MEDIATION OF CIVIL DISPUTES

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A Civil Case Mediation pilot program currently exists in our Courts, permitting judges to refer cases to trained and experienced mediators. Participating mediators have agreed to provide six hours of pro bono services. After that, if the case is not resolved, and if the parties continue in mediation, the mediator may charge a fee. So far, my unofficial and incomplete survey about this program in a mere handful of vicinages has lead me to conclude that judges have been slow to take advantage of it. I hope I am proved wrong, because Civil and Chancery cases, particularly the more complex, multi-faceted cases, are imminently well-suited for mediation. As more has been written lately about divorce mediation, this article describes the civil mediation process and follows with some case histories.

Mediation is a form of dispute resolution unlike typical adversarial proceedings. It is confidential, non-binding and voluntary. No one coerces the parties to settle. Acting as a third party neutral, the mediator facilitates negotiations between the parties to a dispute and assists them in resolving their dispute. By developing a realistic assessment of the strengths and weaknesses of each side, the mediator acts as an agent of reality. The mediator works with the parties to formulate options to meet their interests and/or needs.

At the first session, the mediator assumes control and sets the tone for future negotiations. Thus, for example, the mediator informs the parties that the outcome is their responsibility and the attorneys that their responsibility is to advise their clients, not to advocate. The mediator encourages the parties to use their attorneys for their expertise. For who better knows the facts and the law? However, attorneys cannot resolve the dispute. Only the parties can.

Much of the mediator's task involves organizing and controlling the process. The mediator works with parties and their counsel to define the discovery needed before the parties can begin creating options for resolution. She (or he) sets the agenda and maps out the issues.

While extremely flexible, the mediation process follows certain procedures. In both civil and chancery mediation, the mediator initially meets with all parties and their attorneys. At that first meeting, the attorneys may present written or oral opening statements containing a synopsis of the case and the issues (or their perspective of the issues). Joint sessions that follow are fact-finding in nature. They also afford the parties an opportunity to articulate the issues (as they see them) and their needs and interests. During the early stages, the mediator also needs to assess whether any fact witnesses or experts (other than the parties themselves) are necessary to render technical assistance or other expertise.

Facts and documents are gathered, exchanged, examined and explained during joint mediation sessions. Once this is accomplished, the mediator will begin meeting separately with each party and his attorney. This technique is called the "caucus". Fact-finding in the caucus affords the mediator the opportunity to probe the strengths and weaknesses of each side. Likewise, in caucus, attorneys have the opportunity to educate the mediator and give her ammunition that she may use with the other side. This is the perfect moment for attorneys, or their clients, to spark attention to some vulnerability or weakness in the other side's case, the so-called "smoking gun".

During caucus sessions, the mediator also acts as a sounding board, or conduit, for ideas and creative problem solving. Focusing on the parties' mutual interests, such as a business or family relationship, the mediator steers the parties toward creating options for mutual gain.

One of the mediator's goals in caucus is to leave each session with something to take back to the other side. A mediator is careful, however, not to use information gained during caucus sessions, which is confidential, without permission. Setting time pressures by way of deadlines can also keep the momentum going.

Once the parties reach agreement, closure is critical. It should come as no surprise that in mediation, as in litigation, settlements can be lost because the parties have either been too lax or too thorough. Laxity may later lead to disputes as to the terms of the agreement. Excessive thoroughness may cause the deal to fall apart. Sensitive to these potential obstacles, mediators deal with them in various ways. The parties may prepare a written memorandum, which is signed by them. The mediator may prepare, in advance, a structured outline of the agreement. Or the attorneys may prepare a legal document while everyone is still in joint mediation session.

Attorneys working in the areas of personal injury, construction and labor and employment are already familiar with alternate dispute resolution techniques in these fields. Mediation is well-suited for a wide variety of general equity and probate cases, where money is not **the** issue, or the **only** issue. Such cases include dissolution of a business, breakup of a professional practice (including law firms), partnership disputes, will contest cases, partition actions and foreclosure matters. Mediation is also effective in resolving civil and complex commercial cases as well as a wide array of disputes, including contract, employer/employee (non-union), environmental, inter-corporate, intra-corporate, multinational and international corporate disputes.

Examples of successful civil mediations (mostly from other states) abound. Take the following "sick building" case. Some years ago (in Florida), a defective heating, ventilating, air conditioning system ("HVAC") in a building housing a bank tenant caused the bank's employees to develop a "chemically sensitive syndrome". After becoming ill, bank employees filed various workers' compensation claims. The branch itself had to move out of the building for a year and a half until the defects were cured. Consequently, a multitude of lawsuits, involving almost two dozen plaintiffs and more than fifty lawyers, were filed.

Recognizing the substantial costs and risks involved and the time factors, the attorneys and their clients agreed to mediate all of the cases and claims. This involved major efforts during a concentrated period of time. Over four days, each plaintiff presented a synopsis of his claim. The parties were then grouped together into mutually interested units, such as owner and tenants, the contract services people and the design professionals. Working with the various groups and their attorneys, the mediator dealt with their mutual interests and then with individual claims. After another four days, the construction cases were resolved. It took three more days for the workers' compensation and personal injury claims to settle. Had these cases continued in the ordinary litigation path, it would have taken years at great expense before these cases were tried or settled.

Another example concerned a complex mortgage foreclosure action. A Lender sued a Builder-Developer of a shopping center for non-payment on a Note and Mortgage. The Builder, who was now the Landlord, counterclaimed on the Note. The Landlord was struggling to retain the retail tenants and to attract more tenants into the shopping center.

It was likely that foreclosure would drive the remaining tenants away and doom the shopping center. The mediator stepped in and asked the Landlord to submit a brief as to why the Lender should settle. The Landlord's attorney made an effective presentation, spelling out costs and consequences depending on how the litigation panned out. For instance, the Lender could win on the foreclosure claim and deficiency; and the Landlord could appeal. Or the Lender could win on the foreclosure and lose on a counterclaim. Or the Lender could lose on the deficiency or lose on the foreclosure. The Landlord concluded the presentation with a chart, listing the benefits of settlement and demonstrating that resolution was good for all parties concerned. Subsequently, with the mediator's guidance, the parties worked out a solution which met the needs and interests of the Lender, the Landlord and the shopping center tenants.

A third situation occurred a few years ago in Chancery/Probate Court, when I was asked to "mediate" a will contest case among five elderly siblings. To perform this task, I had a morning (with five or six cases on my "docket"), very little background paperwork, attorneys who were at the very least skeptical of the "mediation" process and parties who wanted their case to be heard by a judge. I soon learned that the squabbling siblings had not met or spoken to one another for two or three years. Compounding the difficulty was the fact that their Will dispute actually involved fifty odd years of entrenched sibling rivalry.

Despite these problems, I observed that there were substantial reasons why mediation, given proper time in the appropriate setting, could work. The siblings' lifelong significant personal relationship had deteriorated over the years due in large part to extensive communication problems. These, in turn, were exacerbated by the law suit. The underlying dispute was certainly about money, but more than mere dollars was involved. When I talked with them, they plainly indicated that resolving the dispute and maintaining some sense of family among and between them was more important than legal principals. In addition, substantial questions of fact, or the siblings' interpretations of fact, existed and would have made resolution through the trial process protracted, difficult and costly. Ultimately, any judicial decision was likely to prove unsatisfactory to all. Moreover, what was left of their family relationships would have been destroyed. The siblings had clear incentive to settle. Had they been encouraged to mediate the case (and the mediator afforded the necessary time to do so), in all likelihood this very exacting matter could have been resolved by the siblings themselves through mediation. Moreover, such resolution would have been tailor-made to meet their needs and interests.

These are but # examples of how mediation can effectively deal with complex and difficult cases. They illustrate the expanding use of mediation, as attorneys, ADR professionals and the Courts continue to explore ways to improve conflict resolution.