

CHAPTER ONE

WHY USE MEDIATION? WHAT SHOULD YOU BE CONCERNED ABOUT?

Mediators tend to be "true believers," optimistic about their ability to handle just about anything. As a practical lawyer or advocate committed to the best interests of your client, you need to be a bit more skeptical—but there are many good reasons why most cases can benefit from trying mediation. There also are some situations that may be particularly good for mediation (and a few where it is not a good idea). All of these circumstances are discussed below.

If you can be successful in negotiating with the other side on your own, you may not need mediation. But if you anticipate or encounter difficulties, consider using it. Even if you can negotiate a specific resolution to a specific problem, mediation may be useful for addressing interests and issues that loom outside the resolution, or that may arise after the case is settled, such as in continuing work relationships.

I. DEFINITION OF MEDIATION

The following definition comes from the Association for Conflict Resolution Mediator Certification Task Force, *Report and Recommendations to the ACR Board of Directors* (March 31, 2004):

Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them without coercion or the appearance of coercion. In mediation, the decision-making authority rests with the participants themselves and strongly values the parties' exercise of their self determination. Recognizing

participants' needs, cultural differences, and variations in style, the mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions, and, when desired, reach a mutually satisfactory agreement. Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached.

II. GOOD REASONS TO USE MEDIATION (INCLUDING THE OBVIOUS AND NOT-SO-OBVIOUS)

A. MEDIATION ALLOWS PARTIES TO FOCUS ON THEIR UNDERLYING INTERESTS AND THE FUTURE, NOT JUST THEIR LEGAL POSITIONS AND THE PAST

Every representative will encounter clients who have needs that may not be adequately met through positional demands for money or other relief typically encountered in litigation. Even when the case is "just about money," strong feelings and anxieties often complicate the parties' ability to negotiate efficiently. And sometimes the chances of recovering the kind or amount of relief demanded are questionable, whereas shifting attention to the client's underlying needs—recognition, closure, an apology, a "fresh start"—may provide a creative opportunity to satisfy both sides.

An example of a creative resolution was found in a mediation involving a discrimination claim against a hotel chain. The charging party was a young woman whose parents came with her and sat patiently outside during the session. The employer saw the case as having only "nuisance" value, but wanted settlement. The solution? A fully-paid vacation at one of the chain's resort hotels—for the charging party's parents. This met one need of the young woman, which emerged in mediation, to provide something of value to reward her parents, who had lovingly sacrificed to support her. The hotel chain gave up only an empty hotel suite and round-trip air fare to settle a chancy case—a "win-win" solution based on both parties' interests.

Litigation generally is concerned with testing evidence and argument against legal standards, so that a judge or arbitrator can decide who wins and who loses based on an historical record and statements of positions

crafted to fit the law. This is a fine and time-tested process that provides as good a vehicle for protecting rights as exists on earth. Frequently, however, litigation may be time-consuming and costly, and may not adequately address what the parties' real needs are. Mediation can help resolve positional demands based on legal standards, but more important, mediation often addresses the underlying needs and interests of the parties, and what will work for the future, expeditiously and at low cost. Another way of looking at it is as follows: Litigation can be seen as a "distributional" system of, for example, deciding who rightly wins and who loses the slices of a given pie, whereas mediation can be seen as a way of expanding the pie, or re-visualizing what besides the pie might be placed on the table!

B. PEOPLE CAN BE HEARD AND HAVE THEIR "DAY IN COURT"

Often, we find that mediation represents the first time a party—whether a complainant or a manager—will feel that someone (most often the mediator) is actually *listening* to his/her story, without judgment or interruption. The mediator does this as a matter of course, but as we will see in Chapter 6, representatives can supply this benefit as well. Particularly when parties have an opportunity to talk uninterrupted on their own (common in mediation but rare otherwise), representatives can set the stage to move beyond "the past" and engage productive conversation about resolution.

Mediation also offers a partially gratifying substitute for the ritual and value of "going to court." The mediator provides a structure and sense of process, a neutral place to meet, and the attention of a central authority. And, of course, mediation can do these things easier, cheaper, and faster than going to court.

C. PARTIES FOCUS ON THEIR DISPUTE SIMULTANEOUSLY, IN A SAFE AND CONFIDENTIAL PLACE

It can be productive, even cathartic, for parties to see and engage each other directly over their issues in mediation. Often, this personal interaction will not happen otherwise (or at least, not positively). It may

be particularly important if the dispute has relational aspects, in which one or both parties needs to engage their counterpart for personal emotional reasons or because resolution may involve a continuing working relationship (whether or not the parties would prefer otherwise). It is the mediator's job to make this a "safe place to talk about dangerous things." The mediator is trained to help the parties with difficult passages, and there always is the possibility of a private meeting (caucus) if needed. At a minimum, the confidentiality of mediation, discussed in Chapter 5 below, offers anxiety reduction about participating.

D. PARTIES CAN DEVELOP VALUABLE NEW SELF-IMAGES AND METAPHORS

Often parties in conflict develop images of themselves or others that get in the way of productive engagement. A common self-image is that of victim, accompanied by an image of someone else as an ogre. A disgruntled employee may wallow in the role of victim, while his/her manager may feel equally victimized by a perceived lack of support from higher-ups or a perception of an unbalanced process. Either or both of these images may have some validity. However, mediation is good at helping people reclaim more empowering and productive images as capable problem-solvers.

E. THE MEDIATOR'S PRESENCE AND ROLE BUILDS TRUST AND REDUCES THE EFFECT OF "REACTIVE DEVALUATION"

Mediators are taught that one of their most important jobs is to build and maintain trust in their role and their process. This trust is a critical foundation for the parties' effective and spontaneous participation.

Psychologists say that parties in conflict tend to suspect or devalue each other's overtures and offers because they do not trust each other. The mediation process can help reduce this "reactive devaluation," and in fact the mediator personally can reduce it by reframing or restating offers and perspectives of the parties to each other. Coming through the mediator, an offer from one side to the other may not be freighted with the same automatic discount. This also means that the mediator can evaluate unrealistic expectations a client may have about what is achievable.

F. PARTIES' NEGOTIATIONS ARE ENHANCED BECAUSE THEY PLAY AN ACTIVE, ON-SITE ROLE IN DEVELOPING SOLUTIONS THAT *THEY* CHOOSE

A core value of mediation is the basic belief in the parties' right and power of *self-determination*, and much of the mediator's activity is directed at helping the parties themselves move in a positive direction towards developing and selecting options that *they* choose. Except in the style variation known as "evaluative" mediation [see Chapter 3 for descriptions of the kinds of mediation], the mediator will not offer advice, select options for parties, nor coerce parties into selecting any particular outcomes. The mediator's job is to help the parties create, share, and evaluate these options themselves. As a party's representative, your part of this process is to support the party's exercise of choice with your advice and "reality-checking." Between the mediator's neutral process facilitation and your support of your client, the client ideally becomes empowered and enabled to develop and choose what they truly want to do. Solutions that they themselves buy into, even if not ideal from the perspective of where they started, are more likely to be satisfying and lasting.

G. MEDIATION SAFELY ALLOWS AND MANAGES VENTING AND STRONG EMOTIONS

Sometimes, clients need to get things off their chest before they are ready to realistically consider settlement. While a certain amount of personal adversity can be expected in almost every dispute, in many instances the atmosphere is unusually charged, and the representative may fear entering a forum where the electricity may "zap" someone and make things worse. *Yet, it is precisely this barrier that may need to be overcome if the parties are to engage productively.* Good mediators are thoroughly trained and experienced at protecting parties from harm and allowing strong feelings to be expressed and managed, so that the parties can get through some venting and thereafter continue to interact productively, even despite lingering ill will. In fact, resolving the personal or emotional issues may constitute the primary issue in mediation, particularly, for example, where resolving the parties' on-going relational issues is central to meaningful settlement. You should recognize that conflict and strong feelings are not entirely negative aspects; properly channeled, they contain within them seeds of creativity and motivation to find solutions!

Your role as a representative in these kinds of cases is to prepare the client to engage, alert the mediator to your perspective, and then be prepared to let the mediator do his/her job.

H. MEDIATION PROVIDES FERTILE GROUND FOR CREATIVE, PRACTICAL SOLUTIONS, OFTEN NOT PREVIOUSLY ENVISIONED

Parties often come to mediation with set ideas about what will settle the case, for them or the other side. Because mediation encourages an expanded view of what people's needs and interests are (and because mediation controls things that interfere with problem-solving), the process frees and encourages the parties to look at things in new and different ways. The hotel case described above is an example. In fact, mediators are specifically taught how to help parties see new perspectives, get creative, and brainstorm ways to meet everyone's needs, and they look for these opportunities in every case.

I. MEDIATION AVOIDS THE UNPREDICTABILITY OF LITIGATION, REDUCES PRECEDENTIAL VALUE OF OUTCOMES, AND CAN REDUCE UNWANTED PUBLICITY

In mediation, unlike in litigation, you are directly in control of the outcome. Representatives know that predicting what a given judge or jury will do with a given dispute is not an absolute science. You simply do not control the outcome in litigation, you merely influence it. In mediation, no settlement is reached unless all parties agree to it, and you are free to leave at any point.

Generally, outcomes are less precedential because the settlement agreement is viewed as a negotiated, compromised outcome between the parties. In response to questions or claims about a settlement's precedential value, the answer can be that the resolution was uniquely crafted to the particular circumstances existing between specific parties. It is even possible to make the settlement agreement itself confidential, and bind the parties to that. Of course, the practical effect of the agreement and knowledge of it among interested outsiders may be subjects to be considered by you and your client in assessing whether to