Mediation—Alchemical Crucible for Transforming Conflict to Resolution

By Simeon H. Baum

Mediation in Context—Negotiation and Dialogue

Day in and day out, we encounter one another, make deals and resolve disputes. Whether it is setting a bedtime with a recalcitrant five-year-old, making dinner plans with a narcissistic couple, setting up a distributorship, breaking a lease, working out credits and offsets in a requirements contract, accounting for changes and delays in a construction job, or the host of issues that might make their way into court if not otherwise resolved—we negotiate. Negotiation is so common, we barely notice it. We are like fish not noticing the water in which we swim. We communicate with others, offering trades where needed, to obtain the cooperation of the other to achieve satisfaction of our needs and interests. Cooperation might come in the form of offering goods, land, information, intellectual property, services, cash, securities, some other form of property, right, permission, or agreement of non-interference or cessation of offending activity,

Sometimes, all that is sought is understanding and acknowledgement. Beyond the trades of negotiation, there are times when, at home or at work, we meet one another in the depth of our humanity, sharing time together in a manner that breaks the mold of social expectations or joint projects, celebrating the wonder of life and mutual existence. Conversely, there are times when we cannot recognize one another, when all we can see is the bundle of needs and obligations that lie upon us. The "other" is an impediment, failing to assist in the achievement of our ends. Or, the other reads us this way, ignoring our humanity. There is a crisis in our relationship, and with it, as said by the Captain of Road Prison 36 to Paul Newman's character in *Cool Hand Luke*: "What we got here is a failure to communicate."

Escalation to Agents and Authorities

When there is a snag in negotiations or in communications, one option is to seek the help of others. We turn to agents to negotiate or intercede on our behalf, including lawyers. We turn to authority figures to help us—such as the boss or HR department in an employment setting or, G-d forbid, a mother-in-law for help at home. And, of course, when we get nowhere, and the problem merits the financial outlay, time, disruption, negative impact on our relationship with the other, and reputational risk, we, or our counsel, turn to the Courts, or to arbitrators, to render a decision that will resolve the dispute and bear with it the force of law.

Mediation Defined by a Developing Profession

Even before reaching the courthouse, there is another time-honored practice: turning to a trusted, neutral third party to help us in our negotiation. In its simplest form, mediation is a negotiation, or dialogue,[1] facilitated by a neutral third party. As early as medieval Japan, one Zen master acted as intermediary bringing about peace between warring lords. Mediation has been used informally in many contexts and many lands. Today, with substantial growth in the U.S. over the last two decades, mediation is used as a dispute resolution process both through court-annexed panels and through private mediation providers. Mediation has increasingly become professionalized. There are associations of mediators,[2] rules of ethics, like the Model Standards of Conduct for Mediators prepared jointly by the AAA, ABA, and SPIDR during the early 1990s and revised in 2005; mediator training programs, like the three-day Commercial Mediation training offered through NYSBA's Dispute Resolution Section last Spring; mediation practice reflection groups; and legislative initiatives, like the effort to enact in New York the Uniform Mediation Act to provide for a mediation privilege adopted by eleven other states.

Mediation, as a confidential, facilitated negotiation, unlike its dispute resolution cousins arbitration and litigation, does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making. Mediation is binding only to the same extent that any negotiation is binding: when a deal is struck and memorialized in writing, that becomes a binding agreement. As with the settlement of any matter, the agreement can have bells and whistles—requiring the filing a stipulation of dismissal or discontinuance, papers attendant to a security agreement, including an affidavit of confession of judgment, if appropriate, notes, liens, mortgages, or any other document that the parties and their counsel might require to complete or enforce the agreement transaction.

Evaluation and Facilitation Considered

Mediation has also been distinguished from neutral evaluation. In the latter process, parties, typically with counsel, present a preview to the mediator of what their case might be like at trial. The neutral evaluator, after discussion that can include caucus, gives the parties a preview of the judicial outcome. This is a predictive exercise in which it is best that the evaluator draw on meaningful expertise. The parties can then use that prediction

to clarify the "shadow of the law" under which they are bargaining and, in its light, strike a deal. In former Magistrate Judge Wayne Brazil's model, before sharing the prediction, the evaluator advises the parties that he or she has written it down and offers, before delivering the message, to facilitate their negotiation of a settlement, essentially shifting to the role of mediator. If the parties reach an impasse, at that point, the evaluation can be shared, and the mediation can continue.

During the 1990s there was significant debate in the mediation field on whether it is ever appropriate for a mediator to provide the parties with an evaluation. This debate was prompted by a seminal article by Professor Len Riskin,[3] which presents a "grid" for classifying mediator orientations, types and strategies. Riskin's grid identifies two major spectrums: broad/narrow focus, and evaluative and directive/facilitative approach. A narrowly focused mediator might attend only to the legal question, ignoring, discarding, or directing discussions away from "irrelevant" emotions, values, business considerations, or even broader societal concerns—all of which are recognized as meaningful by those who maintain a broad focus. The other spectrum distinction shows some mediators as being more evaluative and directive—sharing with parties their own views on the merits of a case, or even, where broadly focused, their views on the moral, just, fair, economically sound, or appropriate thing to do and urging the parties to take a particular course of action. Other mediators, Riskin found, tended to refrain from sharing their view or telling the parties what to do. Their function was primarily to facilitate the parties' own reflection and analysis, decision making and communication. Responding to Riskin's article, Professors Kimberly Kovach and Lela Love published a piece calling "evaluative mediation" an oxymoron.[4] Their view was that the mediator's role is to help the parties with their own problem solving, facilitating their own thinking and communication, but not to drive them to the mediator's solution or, especially, to act as a private judge.

Adding Transformation and Understanding to the Mix

This debate was enriched by the transformative mediation and understanding-based mediation schools. The transformatives urge that the mediator's role was not even to be a problem solver or to get a settlement. Rather the mediator's purpose is twofold, fostering empowerment and recognition.[5] Transformative mediators take a micro focus, following the parties with reflective feedback wherever their discussion leads, and, as they proceed, noting opportunities along the way to make choices (empowerment) or for understanding and acknowledging the other. Transformative theory sees disputing parties as feeling embattled, weakened, and even "ugly," and as uncomfortable with the condition of dispute. Disputes are crises in relationship affecting the quality of the parties' communication. The theory is that when parties begin seeing opportunities to make choices, they feel more empowered. As empowerment increases, parties can shift from defensiveness to recognition of the other. The growth of empathy is the "transformation" for which this school bears its name. As this occurs, relationship and communication are enhanced and disputes tend to resolve themselves. This approach has particularly taken hold for use in family, neighbor, and embedded employment disputes—where there are obvious continuing relationships.

The understanding-based model emphasizes that parties are in conflict together and can resolve it together, by a growth in understanding.[6] The most controversial aspect of this approach is Himmelstein's and Friedman's insistence on using joint session only in mediation, eschewing caucus. Caucuses are confidential meetings of fewer than all participants in a mediation. Himmelstein's and Friedman's concern is that caucus takes parties away from jointly resolving their conflict and makes the mediator the bearer of critical information unknown to one or more of the parties. A caucus process might produce a "fix" with a settlement. But it risks being one imposed from without, maintaining the barriers between the parties. It might not resolve their fundamental conflict in the way that occurs with mutual decisionmaking as a result of deepened understanding, which produces a shift in the parties' understanding of their "own" reality. Critics of Himmelstein and Friedman observe that disputing parties might prefer to express certain views independently or to maintain separateness for the sake of reflection and decision making. Moreover, caucus enables the mediator to give feedback in a manner that does not put the recipient of the mediator's comments in an awkward spot. In caucus, mediator and party can metaphorically sit on the same side of the table and wonder together about possible outcomes of a case or possible deal packages—all of this without putting that party on the spot.

The 360-Degree Mediator

Many providers today consider themselves 360 degree[7] mediators, maintaining a broad focus, utilizing facilitative skills, raising opportunities for empowerment and recognition, facilitating the parties' own evaluation, even giving evaluative feedback when appropriate, and utilizing both joint sessions and caucus.

Case and Mediator Selection as Guided by an Understanding of Mediation

Understanding the debate and divergences in mediation theory and practice, and the opportunities available in mediation, enables counsel to make sophisticated choices in designing mediation clauses for contracts, selecting a mediator, determining if and when a matter is appropriate and ripe for mediation, and in effectively rep-

resenting parties in the mediation process. If the matter is an embedded employment dispute, primarily involving an ongoing relationship with significant communication problems and low economic stakes, transformative mediation might be the best way to go. In these circumstances the form of the settlement might matter far less than healing the relationship and improving the parties' communication. The United States Postal Service set up a program to handle Equal Employment Opportunity complaints using transformative mediation.[8] In other matters where ongoing relationship is important and where both parties are willing to invest in the greater time that a joint-session-only approach might take, counsel might opt for the Himmelstein Friedman understanding-based model. In a scenario where a partnership dispute has devolved into a costly accounting proceeding that threatens to kill the goose that lays the golden egg, restructuring of their business relationship might be the most effective path to resolution. Wise counsel might then seek a mediator who will have a broad enough focus to shift from legal to business considerations, put on a "business head," and activate the parties to develop creative options. If two commercial parties—with little emotional investment in the dispute by party representatives and counsel alike, and ample capacity to bear the cost of litigation—have a *bona fide* difference of opinion on how a point of law affects their respective rights, it might make sense to select a mediator with capacity and credibility to facilitate the parties' analysis of this legal point, or, when and if appropriate, add some reliable evaluative feedback.

Disputes are complex social animals. At times parties might believe they are stuck on a point of law when, in fact, it is a point of pride. For this reason, it is often wise to seek a mediator with "360" capacity, who can make insightful assessments on all fronts, work with the participants to design an appropriate process, and adapt as the mediation process and circumstances require. It is not a bad idea for counsel to determine the mediator's background or orientation through talk with others who have used that mediator or an initial, frank discussion with the mediator at time of selection or in the initial pre-mediation conference.

What Mediators Can Do for You

Mediators may play many functions to lubricate the wheels of a negotiation or to fine-tune the channel of dialogue. Whether it is a hard-core commercial dispute or a family or employment relationship matter, parties—and even counsel—might have strong feelings about the matter or their counterparties. Mediators are trained to facilitate difficult discussions and to use "active listening" skills—validating, empathizing, clarifying, summarizing and reflecting back statements by the participants. Good listening engenders satisfaction in the speaker, a sense of being heard, acknowledged and understood. From a utilitarian standpoint, permitting emotional expression enables people to get past feelings of frustration, disappointment, anger and despair and engage constructively in problem solving to get a dispute resolved. From a non-utilitarian standpoint, good listening creates opportunities for realizing meaning and humane regard for one another. Either way, where emotions are drivers in a dispute, mediation is the process of choice—a richer forum for expression than the witness chair under cross-examination, with objections on relevance and materiality, motions to strike, and directions to limit the answer to just the question that was asked.

Mediators can also assist the parties with a joint problem solving, mutual gains approach—the "win/win" popularized by Fisher & Ury's book "Getting to Yes." Also known as integrative bargaining, this approach seeks to expand the pie by identifying the issues, the needs and interests of *all* parties, and then seeking options that will meet as many of those needs and interests as fully as possible, thus resolving the issues in dispute. Options proposed during this process can be judged and supported by identifying or developing standards—principles with which all parties can agree and which take the matter away from a subjective battle. Standards can include fairness, legality, doability, equity, empathy, durability or whatever principle the parties can adopt. Good communication and cooperation enables parties to learn about one another's needs and interests and be effective in brainstorming and generating options, Thus, Fisher and Ury recommend separating the people from the problem, being "soft" on the people and hard (focused and analytic) on the issues. Counsel might seek mediators who are effective in facilitating this problem solving.

Another Fisher and Ury concept is the BATNA, the best alternative to a negotiated agreement. Considering what might happen if a party does not take a proposed deal is a good way to judge whether the deal is worth taking. In the legal context, the litigation alternative can also be analyzed with a focus on risk and transaction cost. Here, effective mediators might gather information in advance of the mediation session, through phone conferences with counsel and review of pre-mediation statements laying out key facts, any critical law, settlement history and proposals, and annexing useful documents. These pre-mediation communications can also address process issues, making sure the right people with full authority attend, and learning about inter-party dynamics to be sure the process is designed to maximize its effectiveness. Thus, finding a mediator who can be adept at gathering the key information, facilitating a good analysis of the case at the mediation, and helping the parties assess risk and transaction costs (fees for lawyers and witnesses and related costs) can be key. At times, where one's own client, or the other party, is having difficulty hearing tough news about litigation prospects from its legal champion, "reality testing" by a mediator might open the client's eyes to legitimate case risks and prompt more realistic settlement discussions.

Benefits and Promise of Mediation

Properly conducted, mediation offers parties a host of benefits. It can dramatically cut the cost of litigation. This confidential process can reduce some litigation side effects, such as reputational damage through the play of the press and media, and the more localized disruption of griping at the water cooler or removing key employees from work to answer discovery demands, undergo witness preparation, and appear to testify or observe in depositions or trial. It provides a forum for much richer communications, and for addressing a host of feelings, issues, principles and concerns that could never directly be considered or respectfully and humanely given their due at trial. It provides opportunities to improve or restore relationships. Moreover, mediation, like negotiation, permits parties to design their own creative solutions, taking into consideration economic and other factors, to arrive at more doable, durable and mutually acceptable resolutions than a judgment that cannot be collected due to evasion or the lack of funds.

"It [mediation] supports compassion, creativity and realism as parties work together to understand each other and their needs, constraints, and context."

Ultimately, mediation, which has at its core the principle of party self-determination, wrests decision making from third parties—judge, jury, arbitrator—and restores it to the parties. Indeed, while lawyers can still play a very significant role in mediation—as process guides, counselors, and even advocates in opening session or later in laying out the litigation risk to the other side—parties do not live or die on competence of counsel, witnesses, or other agents in presenting a case; again, power lies with the parties in the mediation outcome.

Mediation offers a depth of possibility and sensitivity to truth and values consistent with the philosophical resources and developments in our history of ideas. An underlying humanism puts people, not external systems or things, in the driver's seat. With a valuing of people comes recognition of all aspects of the person, not just that which is legally relevant. Yet, to quote Frank Sander and Robert Mnookin, we bargain in the shadow of the law. The mediation sphere is a place where the norms of both justice and harmony can work themselves out in a manner that fits the actual parties and their circumstances. With recognition of the significance of all parties' perceptions, the philosophical advances of phenomenology come into play. The individual, business and circumstantial focus bears with it the influence of pragmatism. Business considerations embrace our theories of economics. Ultimately, by affirming the parties' joint decision making, mediation celebrates our freedom and our interdependence and our relatedness. It supports compassion, creativity and realism as parties work together to understand each another and their needs, constraints, and context. It offers the possibility of holistic solutions. Fundamentally non-coercive and fostering party responsibility, mediation offers participants a chance to be their best selves and to arrive at superior resolutions.

Endnotes

1. As discussed *infra*, proponents of transformative mediation do not see the mediator's role as assisting in problem solving or in settlement of a dispute. Rather, the role is to foster empowerment and recognition. Similarly in Himmelstein and Friedman's model, understanding is the key. Accordingly, for those schools, non-utilitarian "dialogue," as an encounter of persons, might be a better description of the mode of communication that is facilitated by the mediator. A rich description of dialogue is found in the writings of Martin Buber, such as "I and Thou." *See, e.g.*, Martin Buber: The Life of Dialogue by Maurice S. Friedman (The University of Chicago Press, 1955, reprinted 1960 by Harpers, N.Y. as a First Harper Torchbook edition, and available online at: http://www.religion-online.org/showbook.asp?title=459).
2. E.g., The Association for Conflict Resolution (ACR), a merged entity of SPIDR, CreNet and ACR.
3. Riskin, L., *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, Harvard Negotiation L. Rev., vol. 1:7, Spring 1996, available online at: http://www.mediate.com/pdf/riskinL2_Cfm.pdf. An earlier version of this piece was published by Riskin, L., *Mediators' Orientations, Strategies and Techniques*, Alternatives to the High Cost of Litigation, at 111, September 1994.
4. Kovach, K. K. and Love, L. P., *"Evaluative" Mediation is an Oxymoron*, CPR Institute for Dispute Resolution, Alternatives, Vol. 1, no. 3, at 31 et seq., March 1996.
5. The transformative mediation manifesto is "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition," by Bush, R. A. B. and Folger (J. P., Jossey-Bass, Inc. 1994).
6. *See*, Friedman, G. and Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA 2008).
7. I first heard this term used by Lori Matles.
8. The USPS program is known as REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly). Instituted over a decade ago when the Postal Service had nearly a million employees, this program significantly reduced costs of administering EEO claims, and produced settlement of the vast majority of claims with a very high user satisfaction rate and enhancement of employee morale.

Simeon H. Baum, Esq., litigator, and President of Resolve Mediation Services, Inc. (www.mediators.com), was first Chair of the NYSBA's Dispute Resolution Section. Mr. Baum has broad experience as a neutral—mediator, arbitrator and evaluator—in over 900 disputes. He was selected for *New York Magazine*'s 2005–2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.