages in the sort of "shuttle diplomacy" that is the hallmark of ICM. This process works if there is substantial acceptance of the mediator's evaluation; it must be the center around which the parties explore options for settlement.

SUCCESS FACTORS

Typical Uses of ICM. ICM is most effective when bothsides are well-informed about the facts of the case, the continuing transaction costs are perceived as high, and either the dispute is a "zero sum game," or the legal outcomes are extremely limited. Personal injury and medical malpractice cases, contract disputes over performance, and marital dissolutions are especially amenable to ICM. It may sound odd to include divorce mediation under ICM, since many lawyers mistakenly confuse it with some sort of conciliation process. But divorce mediation-- as it is practiced by some of the most proficient lawyers -- involves neutral expertise. Most divorcing couples are only dimly aware of the statutes, cases, and extensive judicial guidelines which are highly outcome determinative in their dispute. Educating the parties in the rules, option, and likely outcomes can lead them to a resolution of their dispute, at low transaction cost. While the mediator may make some effort at reducing the rancor between the parties, it is secondary to the process of reaching agreement on the terms of the dissolution. And this reduction in rancor is not necessarily different from the efforts mediators make in other settings to bring sufficient civility to the process so that it can move toward resolution.

ICM is most effective relatively late in disputes, when the parties have a thorough understanding of the facts. They may have taken earlier positions based upon what they hoped the facts would be, but have not modified those positions because they feared it would be taken as a sign of negotiating weakness. Conversely, ICM is unlikely to be effective when there are unknown facts which could significantly affect the evaluation of the outcome of the dispute. Many attempts at "Early Neutral Evaluation" founder because the evaluation is attempted too early. ICM is least effective when there is a need to re-define the dispute or expand the settlement options perceived by the parties. While it is possible to resolve a well-advanced dispute through the creation of new options, that is not the primary focus of ICM.

KNOWLEDGE OF DISPUTE PROCESS

Process Centered Mediation (PCM). The PCM method relies on the mediator's expertise in the process of disputation and skill at achieving resolution of disputes. The mediator does not claim expertise in the subject matter of the dispute, or the ability to predict the litigated outcome of the dispute. Rather, the mediator claims knowledge of how disputes work and the ability to move them toward resolution. The mediator can help the parties focus on their real interests, expand their options, and resolve their dispute on terms not previously considered. The mediator can help them discover non-adversarial procedures for achieving their ends, help them agree upon a specific alternative to litigation, or help them move more expeditiously to inevitable litigation. The mediator relies upon a combination of perceived stature, neutrality, and specific techniques for resolving disputes.

Choosing A Mediator. While lawyers are usually familiar with "rent-a-judge" services and colleagues who have participated in court supervised early settlement programs, very few are knowledgeable about PCM mediators. The knowledge and skills employed by PCM mediators have usually been gained through resolving labor-management, community, inter-corporate, insurance, or environmental disputes. Information about mediators is available from some bar associations which have begun to compile lists. Also, the American Arbitration Association

provides extensive screened lists of skilled mediators. The Center for Public Resources maintains a list of former diplomats, government officials and other well-known public figures who are willing to mediate.

The selected mediator must be capable of quickly understanding an explanation of the matter in dispute. In addition, the mediator's neutrality is, at times, the critical element in resolving a dispute.

How PCM Works. PCM mediators often rely upon three specific "process" techniques to move the parties toward resolution of their dispute: active listening, identifying interests, and re-framing issues. While there are many other techniques, these may help to illustrate the difference between relying on prediction (ICM) and process (PCM). Active listening is a technique for both verifying the information being received from disputants and convincing them that the mediator understands the dispute. The mediator repeatedly re-states, in his or her own words, what the disputant has said. Each time the disputant is asked to confirm the accuracy of the re-statement. Discrepancies are explored as an aid to identifying the interests of the disputant.

The actual interests of the disputants may be quite different from their stated interests, and the mediator attempts to help the parties identify their real interests. The stated interest may be huge amounts of money and public humiliation of the other disputant, but the real interest may be in reasonable compensation for time expended in some endeavor and the opportunity to end an unproductive business relationship.

The classic example of stated interests creating a dispute when real interests are not in conflict is the two cooks arguing over a single orange. Both have claims to it based on their relative status and the importance of what they are preparing. Both are convinced they are more deserving of the orange. But one cook wants orange juice for orange ice and the other orange rind for cake icing. In order to resolve this dispute a mediator first helps the parties discover their real (orange juice and orange rind) as opposed to their stated (the orange) needs. Then the mediator helps re-frame the dispute. Instead of a dispute over who gets the orange, the dispute can be re-framed into "who gets the orange at what time." If the second cook gets the orange after the juice has been squeezed out, both can satisfy their real interests.

There are other situations in which re-framing allows the parties to resolve the dispute. What appeared to be "zero-sum" disputes over compensation for serious personal injuries were resolved -- when interest rates were high -- by structured settlements. These represented a re-framing of the dispute. Instead of a dispute about how much a particular injury would bring from a jury, the dispute was re-framed as "what income stream is necessary to replace the economic loss caused by the injury?" With interest rates high, there was an opportunity to meet the legitimate economic needs of an injured plaintiff while bringing the actual cost to the insurer within a range it could agree was appropriate. PCM mediators help parties discover ways to re-frame their dispute to bring about resolution.

Typical Uses of PCM. There are certain types of disputes for which PCM is most effective, and certain times in all disputes when PCM can be advantageous. PCM is most effective in disputes involving workplace rights and obligations, continuation or dissolution of business relationships, and individual or group relationships. It is most advantageous prior to initiating litigation, before and during discovery, and after discovery when litigation has stalled.

Disputes over workplace discrimination because of age, gender, or other bias are particularly amenable to PCM. The essential dispute is often about individual dignity, respect from peers, and freedom from a hostile environment. Before litigation starts PCM can be most effective because it gives the employee and employer the opportunity to correct a problem and continue their relationship. For instance, claims of sexual harassment can be dealt with in a positive way that changes workplace behavior without stigmatizing the employee who brought the claim. An age discrimination claim,

even after suit has been filed, may be more about dignity than money. A settlement that recognizes a former employee's value (perhaps through a paid consultant relationship), may be perceived as more fair than a far larger dollar award. In many lawsuits over workplace relationships, money is simply the available surrogate for lost respect, dignity, and self-esteem.

When business relationships go sour, there is often a unique opportunity for PCM. The parties' real interests frequently cannot be satisfied through litigation, since the legal solution may be dissolution, resulting in the destruction of a productive enterprise or its forced sale. Sometimes intelligent business people neither recognize nor act to further their economic self-interest because they have become deeply involved in a dispute. A PCM mediator can help them re-discover their real interests and uncover options for mutually achieving those interests. Even if the solution to their dispute is to dissolve the enterprise, a PCM mediator can often help the parties dissolve the enterprise in a way that optimizes the advantages to both.

Finally, disputes that involve neighbors, voluntary associations, and even the relationship between governmental agencies and individuals can often be resolved through PCM mediation. In many instances, low cost mediation services may be available through a community based mediation center. The key to these disputes is that the parties must continue to interact after the dispute is finally resolved. The process of compromising is often more important than the specific compromise reached. Even with governmental agencies, the cost of policing an agreement that is not voluntarily achieved may outweigh the benefits of the agreement. Consequently, a governmental agency may be willing to engage in a PCM mediation.

THE LAWYER'S ROLE

To be effective, a lawyer must constantly remember that the dispute belongs to the client. During mediation the client makes decisions about the case. Sometimes these decisions are at variance with legal advice, and sometimes they are made while both the lawyer and a third party are present. This apparent loss of control makes some lawyers uncomfortable, which is why they might choose ICM when PCM would be more appropriate to that specific dispute.

Lawyers feel more comfortable with ICM because it is similar to a settlement conference. While the lawyer's authority is derived from the client, it is the lawyer who appears to be in charge of the dispute. In most instances, the lawyer advocates the client's position while the client remains silent. In PCM the client is more explicitly in charge of the dispute. The mediator needs to hear most things from the client, not the lawyer, in order to decide how best to move the dispute toward resolution. The client usually seeks advice from the lawyer, and relies upon the lawyer to explain the legal implications of a particular action, but the client is clearly in charge of his or her dispute. Being in charge may also make certain clients uncomfortable. Consequently, you need to anticipate and eliminate some of your client's sources of discomfort.

While there are some differences in preparing for, conducting, and terminating ICM and PCM mediations, they both require significant client participation. And this participation must begin with selecting the mediator. The client must choose the mediator. The lawyer can gather information about the mediator and advise the client, but the client must make the choice. The reason for this is obvious. The client must have an intellectual and emotional investment in the mediator. The client must begin with a conviction that this is the person who can resolve the dispute because it is this conviction, in part, which gives the mediator the status necessary to attempt to resolve the dispute.

Preparing for Mediation

Both ICM and PCM mediation require significant preparation, both for the case and client. As of this writing, it appears that Senate

bill 711, which re-writes California Evidence Code §1152.5 will become law. As a consequence, in California, written confidentiality agreements will no longer be necessary to protect statements or documents introduced in mediation; such agreements may still be necessary in other states. An ICM mediator may require more formal written preparation. Some mediators may ask you to prepare a short summary of the facts and current legal posture of the case, before the mediation. It may be sent to the mediator in advance, or provided at the mediation session. Even if you have not specifically been asked for a summary, it is a good idea to prepare one. At the very least, it will re-familiarize you with the dispute, so you can quickly inform the mediator about the basics of the dispute at the beginning of the mediation. And you can offer the written document to the mediator, as an aid to remembering all of the key facts and issues.

Three aspects of this written document are important. First, it should be brief, relating the major aspects of the dispute but not going into the nuances. Second, it should be neutral in tone, but not arrangement. If there are disputed issues of fact admit there is a dispute and then present a defensible version of the facts from your clients point of view. You should not comment on the facts through using adjectives, characterizations or obvious legalisms such as "clearly." Third, if the mediator may not be familiar with key technical terms, give the mediator a glossary. A good mediator will learn the terms immediately and speak the language of the parties, in the hope of building the parties' confidence in the mediator's ability to resolve the dispute.

In PCM mediations a written document is not usually requested. Frequently, a PCM mediator will ask the clients, rather than the lawyers, to describe the dispute. This enables the mediator to judge (by the order of presentation, emphasis, emotional charge) what is most important to the disputants. A written document, prepared by the lawyer, is still useful as a checklist and glossary for the mediator. By giving this document to the mediator, you can assure that nothing is omitted or forgotten.

In both types of mediation it is critically important to tell the client what process to expect, the role a client will be asked to play, and the role the lawyer will play, including the fact that the attorney may be asked for confidential advice - and that the process can be stopped - at any time. This is also a time when the lawyer may help lay the groundwork for a successful mediation by asking what the client really wants out of this dispute, not what he or she feels "entitled to." The client's understanding that this is a real opportunity to resolve the dispute may lead to increased flexibility.

Participating in the Mediation

While the client must ultimately make the decisions which will determine whether the mediation is successful, the attorney has the power to make it fail by creating enough doubt about the legal consequences of an action to make the client too timid to settle or by making the atmosphere so contentious that the process is subverted.

Here are three simple rules, addressed to lawyers, which will insure that they give the mediation a chance to work.

1. Let the mediator take charge of the process. Don't make the mediator arm-wrestle you for control. If you do, you waste some of the initial good-will and stature the mediator brings, without moving anyone toward settlement. If you never permit the mediator to determine how and when things occur, you are wasting the money you spent to buy the mediator's skill and expertise. You might as well go home.

2. Let the client be the center of the process. Allow the mediator to speak directly to the client. Do not try to interpret or explain every word your client speaks. Do not try to protect your client from him or herself.

3. Don't win an argument and lose an opportunity. Often a

mediator will appear to take the position advocated by your opponent. (Indeed, sometimes it will be more than just an appearance.) If you simply say you don't agree, but are willing to listen to what comes next, that is sufficient to keep the process going. It is also an adequate signal to the mediator that what follows may not be acceptable. If you insist on proving your opponent wrong, you risk awakening a fruitless debate and jeopardizing the mediation.

Here are some tips to increase the prospect of the mediation to succeeding. Use the mediator. If your client has unrealistic expectations, let the mediator deflate them. If your client believes that "any fair person" would have to view the facts in a certain way, let the mediator offer another view. If your client is absolutely convinced of an outcome, let the mediator undercut that conviction. The mediator can float "trial balloons," convey positions you would want to disclaim, and hint at the range of acceptable resolutions without revealing your position. In PCM, allow the mediator to probe for real interests by proposing a multi-level contingent resolution, without pointing out every potential problem.

Terminating the Mediation

There are three possible outcomes to a mediation session: resolution, further mediation, or termination. In the first instance it is easy to know what to do: get something written and signed. You need not draft the final documents, but you should at least sign an agreement in principle otherwise you risk new disputes caused by faulty memory.

When it is necessary to adjourn a mediation for any reason, set a date and time for resuming. Try to make it as soon as possible. Mediations develop a "momentum of agreement" that helps the parties move toward resolution. The longer a second session is put off, the more likely that momentum will be lost. Moreover, too long a time between sessions may require the mediator to spend significant time re-establishing a relationship of trust with the parties.

At other times, a lawyer is faced with deciding whether it would in fact be useful to schedule a second session. Ask the mediator. Each side provides the mediator with information and impressions not available to the other side. This information may have shown the mediator there is enough potential movement to provide a good chance of ultimate agreement. Alternatively, the mediator may want to make one last effort to determine whether another session would be fruitful. The mediator may not believe a second session would be useful. If the mediator's view disagrees with the lawyer's assessment, the best person to decide is the client. If the client doesn't want to continue the mediation, it is unlikely to be successful.

In the third instance, a mediation session is terminated because the parties are deadlocked and unwilling to move. It is difficult for either party to know when a mediation is truly deadlocked. When the mediator is moving between separate caucuses, the mediator has a better grasp of what progress is being made. A mediator may know of an available concession but not communicate it for strategic reasons. A mediator may detect movement where neither side is aware that it has occurred. And good mediators have developed an appreciation of the "calculus of despair." They know when keeping discouraged parties at work a bit longer is likely to produce some needed movement.

It is important to give the mediator an opportunity to continue even after you lose your conviction that the case will be settled. Good mediators are unlikely to drag out unpromising mediations. They want a reputation for settling disputes -- or at least knowing when further efforts are futile. If they deliberately continue an unpromising mediation, they risk their professional reputation.

CONCLUSION

As a lawyer you practice dispute resolution. Mediation is simply another dispute resolution tool. This brief introduction to alert you to its possibilities and make you anxious to begin incorporating it into your practice.

If you want to learn more about mediation the American Arbitration Association offers courses and seminars. In addition, many bar associations now offer mediation courses with MCLE credit.

The most important step you can take, however, is to look at your cases and decide if mediation has the potential for resolving any of them. If it does, review the mediation option with your clients and let them decide. Whatever the clients decide, by specifically considering mediation for every case, you have incorporated mediation into your practice. And that is to your credit.

Arbitration Journal, December 1992. This updated version is excerpted from the original.

Biography

Since 1983, **Mr. Norm Brand** has been engaged full time in dispute resolution. A former negotiator and law professor, he has a varied national practice, ranging from arbitrating high profile individual disputes – such as hockey player Petr Nedved's eligibility to play in the IHL, to mediating high stakes public disputes – such as the nation's first "pay for performance" contract in the Denver City School District.

Mr. Brand has arbitrated and mediated cases involving complex issues of law and large dollar amounts. His largest arbitration award resulted in payments of approximately $40 million.

He has served as sole arbitrator in a $50 million biotech case, and in many multi-million dollar pension cases. He mediated the model annual maintenance agreement between Sacramento Delta Reclamation Districts and the California Department of Fish and Game and a dispute over remediation of 9 Superfund sites involving 19 parties. He mediates discrimination claims for the EEOC and has mediated and arbitrated executive compensation, discrimination, and wrongful termination disputes involving Fortune 500 companies.

Mr. Brand has engaged in med-arb under statutory procedures involving state and federal entities, as well as in trust fund and trade secret cases. His primary practice has been in labor and employment law, but he has also served on specialized panels requiring scientific literacy in biochemistry, medicine, and psychiatry, as well as an understanding of research and laboratory procedures.

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Litigate Or Mediate?: Mediation As An Alternative To Lawsuits

by Adrienne Krikorian

WHAT IS MEDIATION?

One often hears the term "mediation" in connection with resolution of disputes which have already become lawsuits, and, occasionally, before those lawsuits are filed. Mediation is a process by which a neutral third party called a Mediator hears a dispute between two or more parties and attempts to help the parties settle their dispute without judging the merits of the case. The term "mediation" is often confused with the term "arbitration." Arbitration is another form of dispute resolution by a third party (as opposed to a trial before a judge or jury). The Arbitrator listens to the evidence presented by each party and then makes a judgment as to who is responsible for the claimant's damages, and how much the responsible person must pay to the claimant, if any payment is due.

WHO CAN MEDIATE A CASE?

Mediators range in training from practicing attorneys, retired judges or other professionals to highly trained mediators who work full or part time in the specialized field of mediation. The right mediator for your case is one who demonstrates overriding neutrality in evaluating and resolving your case. The effective mediator will help the parties recognize the strengths and weaknesses of both sides' case, so that at the end of mediation both parties are reasonably satisfied with the outcome. The effective mediator will also help parties consider the risks and costs of resolving a dispute before a judge or jury, without necessarily meeting the expectations of either party.

MEDIATE, OR LITIGATE?

Ninety-five percent of cases filed in the California court system settle before trial. Some settle early, others settle on the eve of trial or as close as after a jury is picked. The difference between the former and the latter is the amount of money and time a party will spend in getting from one point to the other. Depending on the type of case, the cost could range from hundreds to several thousands of dollars. Often, the costs are not recovered at the time of settlement. Thus both parties bear their own burden of costs.

Mediating a case before a lawsuit is filed enables the parties to present their case to a mutually selected neutral person (or in some cases two persons as co-mediators) before any money is spent on litigation. Many times the simple process of telling one's

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story to a neutral willing to listen will take the parties a long way toward settlement. The cost of mediating a case (which can be as little as a few hundred dollars, or as much as several thousand dollars per day) is minimal compared to the costs incurred through the life of a lawsuit.

WILL THE COURT MAKE ME MEDIATE?

In some cases, contracts between the parties require that a case be mediated and/or arbitrated. This is often occurs in medical malpractice actions, construction contracts, and real estate purchase agreement. In some cases statutes require pre-litigation mediation or alternative dispute resolution, such as in most types of homeowners association disputes. The excessive backlog in court calendars makes mediation an attractive alternative in other types of cases, resulting in the resolution of disputes in a timely manner, and avoiding the painstaking experience of costly litigation lasting up to five years.

HOW DO I START THE MEDIATION PROCESS?

If you have a dispute with another person or business, which you want resolved, you can first propose to the other side to mediate the case. If you are uncomfortable with that option, then you can make the first call to the mediator and ask the mediator to approach the other side with the invitation to mediate. A well-trained mediator can effectively maintain his or her neutrality during this process.

If you are not familiar with any mediators, you can call the local court and ask for potential mediators, or you can call your local bar association which often has a panel of mediators. Other possible sources are the Internet, as well as private mediation companies.

Select a mediator who has some familiarity with the area of law of your dispute (i.e., homeowners associations, landlord/tenant, business practices, construction disputes, family law, etc.) and someone in your geographic area. Ask the mediator what his or her fees are, and how much time he or she will allocate to your dispute. A good mediator will commit as much time as is necessary to help you resolve your dispute.

WHAT IF MEDIATION DOES NOT SETTLE MY CASE?

In most states, what takes place in mediation is confidential. For example, in California, the mediator cannot be forced to testify at trial as to what was said in a mediation hearing. Any offers made during the mediation process, and any concessions made, are confidential if the case doesn't settle. Of course, certain limitations do exist in connection with protecting others from danger or imminent harm, or in connection with illegal activities. But, parties to most typical disputes over money or negligent conduct are generally protected by laws of confidentiality.

WHAT IS THE SECRET TO A SUCCESSFUL MEDIATION?

The mediation process is as successful as the willingness of the parties to participate in good faith to reach a settlement. A good mediator will work with the parties until he or she determines that a settlement cannot be reached at the time. Parties who consider what they have learned during the mediation process often reach a settlement after the hearing in order to avoid spending precious time and additional funds which may never be recovered at trial.

Biography

Adrienne L. Krikorian represents homebuilders seeking to develop and sell new homes in master-planned communities, condominium projects and age restricted communities. She advises merchant builders and master developers on establishment of homeowners associations and community services organizations, negotiation of contracts to provide services to new communities, and disputes with home purchasers and homeowners associations. Ms. Krikorian's experience includes representation of homeowners associations as general counsel. She represented several associations during recovery from the 1994 Northridge earthquake including handling insurance negotiations, negotiation and administration of construction and design contracts, and negotiations with governmental agencies including SBA, FEMA and local building departments for funding and permits for rebuilding. In addition to her transactional background, Ms. Krikorian is an experienced litigator in the areas of real estate, complex business disputes, and insurance bad faith. She is mediator and arbitrator, particularly in the area of real estate and business disputes.

Education
Loyola Law School (Juris Doctor 1989)
University of Southern California (Bachelor of Science in Dental Hygiene, 1971)

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Thom , Rockwall TX **08/18/04**

A prior question asked what percentages of mediation cases settle? The simplest answer is a majority do settle, though not necessarily in the first mediation. Settlement percentages vary by the subject nature of the mediation. I know of a federal agency using mediation for internal employee-management issue resolution that claims better than a 95% settlement rate. In federal EEOC cases, the percentages vary by region with an overall average better than 60% and as high as 85% in some locales. I'm aware of a Longshore claims study that showed an 87% correlation of proposed settlements at mediation against actual 5th Circuit Court decisions. Your personal experience may differ as success depends upon a combination of the willingness of the parties, the mediator, and the depth of the issue in terms of difficulty to overcome and materiel comittment to attain agreement. With regard to percentage dollars of settlement versus initial requests, mediation does require compromise. However, that does not necessarily mean that the true evaluation of the settlement is necesarily of less value, as dollars are not the only measure of results. A private mediation agreement has multiple values and while it may contain a negotiated dollar value of settlement, it also generally contains other aspects that you may may consider priceless such as: non-public record privacy, the expediency value of a swiftly held mediation and

an outcome that is certain which you chose - - instead of one of surprise imposed by a Judge. More, the mediation process itself, in which you can vocally participate in to your fullest desire yields far more emotional and self-action satisfaction than when you are represented in a Court and can only testify when called as a witness. Transformational mediation is especially suited for highly emotional issues such as employee-management relations and has been highly successfully used by the US Postal Service and adopted by many other major employers.

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An extremely useful article to all seeking information, basic or otherwise.

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Stella Monageng , Gaborone BW **smonageng@idm.bw** **03/20/02**

The article is vital.

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Mediation: A Process To Regain Control of Your Life

by Nathan Davidovich

Are you weary of trying to solve the pressing conflicts in your life through long drawn out legal battles?

Does the thought of a judge, or another person of authority, dictating the resolution of your problems, despite your desires, bother you?

Are you concerned about the prospects of paying lawyer's fees ranging from $150 to $300 per hour for the many hours it takes to process a claim through the court system?

If you answered "no" to all of the above questions, do not read any further. However, if you want to regain control of your life, read on.

REGAIN CONTROL THROUGH DIRECT INVOLVEMENT

Mediation provides a method for people with disputes or conflicts to exercise their own choices and discretion and to regain a sense of control over their lives in resolving disputes. It is a means by which you can be an active participant in the decision making process and have direct involvement in the determination of your destiny. In the informal setting of mediation, the parties are given the opportunity to express their emotions and by searching for the identity of their true interests, to ease their emotional turmoil. Instead of having a decision forced upon the parties to a dispute, mediation provides the mechanism for the parties to craft their own decisions. Once a mutually acceptable agreement is reached, the parties breathe easier and are able to end the emotional turmoil that would continue to plague them for an unknown time into the future while awaiting resolve of their case through litigation.

Because of the voluntary nature of mediation, and the direct involvement of the parties at every step of the proceeding, the process is totally different from the established methods of resolving disputes through litigation. Contrasted with the formality of litigation, mediation is informal and encourages the open exchange of discussion between the parties. As opposed to the limited number of options available in litigation, mediation provides the ability for creative resolution of problems, molded to fit the particular needs of the parties. In addition to tailoring agreements to the particular circumstances of the parties, mediation remains, at all times, a confidential process, thus further fostering a restoration of prior good relationships.

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TIMES
As a lawyer who has specialized in civil litigation in the United States for over 35 years, I have personally witnessed the evolution of a mindset that propels people to the courthouse for every real or imagined wrong. As the rush to litigation has grown, the sphere of individual patience has diminished. Rather than attempting to calmly discuss each other's feelings and determine the driving force behind the dispute, there is a rush to the lawyer's office. By these comments, I do not mean to demean the valuable services provided by lawyers to their clients. Unfortunately, the lawyer sometimes gets caught up in the client's insistence that the lawyer be his/her "mouthpiece", including mimicking the emotions of the client. There then develops a point in the litigation process in which the process becomes self sustaining (a goal in and of itself), leaving little hope for early peaceful resolution.

ANALYZE THE GAMBLE IN LITIGATION
WHAT IS THE REAL RISK OF YOUR GAMBLE?
As is the case with people who gamble, most litigants believe that they have a strong likelihood of winning in court. It is interesting for the mediator to ask the parties, after listening to their prediction of the outcome they believe they are entitled to, if their attorneys are prepared to guarantee those outcomes. In the same vein, the parties need to ask themselves, if there are any guarantees that the result won't be one-half or double, or one fourth or quadruple the expectations.

WHAT ARE THE COSTS OF THE GAMBLE?
The disputants need to factor in the amount it may cost to find out if they are right, and whether there is any assurance that such costs won't be double or more. In mediation, the parties have better control of the costs, as they are involved in all steps of the process. They don't have to suffer the orders of a court requiring their attorneys to spend valuable time and money submitting lengthy legal documents.

TIME NEEDED TO SEE IF THE GAMBLE WAS CORRECT
The parties need to get a realistic grip on how long it will take to find out if they were correct in their guess as to the outcome. The average litigation can take years. By contrast, most mediations can be completed in a matter of weeks or months.

DO YOU REALLY WANT TO ABDICATE CONTROL?
After dealing with all of those questions, if the litigation process continues, the parties have abdicated their control to a judge, over whom they have no control. Isn't a negotiated settlement a better alternative?

PEACE AND HARMONY IS WITHIN OUR REACH
Given the above, does it not make more sense to take a step back and regain control of your life by a proven method of alternative dispute resolution - voluntary mediation? Mediation is the voluntary process where a neutral, impartial person, acceptable to all parties of a dispute, helps the parties to reach a mutually acceptable agreement to end their dispute. That means that the parties choose to participate by their own free will and freely reach a settlement of their dispute. Mediation is a part of the negotiation process, but is not the imposition on parties to a dispute of a 3rd party to make decisions for them. The goal of the mediator is to not only help the parties reconcile their present areas of controversy, but by identifying their interests, to look to the future and through an exchange of mutually acceptable promises that the parties feel meet their personal standards of fairness. In contrast, with litigation, in a mediation, all sides to the dispute have a greater opportunity to walk away as winners.

Through the confidential and voluntary process, you will take an active role in the control and resolution of your problems. An agreement reached will allow all parties to walk away with their heads held high, as winners - not just in the resolve of their problems, but in life. Peace and harmony is an attainable goal, at a financial and emotional cost which is far less than what will be spent in protracted litigation.

Biography

As the managing director of Independant Mediation Service of Israel, **Nathan Davidovich** brings the benefit of more than 15 years of experience in mediation, as a successful trial attorney representing disputing parties in complex litigation matters.

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