Mediation, The Basics, Part I

By Jerome F. Weiss, Esq.

It seems that lately we hear more and more stories about clients and their feelings about being forgotten and/or lost in a legal - judicial system that is perceived as out of touch with the actual interests of the major participants: namely, the parties. As a participant in a recent ABA teleconference on ADR related it, clients feel like they are merely the passengers, with the lawyers and judges driving them around without ever sharing information about destinations or times of arrival - or even the purpose of the trip. Even worse, many clients feel as if they are locked in the trunks of the various legal "vehicles"; rarely to be let out at the time of an occasional deposition or trial and only to be quickly replaced in the trunk after these brief appearances.

The rise of mediation as a meaningful dispute resolution process is due in large part to such attitudes. Clients want to be in the front seat of the car. They occasionally want to have a hand on the wheel with at least, a little bit of the feel of the road. Another ABA panelist related that clients generally don't like litigation. Instead, they view it as a necessary evil. Likewise, they think that discovery is bad, or at least meaningless and that the rules only fit and serve those of us who are members of the legal or judicial "club". Many believe that the process is surrounded by a mythology that is created by us lawyers and perpetuated so that clients will never be able to understand. Sadly, a lot of people view litigation itself as a myth - something that takes forever, costs a fortune and still never happens. While we lawyers could argue any one of these points, the fact is that there is a lot of truth to all of them, especially the public perception that there ought to be a better and more cost effective way to deal with the resolution of disputes.

All we need to do is look at the numbers that confirm this "myth". Nationally, over ninety percent of filed cases are resolved by means of non-trial dispositions (with what is often little, if any litigation action), most of which involve some agreement of the parties such as a settlement agreement. Of that ninety percent (in some jurisdictions the numbers are higher), many resolved cases find closure near the end of the case life and without any early formal attempt between the parties at resolution. The result of such statistics and attitudes is an increase in the use of resolution techniques such as Mediation.

What is Mediation and where does it fit in the present legal landscape? Recently, I bumped into a colleague whom I hadn't seen in a few years. He asked me what I had been up to. I explained that over the past decade, as my mediation practice expanded, I was receiving considerable gratification from being a Mediator. I compared the rewards to those received from the rest of my practice - Litigation - and sang the praises of mediation as a resolution device. His response revealed the kind of lack of information that still exists in the legal community with respect to the various forms of Alternative Dispute Resolution. He asked: "Do you sit alone or on a panel when you evaluate cases and render decisions as a mediator?". Of course, he wasn't talking about mediation at all. The core focus of mediation is neither evaluation or rendering decisions or verdicts. He was referring to one of the other "ations" - namely arbitration, something very different and for the most part, unrelated to mediation. This lack of information is not uncommon. Because of the increased use of mediation and recognition of it as a viable resolution method, a description of some of the basics is in order. The following entails some of the more frequently asked questions with answers that should clear up some common misconceptions.

What is Mediation?

Many definitions come to mind, but one that is reliable and fairly universal is a process of self determination among two or more parties in conflict or dispute whereby the parties, with the help of a neutral facilitator, determine a resolution. The proceedings involve several levels of confidentiality and neutrality on the part of the facilitator. As I have written before, this definition perhaps best captures the major strength of the process: keeping the determination in the hands of those most familiar with the law, facts and actual underlying interests of the parties. There are two basic approaches to mediation: evaluative and facilitative and hybrid sub-species and models such as traditional labor, supervisory, "muscle" or "power", shuttle and so forth. There are also hybrids that combine mediation with other forms of dispute resolution such as Med-Arb, where parties are able to resolve issues or core conflicts between themselves through mediation, but also need the mediator or another third party to actually decide other aspects or issues of the dispute with finality.

How Do Parties Get to Mediation?

A dispute does not have to be a court filed case in order to be mediated. Early use of the process is gaining popularity with parties and their counsel or other advisors finding ways early on to resolve conflict through mediated resolution, recognizing that the ultimate solution to the case might go through a mediation type of process in any event. The thinking is, "Why not do now, that which is going to be done later". Many cases get resolved this way before a filing or promptly thereafter. Increasingly, parties are pushing their counsel into this mode and in many cases, counsel are prompting their clients - for good reason. The decision to mediate is independent of court proceedings in most cases and can be done without any court involvement. It is not a settlement conference.

There are several court annexed programs such as the Cuyahoga County Court of Common Pleas business and general claim mediation program and the U.S. District Court's ADR programs; however, any parties deciding to go into mediation can do so privately, without such programs. In fact, any mediation process that is ordered or otherwise compulsory begins on a questionable note, in as much as desire and self-determination are key ingredients to mediation that are often missing when arms are twisted during mediation or in the process that gets people involved in mediation in the first place. Often the process to involve people in mediation is a complicated and difficult one fraught with unfounded fears of the unknown and mistrust that has existed or developed due to the underlying conflict and relationships among the disputants. The effective mediator can help to break through such log jams and get the parties rolling with constructive dialogue, information, education of the participants and focusing them on positive themes and goals.

How Do Disputants Select the Mediator?

Much has been written and said about the mediator selection process. In court annexed programs, the mediator is usually selected from a court generated list, although as discussed above, parties are always free to select private mediation and their own independent person. In a recent article, I wrote in more detail regarding this selection process and addressed issues concerning whether judges should mediate; consideration of the type and style of case and mediation; whether expertise in subject matter was necessary; and a range of other considerations that should go into mediator selection. *See,*

"Issues to Consider When Selecting a Mediator", *CBA Journal*, July/August 2000, p.10. As I wrote in that article, there are many factors, depending on the particular variables and permutation of a dispute at a given time and it is important to remember that mediation is as much an art form as anything and some less tangible elements such as experience, timing, people skills, diplomacy, listening skills and intuition should be kept in mind during mediator selection. They are important.

This is a process involving all sides to a dispute. Above all else, actual experience and an established track record with a mediator will give you the best feel for fit, comfort and effectiveness. It is important to remember, however, that ultimately mediation is a process of self-determination that depends on parties and neutral alike. The professional mediator should be looked to for models and insight that many times are missed by the participants and their counsel because of biases inherent in their own positions or approaches. Often, the mediator can do many things counsel can not such as reality testing with respect to approaches, defenses, prospects of recovery, etc.

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