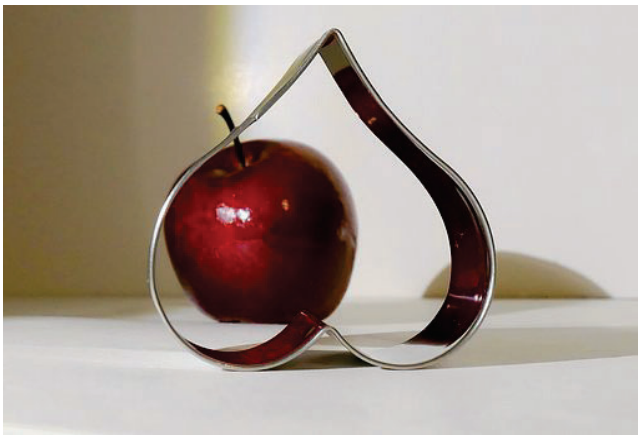

BREAKING THE COOKIE CUTTER: CHANGING AND CHALLENGING TRADITIONAL MEDIATION IN #METOO TIME

Advanced Attorney Mediator Training
Association of Attorney-Mediators
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Oh, Would Some Power
the Gift Give Us
To See Ourselves
As Others See Us.

–Robert Burns
"To a Louse, On Seeing One on a Lady's Bonnet at Church"

What would we see if we could look at a mirror of our professional practice? Certainly there would be much that might make us proud, but we might well examine from time to time how we are regarded by those who seek our services and determine if we are too ingrained in our own way of mediating.

The idea of mediator self-reflection is not new. The American Bar Association assembled a group of mediators, researchers, law professors, program administrators, and other professionals with a range of experience and expertise to study and determine best practices for mediators. A comprehensive, lengthy report of the Task Force on Improving Mediation Quality was issued in 2007, and it was published online last year.[1]

One of the findings of the task force was that mediation participants would prefer a process tailored to their specific needs, rather than a standarized "cookie cutter" process. Following on that idea, and with reference to some of the task force findings, we present here a blend of a very experienced mediator and one whose long-time participation in mediation has been overwhelmingly as a lawyer for participants, rather than as a mediator.

The idea is to focus both on the perception of the user and that of the provider of mediaton services and attempt to suggest areas that need attention, as well as perhaps some novel ideas on how to address them. Rather than suggesting a major change in the mediation process, the intent is to foster a re-examination that includes the users' perspective and perhaps induce a discussion of the current practices, how they might be improved and the merits of new and different methods.

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[1] It is accessible at
https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf

USERS' PERSPECTIVE ON THE PURPOSE OF MEDIATION

Let's begin with our concept of the basic purpose of mediation. It is often described as having a neutral mediator assist the parties to resolve their conflict on their own. That assumes that it is the parties who are in the best position to find a solution, rather than resort to the risk and expense of litigation. Inherent is the premise that the mediator does not act as a lawyer and must avoid expressing any opinion or suggestion that might be interpreted as legal advice.

The task force research indicated that 100% of the parties wanted the mediator to specifically suggest ways to resolve the issues in the conflict, 84% wanted the mediator to recommend a specific settlement, and 60% desired a prediction from the mediator about the likely result if the parties proceeded to court.

In sum, it appears that parties considering mediation are looking for a process more akin to conciliation, such as might be utilized in labor disputes and some consumer complaints. Rather than having the neutral assist the parties in developing and communicating their positions, users express a desire to have the neutral be aggressive in pushing negotiations and directing the parties to agreement by fashioning and proposing the terms for resolution, even to the extent of predicting a likely result in court.

To some parties, the perception seems to be that mediation is convened with the premise that it is up to the parties to move toward settlement by progressively moving their position toward that of the opponent. Often some mediators propose that a good settlement is one in which both sides are unhappy with the outcome. That could be heard as the mediator saying, "You just paid me to make you unhappy."

Is it a good practice for a mediator to open the process by just asking that a party present a proposal before there is any discussion of the issues in the conflict? Consider a case in which the primary issue was not damages, but an individual's position within an organization. A generally well regarded mediator insisted that the claimant propose a money demand at the joint conference after the parties had presented opening statements. Not until hours later when impasse seemed increasingly likely did the mediator admit error and try to develop the main issue, but regrettably it was much too late.

BETTER PRACTICES FOR PREPARATION

Respecting the line between relying on the parties to develop their resolution and instead offering the parties evaluations and suggesting specific proposals rests on preparation–both of the parties and of the mediator.

Effective mediators dedicate a significant time to confer with counsel for the parties before convening the mediation. The attention given to pre-mediation memos and other documents submitted by the parties prior to the mediation varies. There is even at least one mediator who insists that the parties should not communicate any information before the mediation because that might affect the required neutrality.

A mediator's discussion of the issues with counsel for the parties in advance of the mediation can greatly advance the process. Rapport with the mediator can be established. Issues can be better defined. Specific problems related to the parties' personalities, history and proclivities can be anticipated. Skype or other video conferencing such as Face Time can improve the communication and might facilitate the participation by both parties and counsel. Participation by the parties in pre-mediation discussions can avoid the necessity to describe the process to the parties, moving the parties toward negotiation more quickly.

A questionnaire or checklist can be requested of counsel prior to a pre-mediation conference. Whether or not such a response is requested, submission of a pre-mediation memorandum should be encouraged and specific guidance should be given on the content. In the discussion, counsel can be encouraged to consider providing the memo to opposing counsel, having had the opportunity to share with the mediator any sensitive information. Counsel can be asked to address particular facts or legal issues addressed in the pre-mediation conference. In some cases, such as when the issues are particularly contentious, parties might be encouraged to present the pre-mediation memorandum from the viewpoint of the opposing party.

A brief guide on suggestions to counsel on how to prepare for the mediation can be included with the standard letter scheduling the mediation. Counsel's experience with mediation can vary substantially. For example, in the course of a mediation in which the lawyer was asked about a party's computation of damages, the lawyer replied he would have to contact a legal assistant at his office.

For a mediation in a case in which there has been significant litigation, the parties might be asked to provide selected portions of their court submissions with highlighting to facilitate review.

The time and attention dedicated to pre-conference preparation will expedite the mediation conference, potentially reducing the time of the mediation and increasing the probability of reaching a resolution. It also can serve to determine if a joint conference will be used to start the mediation, and how the joint conference can best be conducted to narrow and focus the issues for negotiation.

USE OF A JOINT CONFERENCE OF THE PARTIES

There has been substantial disagreement over whether the initial joint conference with the parties should be discarded. Objections generally center on considering the joint conference a waste of time and on the concern that one or more of the parties can frustrate the process by being overly aggressive in presentation of the party's opinion.

Adequate preparation permits the mediator ample flexibility to adapt the joint conference to promote a successful resolution, establishing its effectiveness as an essential part of the process. Dispensing with the opportunity for the parties to confront each other in a controlled exercise might be perceived as an inequality, and it can deprive a party of needed venting. Having the parties, not their counsel, make the presentation might be more appropriate where one or both parties need to vent hard feelings. The mediator can direct the parties to present and flesh out key issues during the conference. In some cases, it can be productive to let the parties have a short, private discussion without the presence of their counsel and the mediator. It would be advisable to let the joint conference continue for whatever time is necessary for the parties to get an accurate appreciation for the others' position.

NEGOTIATION IN SEPARATE CAUCUSES

Having the parties present the initial negotiating posture at the outset can rekindle, or even increase, the degree of adversity and contention of the parties. Before active negotiation begin, the opportunity should not be lost to explore the parties' understanding of each other, further refine the issues, and have the parties address ways in which a good relationship can be restored.

Having party representatives with sufficient authority and flexibility present at the mediation is a common problem. The mediator might depart from a stated requirement for participants with full authority to be present, allowing a party to have a decision maker potentially available by telephone. Much of the value of the mediation can be lost if a decision maker is not present to see and hear an effective presentation in behalf of the opposing party. A better alternative might be to have the party present at the joint conference by Skype or other video connection. Under circumstances that warrant it, the mediation might proceed to the point of a potential resolution, then break or recess the mediation to have the decision maker participate in person or by telephone.

If a party adamantly insists that an essential decision maker cannot or will not appear, a mediator might raise the possibility that the settlement agreement will include a provision that either party may withdraw its approval within two business days after it is executed.

EVALUATIONS IN THE PROCESS

Reconsider the task force findings: The parties want and expect the mediator to guide them to ways in which they can resolve their issues. The parties want the mediator to propose a specific resolution. The parties want to depend on the mediator for a prediction on what could happen if the decision is left up to a court. How does that conform to the idea that the mediator must remain neutral and depend on the parties to fashion their own resolution?

In order to properly guide the parties within their expectations, the mediator must be capable of conducting the necessary evaluations. Thorough preparation can lead to better results in making several evaluations raising the possibility of the mediator's making a specific recommendation or predicting the outcome of litigation. In the course of the mediation, the mediator considers and evaluates the interests of the parties, their respective bargaining positions and strengths, the dispositive legal issues and the likelihood, substance and value of the potential relief.[2]

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[2] Some of the observations made with respect to evaluation are adapted from a presentation, "Evaluation: A Potential Tool in a Mediation Strategy" by Professor Dwight Golann of Suffolk University Law School in Boston. Their application, however, is based on the

With the background obtained in preparation, the mediator can guide the parties in the exchange of information, the identification of major issues, and their analysis. Individual issues can be separately evaluated jointly, first in general terms, then by more specific scrutiny. Depending on the importance of the issue and any potential intransigence, evaluation discussions can also be had in a reconvened joint session. In the respective caucuses, discussions with the parties can incorporate the possibility of a need to change the negotiating strategy, or evaluate issues of liability or quantum of damages.

WHETHER TO MAKE RECOMMENDATION

Considering the perceived preference of the parties for a specific recommendation, the mediator can explore options other than an absolute resolution of the conflict. The recommendation of the mediator might be, in an appropriate case, that the parties continue with existing litigation to satisfy themselves that access has been obtained of all essential information, to narrow the issues through motions to the Court, or even to proceed to final judgment, for example, when a party's real interest is in obtaining a judicial precedent in a yet unresolved issue of law. A suggestion might be appropriate that the parties take some time for reflection or consultation before returning to proceed with the mediation.

Anticipating a resolution that focuses on a monetary agreement or a party's agreement to some specific action might not be appropriate. That can put the process on a wrong path, leading to what might have been an avoidable impasse, or even worse, increasing the enmity and conflict of the parties. On the other hand, patient understanding, flexibility and resourcefulness can produce a mutually acceptable result.

Consider the grievance of a machinist who was being paid a dollar an hour less than a coworker with the same training, experience and time on the job. The deceptively obvious resolution was to work toward a pay increase. Hidden was the long standing personal grievance of many months of ridicule from the machinist with higher pay. When asked for a proposed resolution, the other machinist said, "What I want is Joe's pay to be reduced to mine."

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opinions of the authors of this paper, and they might differ from those of Professor Golann.

There was a dispute over the layoff of a senior, highly compensated executive of a corporation. The layoff was caused by a sharp decline in the corporation's financial condition. Payment of an expensive severance was out of the question. The case was settled by an agreement of the corporation to make a six-figure in-kind contribution to a charitable project the executive organized at his church

NOW IS A GOOD TIME FOR REFLECTION

The #MeToo Movement has brought new and complex considerations to dispute resolution. A complaint might be brought for conduct that occurred many years before. An employee upset about a bad evaluation or lack of advancement might raise a sex harassment complaint against an innocent supervisor, placing the supervisor's employment and family relationship at risk. Finding common ground and assisting the parties to develop a resolution is significantly more difficult. The challenge presented should be an inducement to carefully consider different approaches to the cases.

DEVELOPMENT OF THE TRADIIONAL BASE

When mediation began to be actively used as an alternative to litigation, mediators received standardized training, and much of the original features still are retained. Some have been modified or abandoned, such as fees based on the perceived amount in dispute, or the demand at joint conference that parties express their willingness to be ready to negotiate up to the opposing parties' demand for settlement.

The use of mediation has greatly expanded, and numerous books and professional presentations set out recommended better practices. But the basic pattern has remained, and there is resistance and increasing concern that the process is not as successful as when originally presented. Parties complain that their mediator did not appear to understand the conflict until the parties made their opening presentation, that the mediator immediately asked for an opening demand and then spent most of the time just carrying proposals back and forth. Lawyers complain that the mediator's disparagement of the cost and risk of litigation unnecessarily and unfairly demeans their efforts in filing and prosecuting a lawsuit. It is increasingly common to have a party express buyer's remorse and claim that the settlement was the result of undue pressure by the mediator.

Many of the complaints expressed can be attributed to inexperience of the mediator in the case. It is not untoward to question, however, whether at least some part of the complaints are justifiable and attributable to rigidity and complacency of the profession.

This paper does not suggest that established practices are wrong and potentially harmful. Rather, it is meant to address the proposal that we should give due consideration to defining the purpose of mediation . We shoud consistently adapt mediation services to the goal of reconciliation of the parties when possible, to seek to fully understand the motivation of the parties, to present what we do as an independently preferable pursuit, not just a better alternative to litigation, and to increase professional satisfaction by rendering services effectively and creatively.

The suggestions herein are not exclusive, but instead are intended to foster a consistent reconsideration of mediation practice and the ability to adapt to the infinite variety of motivations, interests and desires of individuals needing assistance to better get along and work out their differences.

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