

-WHY MEDIATE?... WHY NOT? -  
MEDIATION IN THE TWENTY-FIRST CENTURY

BY ANTHONY M. LANZONE, Esq.  
Attorney-Arbitrator-Mediator

PREFACE

IN THIS PAPER WE DISCUSS MEDIATION AND REVIEW THE ROLES OF ITS PARTICIPANTS. WE COMPARE SOME SIGNIFICANT DIFFERENCE BETWEEN ARBITRATION AND MEDIATION. NOTE THE ABSENCE OF ANY COMPULSION ON THE PARTIES TO ACCEPT OR MAKE A DECISION. THAT WHILE IN ARBITRATION THE DECISIONS ARE MADE BY NEUTRAL ARBITRATORS, IN MEDIATION THE GOAL IS TO EMPOWER THE PARTIES TO DISCUSS AND, UNDER THE GUIDANCE OF A NEUTRAL MEDIATOR, MAKE A GOOD FAITH EFFORT TO RESOLVE THE ISSUES IN DISPUTE. WE ALSO REFERENCE SEVERAL COURT DECISIONS RELATING TO MEDIATION.

Over time a client will ask - 'Why should I mediate? I know I'm right, why should I waste my time and money mediating? Its a waste of time! They are not reasonable!'

The above refrain is often expressed by clients who fail to understand the objectives and benefits of a properly structured mediation.

It falls upon the lawyer to educate her client about mediation and the benefits to be derived therefrom. The experienced lawyer knows that an informed client, who enters a mediation with reasonable expectations, increases the chance of reaching a settlement.

Clients sometimes confuse mediation with arbitration and fear that they may be forced to lose control of their case. An informative explanation of the difference in both procedures will definitely provide comfort to the client.

Frequently the client who is reticent about mediation feels that they have tried to settle the dispute but to no avail so why waste any more time and effort. It is helpful to explain the role of the mediator and the efforts that she will make to encourage a settlement and that if perhaps there is any impediment to settlement of which we are not aware the mediator may possibly ferret it out and aid in our reaching a settlement.

While all mediations are not successful a lawyer must be careful that his conduct was not the cause of such failure. For example a party's lawyer inexperienced in mediation may be poorly prepared or might over react during discussions and make it difficult for the mediator to lead the parties to a settlement.

Some trial lawyers are not comfortable in the less combative atmosphere that exists during mediation.

It is important for outside counsel to fully understand the nature of the dispute; how it developed and why it has not settled without the need for his involvement. This is especially important if the lawyer is the one suggesting that the parties try to mediate their dispute.

Many suggestions to mediate are rejected because the representative of the corporate client is a person who was personally involved in the transaction out of which the dispute arose or whose own efforts to settle have been unsuccessful.

Parties have rejected mediation or have become obstructive during mediation because of some perceived personal slight by the opposing party or some affront that had gone unnoticed by others at a negotiating session.

The experienced mediator can sometimes become aware of the existence of some undiscovered reason why the dispute has not been resolved and direct the parties to the issue and help them find a solution.

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Parties engaged in a dispute may be subject to stress which then may play a psychological role affecting decisions as to how best some issues should be resolved.

While mediation is generally less stressful than arbitration or litigation the stress often resulting from the confrontation of the parties meeting face to face in a mediation conference room can sometimes encourage a combative attitude. Accordingly, whenever possible the site for the mediation should be carefully chosen so that it does not threaten a party but is instead a location conducive to a somewhat congenial atmosphere.

An experienced mediator being aware of the need to reduce such stress will join in efforts to create and help maintain a workable atmosphere in which the participants can conduct negotiations.

A mediator dealing with first time participants in mediation will recognize their need for some comforting. The mediator will attempt to put the parties at ease by describing her role and stressing her neutrality and the confidentiality of the hearings.

The parties and their lawyers should all be cognizant of the fact that the informality of the hearing requires a respectful attitude by all participants!

The mediator may seek to relax a party by commenting that this is not a persons first mediation but that in fact they have already participated in numerous mediations during their lifetime, including some in which they themselves were the Mediator! For instance in disputes between themselves and a sibling or other family member. The mediator on those occasions was either a mother or father who then guided them in making the decision on how best to share that cookie or toy. Sometimes they can be reminded how often they themselves intervened in disputes between friends or family members and helped them find a solution to a dispute. They need to remember that they were not always successful in resolving these disputes and most of all that they could not force their friends to accept a solution if they did not wish to do so.

No one ever likes to give up control, if they can help it, consequently a party should be informed at the outset that there are no compulsion factors involved in engaging in the mediation. They will control their document production as well as decide which witnesses, if any, to produce.

Parties are more comfortable with the concept of Mediation when they know that they will have the power to refuse any proposed solution that they truly find unacceptable. That they are the one with the power to decide Deal or No Deal.

The participants need to understand that they are expected to enter into the mediation with a good faith intention to try to work out their issues.

A party needs to be comfortable with, as well as trust, the person who will be the Mediator. He needs to know how such person will be selected and what power he will have in the mediation. These and similar concerns must be addressed in a manner that encourages the party to mediate.

Both the mediator and the lawyers have an obligation to see the parties have an appropriate understanding and expectation

regarding the mediation.

The neutrality, impartiality, lack of any personal or financial interest of the mediator should be stressed by both lawyers and the mediator.

In an ad hoc or private mediation, the mediator will be a person whom the attorneys and usually the parties have agreed upon, especially if it was felt that the mediator was required to be a person required to possess special knowledge or expertise in order to understand the issues.

Emphasizing the confidentiality of the meditation and that all discussions and documents are protected from disclosure to non participants will also encourage more frank discussion and exchanges between the participants than might otherwise be the case.

The understanding by the parties that the mediation is intended to determine if a mutually satisfactory solution can be arrived at during private confidential discussions, guided by the Mediator, should raise a parties comfort level and may assist in establishing a congenial atmosphere in which to work out a settlement.

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The Mediation Domain is not pre-empted by any one entity or authority. It may arranged to be used privately and according to rules the parties themselves create. It is available as a dispute resolution method by both individuals and corporations or it might be Judicially directed to be used in legal matters involving commercial, criminal, civil, domestic and bankruptcy. It is used in schools and businesses such as medical, insurance, reinsurance, IRS and in many other areas of our Society. There are Community Dispute Resolution Centers and commercial organizations and Associations that train individuals in Mediation and also make available both mediators and facilities in which mediations may be conducted.

The government, courts and businesses are all cognizant of the importance of the role of mediation in keeping disputes from blossoming into litigation in our already overcrowded courts. The time and cost savings that results from most mediations has more than justified its increased adoption world wide as a dispute resolution method. It is often better than litigation or arbitration since the solutions offered by mediation are also more varied, creative and are generally neither confined or restrained by rules or legal precedents.

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While the conduct of a mediation does not require representation by legal counsel it is often of benefit for a party to have an attorney to represent them.

In our discussion we will assume each party is represented by a lawyer. However, many of our observations and commentary concerning the role and activities of counsel may assist an individual who is not represented by counsel prepare for a Mediation.

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Preparation is important and any attorney experienced in mediation realizes that she must prepare for the mediation conferences as if she was preparing for a trial or arbitration! Preparation will assist your being ready for either arbitration or litigation should the mediation not result in a settlement.

The preparation includes not only the marshaling of his parties evidence but will include educating his client to the roles expected to be played by himself and all the other participants. To the best of his ability he must make sure the client understands what is likely to occur and what is expected from him.

One other benefit of fully preparing for the mediation is how much it will impress his client!

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Mediators are selected jointly by the parties in a private mediation and the attorney should make every effort to have the client participate in the selection process. The clients involvement in the mediator selection will increase her comfort level with the mediation process and also the chances that the dispute might be resolved.

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A lawyer should be prepared to gain creditability with the mediator by impressing her with his preparedness, knowledge of the facts, law and the parties.

Preparation may require meeting with opposing counsel prior to the meditation in order to agree on document exchange, the number and identity of persons who will be in attendance at the hearing, scheduling and the use of written briefs or position papers. If it is at all possible the lawyers should try to jointly prepare an agreed statement of the facts to furnish the mediator prior to the hearing. If circumstances permit he should also prepare a written draft of the settlement terms his client desires.

The engagement with opposing counsel in preparing or furnishing these items sometimes can result in contacts and communication that enhance the opportunity for a settlement prior to the meditation.

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The attorneys may request that the mediator meet jointly with them to familiarize her with a general description of the issues in the dispute. Such a pre-hearing will aid in determining the necessity of furnishing written briefs to the mediator or such other information and documents that the mediator might deem necessary to have available both prior to and during the mediation.

It is worth noting that some mediators will not meet with counsel before the mediation and will never meet with them if their clients are not present.

A pre-hearing is helpful to the mediator when it targets for her the objectives of each party and affords her a sense of why and how the dispute arose. Often it will lead to eliminating several of the issues and indicate to the mediator what issues or events may really be behind the inability of the parties to have previously settled the case.

The mediator must be forthright in confirming her neutrality and that she is without prejudice and does not have any financial interest in the case. She must be sure to reveal any current or prior dealings or relationships, both business or social, with the attorneys, parties or any witnesses she is informed a party might wish to bring to a hearing.

In *Guseinov v. Burns*, Nos. B188984, B191645, 2006 WL 3691602 (Cal. Ct. App., Dec. 15, 2006), an arbitrator was challenged when a party learned that he had been a volunteer mediator in a different and unrelated dispute involving a parties attorney. It was argued that he was required to disclose this information under California rules and the court was requested to vacate the arbitration award. The court denied the petition and held the non disclosure was not grounds for disqualification. The court considered the fact that the arbitrator had acted as a unpaid volunteer in the mediation and had no professional relationship with the attorney and the mediation was an isolated incident of service. The court did not find any facts that would cause a reasonable person to doubt his impartiality.

While the Mediator acts as a leader in developing and guiding the discussions, it is imperative that he ascertain the parties objectives so as to better define and perform his own role. The French politician ALEXANDRE LEDRU-ROLLIN best described such a role when he said:

"THERE GO MY PEOPLE. I MUST FIND OUT WHERE THEY ARE GOING SO I CAN LEAD THEM."

The mediator must ascertain whether the parties wish to allow any ex parte discussions with him? Whether they want him to give his comments on the law or to act as a facilitator or conciliator? He should determine the extent to which he is permitted to go in trying to close a deal and force any settlement. Just how persistent do the parties wish him to be?

The mediator should determine whether the attorneys are acting as a collaborative attorney. That is an attorney who with the written consent of her client will represent a party only in the mediation and who has entered into a written agreement that should the mediation fail neither attorney will represent the party in any subsequent arbitration or litigation. Such an arrangement can further expand both the discussions and document production during the mediation when it is recognized that information obtained or freely given is not a waiver, is subject to confidentiality and may never be used by a participating attorney in future activity.

The mediator shall acknowledge in writing that he is bound by confidentiality rules and determine what the parties wish him to do with any writings he may receive during the mediation.

The attorneys need to confer and establish with the consent of the mediator various dates for conferences, document and other evidence production as well as a conclusion date for the mediation.

In the event of a settlement the memorandum detailing the terms of settlement should be signed by all parties. The failure to document the settlement may prevent a court from enforcing it. In *Meyer v. Alpine Lake Property Owners Assn.* No. 2:06 CV 59, 2007 WL 709304 (N.D. W. VA. Mar. 5, 2007), a party sought to enforce a non documented mediation settlement. The court ruled that it was unable to conduct an inquiry into events of the mediation due to the local rules regarding the confidentiality of mediations.

Under the Uniform Mediation Act, the rules relating to the confidentiality of the mediation do not apply if the settlement agreement was signed by all parties. Section 6[a][1] of the Uniform Mediation Act.

There was an unusual interpretation by the California Supreme Court of Sections 1119 and 1123(b) of the California Evidence Code which deals with the protection of the confidentiality of communications made during the course of a mediation. The Supreme Court in *FAIR V. BAKHTIARE*, No. S129220, 2006 WL 3630768 (Cal. Dec. 14, 2006), identified an exception to the rule that the language in an Agreement in order to effectively waive the application of the statute must directly express the parties agreement to be bound by the document they signed. The Court held that the necessary language was not found in the subject agreement. On remand the Court of Appeals in *Fair v. Bakhtiari*, No. A100240, 2007 WL 1031708 (Cal. Ct. App. Apr. 6, 2007), confirmed the trial courts ruling that no waiver of confidentiality had occurred.

It is clear that in California under its evidentiary statute no communications that have been exchanged during mediation may be revealed unless it is provided for under the state statute. *Alkop Agriservices Inc. v Giampaoli*, No. CO51609, 2007 WL 1068150 (Cal. Ct. App. April 10, 2007).

The confidentiality statute in California is extremely broad and represents an apparently expansive legislative policy of preserving confidentiality of mediation. Some authorities have commented that the rule is too broad and has possibly caused unfair results. *Wimsatt v. Superior Court*, No. B196903, 2007 WL 1739 (Cal. Ct. App. June 18, 2007).

It has been held that the effort to enforce the confidentiality afforded by a mediation exists only in a formal mediation. *E.E.O.C. v. Albion River Inn, Inc.*, No. C 06-05356 SI, 2007 WL 2560718 (N.D. Cal. Sept. 4, 2007).

It is common knowledge that the courts now look with favor on the use of Alternate Dispute Resolution methods. The United States Supreme Court referenced the subject recently in *PRESTON V. FERRER*, 128 S. Ct. 978, [U.S.2008] A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results. We submit that such an objective is also the goal in mediation.

The court in upholding a mediation settlement agreement in *Yaekle v. Andrews*, No. 05CA1569, 2007 WL 609872 (Colo. Ct. App. Feb. 23, 2007), said in part that its decision was supported by the strong policy favoring dispute resolution rather than continued litigation.

Where an agreement required the parties to mediate prior to entering arbitration a Texas appellate court held that where there was no evidence of any attempt to mediate a party could elect to skip arbitration and litigate the dispute. In *re Igloo Products Corp.*, 238 S.W. 3d 574 (Tex. Ct. App. 2007).

There can be drastic consequences where a party fails to observe the terms of a contract provision that requires the parties to submit all claims to mediation prior to bringing litigation. Where a party commenced its suit for breach of contract and did not make any attempt to mediate the court dismissed the suit which resulted in the parties loss of \$500,000 in earnest money that had been placed in escrow. The Court commented that when a contract between the parties provides for the submission of disputes to pre suit Alternate Dispute Resolution, it is simply against general contract principles to permit [one party] to avoid this aspect of their contractual bargain. Also see *Cole v. R & T Properties, Inc.*, No. B192815, 2007 WL 806519 (Cal. Ct. App. Mar. 19, 2007).

In *Perdue Farms Inc. v. Design Build Contracting Corp.* No. 3:06CV245, 2007 WL87667 (W.D.N.C. Jan 9, 2007) the court interpreted the contract as requiring that "...claims not resolved by mediation shall be decided by arbitration." and since the parties failed to mediate their dispute the court rejected an attempt to compel arbitration.

Under Iowa Code Sec.654B.3 in a dispute involving a farm resident that relates to a care and feeding contract, mediation is a jurisdictional prerequisite to filing suit. Without entering mediation one party commenced litigation and the other responded with a counterclaim. The court ruled it had no jurisdiction and dismissed all actions, leaving the parties to go to mediation. *Klinge v. Bentien*, No. 04-0843, 2006 WL 3691183 (Iowa Dec. 15, 2006).

After a suit was commenced under a Distributor Contract, when the court became aware that the contract required mediation as a precondition to suit it stayed the litigation and ordered the parties to mediate. *Composite Mat Solutions LLC v. Big Red Events, Inc.*, No. 06-9602, 2007 WL 782191 (E>D> La. Mar 12, 2007).

A further illustration of how courts have elevated the role of mediation can be found in a case decided in the United Kingdom on March 30, 2008. In *James Carleton Seventh Earl of Maimesbury and others v. Struff and Parker* (a partnership), *Lawtel*. This case reflects what British courts expect regarding the conduct of the parties during a mediation. In this instance a claimants entitlement to costs was affected by its conduct during a Judicially ordered mediation.

The Court reduced the claimants costs on both liability and quantum due to their recovering a significantly lesser sum than was alleged in the claim and because they exhibited an unreasonable attitude during proceedings.

Another case involving a parties conduct arose in a matter where a party left the court ordered mediation early and was then accused of bad faith and the other party sought reimbursement for their costs of mediation. The court found no evidence of bad faith since before leaving the hearing the party representative gave their settlement authority to another individual; the parties at the time were far apart in settlement terms and the mediator had stated to one of the parties that the case would not settle. The court observed in effect that when you participate in a mediation you know that it is a process that may result in an impasse. *Bauerlein v. Equity Residential Properties Management Corp.* No. CIV 04-1904-PHX-SMM, 2007 WL 1521606 (D. ARIZ. MAY 22, 2007).

In *JNG LLC v. United States Fire Ins. Co.*, No. B188517, 2007 WL 106167 (Cal. Ct. App. Jan. 17, 2007), a California Court of

Appeal affirmed the use of terminating sanctions where a parties conduct included failure to attend a court-ordered mediation.

Another interesting case out of California involved a private mediation which was held by the parties while litigation was pending. The mediation resulted in a settlement and the court was notified of the settlement and was proceeding to dismiss the action. However before the court had acted the party discovered new evidence that critical information had been withheld during the mediation. The court ruled that the allegations of alleged wrongdoing which may render the mediation settlement unenforceable was enough to allow the court to overlook the Court rule that the action should be dismissed due to the settlement. The court held that the good cause exception to the dismissal rule was applicable.

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Mediation is alive and well and is gaining even greater acceptance in the world of commerce. A successful mediation may result not only in a settlement but in the preservation of a desirable relationship.

#### SUMMARY

AN OBVIOUS DIFFERENCE BETWEEN MEDIATION, ARBITRATION AND LITIGATION IS THAT THE MEDIATION PROCESS IS NOT INTENDED TO CREATE A WINNER.

IN MEDIATION THERE IS NO COMPULSION. IF YOU WISH TO REJECT THE SUGGESTED SOLUTIONS YOU ARE FREE TO WALK AWAY. HOWEVER, IF THE SYSTEM IS WORKING AND THE PARTIES ARE REPRESENTED BY COMPETENT COUNSEL MUCH CAN BE ACCOMPLISHED IN A MEDIATION.

A GOOD MEDIATOR WHO CONDUCTS A SOLUTION FOCUSED MEDIATION WILL STRIVE TO DETERMINE WHAT THE PARTIES REALLY WANT TO ACCOMPLISH.

IF THE PARTIES DESIRE TO EITHER SET A VALUE, OBTAIN AN UNDERTAKING OR TO FIND A WAY TO AVOID A REOCCURRENCE OF A TROUBLING ISSUE THEN THEY ARE EMPOWERED TO WORK TOGETHER TO FIND A SOLUTION.

MEDIATION IS NOT INTENDED TO PUT THE BLAME ON ANYONE, BUT INSTEAD IS TO, WHATEVER EXTENT IS POSSIBLE, ESTABLISH A BETTER RELATIONSHIP OR UNDERSTANDING FOR THE FUTURE!

THE END

Anthony M. Lanzone graduated from St. Johns University School of Law in 1953 and was admitted to practice that same year in New York. He was subsequently admitted to practice before the United States Supreme Court and various Federal Appellate and District Courts. He is recognized for his extensive involvement in litigation and Alternate Dispute Resolution matters here in the United States and Internationally. He has significant experience with Domestic and Foreign insurance and reinsurance disputes, including Lloyd's of London & London Market cases, in the area of reinsurance underwriting, managing agency operations, brokers obligations, claims, insolvency, auditing, run off and various types of reinsurance contracts. He has written both insurance and reinsurance wordings and is familiar with the custom and practices in both the London and American insurance markets. He has written articles on Reinsurance; Alternate dispute Resolution, Neutrality of Arbitrators and the legal obligations existing between Excess and Primary insurers.

He presently resides in Charleston, South Carolina and is available to serve as an arbitrator, mediator or consultant in both American and International disputes in reinsurance and insurance related issues. In addition to his having authored insurance and reinsurance articles he has frequently been called upon to lecture on these subjects. He is a ARIAS U.S. Certified Arbitrator and Mediator and is also a member of ARIAS U.K. He is a member Emeritus of the FDCC and the American and New York Bar Associations.