

Memorandum 83-93

Subject: Study J-700 - Mediation

At the September meeting, the Commission decided to consider at the November meeting whether the Commission should study the subject of mediation with a view to recommending legislation for enactment by the Legislature. If the Commission decides to study this topic, we can seek authority to study the topic from the 1984 Legislature.

Chairperson Rosenberg made arrangements with Mr. Gary J. Friedman to attend our November meeting to make a presentation and to answer questions concerning mediation. Mr. Friedman practices law in Mill Valley with emphasis on mediation and also is the Director of the Center for the Development of Mediation in Law.

Commissioner Berton also is interested in this topic. He discussed it with retired Judge Yale, a former member of the Commission who is active in mediation. Judge Yale was unable to attend the November meeting. He believes that legislation is not needed at this time in the area of mediation. He believes that much more experience is needed before it can be determined whether legislation is needed. He would be willing to attend a future meeting if he could be of assistance to the Commission.

The last issue of the California Lawyer contained an article on mediation. A copy of this article is attached. The article takes the position that mediation should not be required; to coerce the parties into mediation will undermine the process. "To be effective, mediation must be voluntary."

Respectfully submitted,

John H. DeMouilly
Executive Secretary



Using mediation to resolve disputes

The parties and their counsel develop the procedures and control the results

By Barbara Ashley Phillips
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Dispute resolution ranks as one of the principal functions of lawyers. Yet litigation seldom produces a satisfactory result; it aggravates the differences between the parties and typically leaves at least one of them the loser. But what can be done when direct negotiations are not working? Mediated negotiation is an alternative that is often overlooked.

Mediation has been commonly employed for many years to resolve labor disputes and disputes under international law. In California, mediation has been mandatory in child custody disputes since 1981, when Civil Code §4607 went into effect. It is only recently, however, that mediation has begun to be recognized as an excellent tool for resolving ordinary civil disputes.

Mediation facilitates negotiations. It is a vehicle for:

- testing the water for a proposal without requiring either party to make it;
- opening discussions between parties who are unwilling to meet face to face;
- increasing the options available for resolving the dispute, and
- giving each side a chance to evaluate whether litigation will satisfy its interests.

In mediation, unlike arbitration and other adjudicatory systems, the disputants retain complete control of the process. The parties and their counsel develop the procedures for the mediation

and control the result. The only binding resolution to mediated negotiations is an agreement to which all parties voluntarily subscribe.

Proceedings are informal. The disputants do not submit evidence or produce witnesses, although they may exchange information and make witnesses available informally. The mediator does not make findings of fact or law. He or she meets with the parties in either joint or individual sessions. An important aspect of the mediation process is the parties' prior agreement that all disclosures to the mediator are confidential and privileged. As a result, the parties can advise the mediator of facts they would not want disclosed to one another but which may facilitate settlement.

All disclosures to the mediator are confidential and privileged.

The following are the principal applications of mediation as a tool for improving negotiations:

- Mediation opens up an effective channel of communication when hostility or distrust among the parties impedes direct negotiations.

- Mediation can help break an impasse by permitting parties to explore options without having to take the responsibility for suggesting them. Mediation allows one party to test the other side's responses without disclosing confidential information or revealing a willingness to compromise a position previously taken.

- Mediation assists the parties in developing options through exploration of their underlying interests. Clients sometimes adopt positions on issues that bear little relationship to their actual interests. The process of framing causes of action or defenses in a lawsuit exacerbates this tendency by forcing the disputants to focus on issues defined by the Legislature or the courts.

A community group, for example, might file suit to enjoin a proposed commercial development. The group's underlying interests might be to ensure that the neighborhood's residents are not displaced through demolition of their homes, and that traffic flow, parking problems and noise are not worsened. To state a cause of action for injunctive relief, however, the group may be forced to allege procedural violations by the developer in obtaining governmental approval of the project. A long and costly court battle might then ensue over that legal issue. If mediation is used instead, options can be developed that address more directly the group's underlying interests, such as inclusion in the project of moderate-income apartments and a parking garage. Participating in mediated negotiations gives all parties a sense of ownership in the outcome, which permits reasonable approaches to be developed and agreed on.

- Mediation helps to depersonalize a dispute by focusing on the development of options, rather than on who is right or wrong.

- Mediation enables the disputants to test the reasonableness of their respective positions and perceptions. This is valuable because the adversary process tends to distort perceptions and impair objectivity. A mediator can facilitate the exchange of information essential to clearing up distorted impressions.

- Mediation can play a major role in ensuring that the settlement of a dispute, once reached, is durable and can be implemented in a way that avoids future conflicts.

Sensitive negotiations

Mediation may be used whenever an extremely sensitive negotiation is likely to degenerate into an adversarial dispute. A professional mediator can help maintain a collaborative focus, increasing the likelihood that the resolution will address the needs of all parties and strengthen the relationships among them.

In one case, for example, a business relationship between a new production

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company and an outside sales agent was threatened when unanticipated questions arose regarding the terms of the commission agreement. If each party had insisted on enforcing its "legal rights" under their agreement, the resulting adversarial process might have soured the parties' future business relationship, to everyone's loss. Using mediation, the parties focused on their underlying interest in successfully marketing the product and arrived at a supplemental agreement that was profitable for both parties.

Mediation depersonalizes a dispute by focusing on the development of options.

In another case, a development partner and a financial partner, with the aid of a mediator, successfully negotiated a provision in a new partnership agreement that set forth the extent to which the development partner would be compensated for pre-development work.

Although statistics are scarce, mediators generally report that mediated negotiations result in settlement about 90 percent of the time. But even when mediation does not produce an immediate settlement, it can streamline litigation by eliminating extraneous issues and parties, clarifying issues and reducing the emotional component of the suit. Mediation can also simplify the exchange of information that would otherwise proceed formally through discovery, produce an agreement regarding the use of experts and inject an element of trust into the suit.

The price tag for mediation is low. Fees for mediators vary within a range roughly equivalent to the range for lawyers' fees. Mediation, however, may take only a few hours and rarely requires more than a few days, although the mediator's time may be spread over a longer period. Costs are apportioned by the parties equally, or according to whatever ratio they agree on. It is not unusual for a financially strong party to agree to pay more than half of the mediation costs, or to pay for the first several days, in order to lower the risk to a less affluent party. It is essential, however, that all parties share the cost, as a symbol of their investment in the process.

How can you persuade a party to a dispute to come to the negotiating table?

First you have to be willing to re-examine your own position and communicate that willingness to the other side. You are unlikely to persuade your opponent by suggesting that mediation will demonstrate how untenable his position really is. You should also emphasize the potential savings for both sides if formal proceedings can be avoided or at least shortened.

If communication is so bad that no direct approach is feasible, you might ask a mediator to approach the other side. The mediator might say, "I've been informed that settlement discussions might be fruitful in your case. Would you be willing to try mediation if your opponents are willing?" Another strategy is to have some other third party—a public official or an expert—suggest mediation.

Frequently it is an angry client who stands in the way of resolution. Yet such a client may agree to mediation, seeing it as an opportunity to demonstrate to an impartial person the reasonableness of his position and to have someone "talk sense" to his opponent.

As part of the well-documented war on litigation costs, many companies are now considering routine use of mediation (see "'Managing' Company Lawsuits to Stay Out of Court," *Business Week*, Aug 23, 1982, p 54). When a company adopts a policy favoring mediation, or builds mediation into its contracts, its counsel is obligated to offer to submit to mediation early in the dispute and at other points along the way. This policy removes the onus associated with being the first to suggest settlement talks. To be credible, however, the company's offer must be sincere.

Courts are beginning to serve as catalysts for the exploration of alternative settlement possibilities. Some judges are referring cases for mediation under special-master rules for state and federal courts (see, for example, CCP §639, Fed R Civ P 53). In doing so, the judge relieves the parties of the tactical problem of being the first to suggest settlement, and can make the suggestion when it appears to the judge that the parties may be receptive to the idea. There is, of course, a risk that the judge will attempt to coerce the parties into mediation, and thereby undermine the process. To be effective, mediation must be voluntary.

In choosing a mediator it is important to find someone who has been trained specifically in the process. Mediation skills differ considerably from trial practice skills, which emphasize an adversarial orientation. It is also important that all parties be comfortable with the mediator throughout the mediation. It is no advantage to have a mediator who is biased toward your side. Such a mediator lacks the necessary professional impar-

tiality and will only subvert the process, which depends for its effectiveness on the parties' conviction that the mediator can be trusted.

Choosing a mediator with expertise in the substantive field of the dispute is not essential. It can be a handicap, for the parties may tend to look on such a mediator as a counselor or adjudicator, rather than as a facilitator of the parties' own resolution. Mediators concentrate on what is relevant and essential to resolving the conflict.

Among the mediation services in California that offer panels of trained mediators are: Endispute of Southern California, 3345 Wilshire Blvd., Suite 411, Los Angeles, 90010; American Intermediation Service, 126 Post St., Suite 600, San Francisco, 94108; American Arbitration Association's Community Disputes Service, 445 Bush St., San Francisco, 94108; and Judicial Arbitration and Mediation Service, 1900 East 4th St., Suite 108, Centre Place, P.O. Box 1033, Santa Ana, 92711. These services also offer advice on evaluating the usefulness of mediation in a particular case, and on setting up mediation procedures.

It is important to choose a trained mediator.

Checklist for mediation

The following checklist may be useful in preparing for a mediation:

- Confirm with opposing counsel the agreement to participate in the mediation, the choice of the mediator and the allocation of costs.
- Make certain your client understands the nature and purpose of the mediation, that it is voluntary, low-risk, confidential and non-adjudicatory.
- Clarify with the mediator whether the first session is to be a joint meeting or a private caucus. Counsel may be present or absent, as the circumstances require.
- Prepare a concise summary of the relevant facts and issues to submit to the mediator before the first meeting. This should identify the factual issues to be clarified. Mediated settlements do not require agreement as to what happened in the past; they rest on agreement about what is to be done in the future, given present circumstances. The summary should also describe the interests in dispute, from the point of view of each participant. These are the insights that produce rewards. Suggest the options that you think may lead to resolution of the dispute.

- Identify the information you are willing to share with the other side as well as any information you want kept confidential. (The mediator is responsible for obtaining a party's permission before releasing any information to the other side, but it is a good precaution to identify at the end of each mediation session the matters that should under no circumstances be revealed.)

Mediation can avoid as well as simplify lawsuits and foster settlements. If your stock-in-trade as a lawyer includes cost-effective dispute resolution, mediation can improve your track record and help you maintain a successful practice. □

Suggested Reading: Raiffa, *The Art and Science of Negotiation* (Harvard Univ Press 1982); Phillips and Piazza, Commentary, *The Role of Mediation in Public Interest Disputes*, 34 Hastings LJ ____ (May/July 1983); *Selected Materials on Dispute Resolution (Mediation-Arbitration)*, 37 The Record of the Association of the Bar of the City of New York 166 (March 1982).

California Lawyer welcomes articles on substantive law topics for the CEB Forum. Proposed outlines are greatly preferred, but completed manuscripts will be considered.