ALTERNATIVE DISPUTE RESOLUTION (JUDICIAL BRANCH OF ARIZONA IN MARICOPA COUNTY)

& STATE BAR OF ARIZONA ADR SECTION

ON BECOMING A MORE EFFECTIVE MEDIATOR/NEGOTIATOR

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Full - Time

MEDIATOR – ARBITRATOR – FACILITATOR

Assisting Professionals Nationwide to More Effectively

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MEDIATION FROM A MEDIATOR'S PERSPECTIVE

(Steps to Effective Mediation)

Counsel who is fully aware of these "Mediation Keys" will more effectively serve and represent a client in the mediation process.

These are also "Teaching Points" to be shared by counsel with client; assisting the client to better understand, anticipate and participate in the process; as well as reminding the client of how professional, wise and caring counsel truly is.

After all, whatever the basis of the conflict, ultimately it directly or indirectly affects the client's business and the family of all employed in the business.

- **The mediation process is no longer a form of "alternative" dispute resolution.**
- **Counsel and client should come to the mediation actually seeking to settle the case. Many Mediators believe that some attorneys, billing a client on an hourly basis is concerned about losing the business that would come with continued litigation.**
- **Some attorneys use excuses to avoid moving forward with the mediation process, or discourage settlement during the mediation, by declaring "It is too early in the case; we need more discovery to better understand parties' positions" In fact, the longer the parties litigate, the more money they have "invested" in the litigation – forcing all parties to seek higher settlements to recoup counsel fees and expenses or, conversely, to offer lower amounts in settlement.**
- **Spending significant time and money preparing for a trial that statistically will not occur does not seem a wise allocation of a client's time, money and other resources. A large majority of cases that are mediated are settled in the mediation, or as a result of the "seeds" that have been planted. A very small percentage of all civil cases actually go forward to a jury trial.**

- **Mediation is a dynamic process. Serving as a Mediator is in many ways more of an art that each Mediator (and the other participants) develops with experience, rather than a skill that can be taught.**
- **Experienced Mediator recognizes counsel will attempt to "game" the Mediator in order to get the best result for their client and that the Mediator is attempting to manipulate the parties to settle their case.**
- **"Manipulate" is a term which many Mediators would object to yet which can be an accurate description of a Mediator's tools. In contest if means to "manage or influence skillfully" and that is what the mediation process is about. A Mediator manages a party, and counsel's expectations, in order to influence the parties to agree to something they apparently have not been able agree to on their own.**
- **The Art of Mediation finds an experienced Mediator both creating a comfortable supportive environment for the parties to exchange ideas, and concurrently taking the parties out of their respective comfort zones. The Mediator/Artist creates realistic and justifiable doubt in a party's belief about its likely-hood of success and increases a party's sense of risk if they do not settle.**

Experienced counsel is also an artist, recognizing and "moving with" the movement of the mediation hearing. Among others, below are a few aspects of the process that from my "Mediator's" perspective counsel can use to enhance the likelihood of a more efficient and effective mediation.

1. **Selecting the right Mediator for the dispute.**

- **Selecting the right Mediator, or how you select the right Mediator is often crucial to success.**
- **Determining the "most appropriate" Mediator for a given dispute is not always an obvious decision.**

- **Many attorney have a favorite Mediator. Although Mediators appreciate that loyalty counsel truly wants is a Mediator that can influence the other side – someone in whom the other side will have confidence and will trust.**

- **Consider off letting the opposing party select the Mediator provided you have made some initial decisions to insure the proposed Mediator is qualified and Neutral.**

- **Give strong consideration to whether the Mediator should have substantive expertise or is a good experienced Mediator needed. Even amongst mediators this is often a disputed question.**
- **After coming at that decision suggest that the other side to propose 3 Mediators that have those qualifications. To ensure the Mediator's competency you can suggest that they be a Neutral certified by one of the recognized providers such as the American Arbitration Association, the International Mediation Institute, or the National Academy of Distinguished Neutrals.**

- **This guidance has the special benefits of letting your opponent select a Mediator in whom s/he has confidence (who hopefully can influence them), insuring that you get a competent qualified Mediator and, in the end, you get to make the final selection.**

- **Checking a prospective Mediator: check the website; ask colleagues about the Mediator (his style, preferences, etc.); might there be a "conflict of interest" (e.g. Mediator at one time worked with the firm representing a party); does the Mediator have "subject matter" knowledge; can the Mediator be trusted with confidential information; will the Mediator give good "third party' feedback; ask the Mediator whether he will want a brief, an informal letter, pleadings; use caucuses; ask for opening statements; prefer the client also talks.**

2. Be prepared

Many attorney's come to a mediation hearing "unprepared" to have a substantive discussion regarding the facts and legal issues regarding their case or the opposition's case.

Understanding the strengths and weaknesses of your case.

- **Be prepared to assist the Mediator understand the strengths and (to a certain extent) the weaknesses of your case in order to better assist you to evaluate where settlement is likely and how to better get there.**

- **Every case has problems; if not, the parties would not be in mediation. Generally sharing your downside analysis with the Mediator does enable the mediator to serve more effectively.**

a. Understand the strengths and weaknesses of the other party's case.

- **The Mediator needs to know what you believe are the real strengths and weaknesses of your opponent's case, not just what you have plead.**

- **Going through a decision tree type analyses of the case with your client can be very helpful**

3. Pre-mediation memo and pre-mediation conference with the Mediator.

Experienced Mediators will obtain much of this information from the parties through a pre-mediation memo and pre-mediation conference. Your pre-mediation memo should not merely sending the Mediator a copy of the pleadings, although you should provide the Mediator with the important pleadings.

- **Your memo should include your own confidential assessment of the case and your opinion as to how you believe it can be resolved.**
- **Set out any issues that may impact the mediation such as:**
- **the parties hate each other and should not be in the room together**
- **you have a bad / good relationship with opposing counsel**

- **the client needs to resolve this for some external reason (a continuing Relationship)**

- **At the pre-mediation conference you should discuss with the Mediator the issues in your memo but also those issues you may not have felt you should put in writing ("it is confidential but…"). These can include:**
  - **Client control issues**
  - **Third party influencers**
- **Related conflicts / issues**

You know the case and the parties better than the Mediator – Share any ideas you may have on how the Mediator can facilitate resolution.

4. Preparing your client and managing expectations.

- **Spend significant time with your client; fully explain the mediation process – that it is a process for compromise - not winning; and that your role as counsel is to facilitate settlement - and manage client expectations before arriving at the mediation.**
- **That this is not in court where you otherwise would be a strong and relentless advocate.**

- **Explain that a successful mediation generally means a party receives less than what has been sought in its claim, or conversely have to pay**

more than is argued as the pleadings indicate.

If you have problems doing this, share this with the Mediator so the Mediator can incorporate that in the initial private discussion with your client. Learn the client's true "wants" and "needs"

- **Both you and the client should :**

Learn from the other side.

Be a "witness" during the process – listen, hear and learn.

Hear the other side's arguments: which make sense and which do not.

Where does the other side appear to lack confidence in its case/ in their abilities?

Pay attention to just what a jury or judge would hear at a trial of the issues.

Settlement in about compromise – not justice.

Compromise is not "giving in" – it is strategizing for the client's future.

This is the client's chance at deciding its own fate – not just handing its company's life over to a judge or jury or arbitrator.

Help the client to show confidence by: appearing flexibility, relaxing, leaving the "ego" at the door, being objective, hearing all sides.

Work with the client to "overcome" what the client remembers was "colored" by a complaint or petition in which counsel "attacks" the other side and "might" have exaggerated the case.

Help the client to recognize and avoid emotional attachments that hinder the process and prevent solution; counsel must also look a counsel's own emotional attachments. Serving the client, not your own ego or attachments, better ensures client loyalty, respect and devotion.

Remind the client that :

Emotions often have little to do with the real factors.

It is alright to vent – but that also might be looked upon a lack of confidence/

When the other side vents – witness, listen and learn.

This is not about "giving up" perspective, but "overseeing" and witnessing it all.

This is not litigation or a deposition; counsel is actually "holding-back" in order to honor the client and give the mediation process an opportunity to resolve these issues and save the client considerable expenditures of time, finances and "stress."

Remind the commercial client that "this is business" and its business life can depend on this.

5. Evaluating the other parties:

You might have a good understanding of the dynamics on your side of the table, however it is what is going on the other side of the table you need

to understand – what is driving them?

a. Who is the decision maker

b. Claims in mediation are aspirational - settlement offers are real. To the Mediator (at least this one) the most important person in the room is the one who can write the check that settles the case.

What do they need to settle

- **What are the other side's drivers? Are there non – money issues the other party is concerned about? Do they need to structure a settlement in a certain manner? Do they have disclosure issues?**

- **What is a realistic settlement? We understand "positional" bargaining – but negotiations should start from a realistic position that you can explain – be serious in your offers and expect the same from the other side.**

- **Are there non-money options to settlement?**

- **Are you asking for something they cannot do rather than do not want to do? If you are they won't do it.**

- **<u>Decision Analysis: know yours and theirs:</u>**

Decision Trees: multiple steps; at each step look at the net expected value:

Examples: Motion for Summary Judgment; discovery and inspection, appeal – what are (percentage) chances of success?

- **<u>BATNA: Best Alternative for a Negotiated Agreement</u>**

Analyze a party's BATNA "in their shoes."

What if they do not go along with us? What would the costs be in time, financial costs, and not knowing how it would otherwise "workout". Systematically work through.

- **ZOPA (ZONE OF POSSIBLE AGREEMENT)**

Is there a ZOP which is "better" than the BATNA of each party? Be creative; think beyond your usual boundaries.

- **<u>ANCHORS</u>: At what amount to start the negotiation.**

As time progresses concessions get smaller.

6. Using the Mediator:

An experienced Mediator understands that each party is trying to game the Mediator to its benefit – there is nothing wrong with this; however, counsel must do this effectively. Skillfully trust the Mediator. The Mediator can assist counsel in many areas:

a. Gaining insights to the other parties' positions.

- **Within the limits of confidentiality the Mediator can help counsel, and importantly counsel's client, better understand who and what is driving the other side's decision making. This assists to guide the framing of offers and counteroffers.**

b. Client control issues.

- **If you are having an issue with your client tell the Mediator. In caucus an experienced Mediator can often defuse issues by giving a party an independent assessment of the matter when counsel may not, or cannot do. This can also serve to preserve counsel's relationship with the client.**

c. Reality testing.

- **The more information you share with the Mediator the more effective the Mediator can be in using reality testing with your client, and with the other side.**

d. Side meetings between Mediator and counsel.

- **Under proper circumstances it can be effective for the Mediator to meet with the attorneys without their clients present; or to meet with the clients without the attorneys present. Strongly consider this if it is suggested by the Mediator; or consult with opposition counsel and jointly suggest this to the Mediator. Don't hesitate consulting with opposition counsel.**
- **Suggest tactics and tools for the Mediator to use with the other side (scripts a dialogue, present "eureka moment", etc.)**

7. Develop a settlement approach

- **While counsel often prepares to argue their case at the mediation hearing sometimes counsel spends very little, if any time thinking about their strategy for reaching settlement.**

- **Before the mediation spend sufficient time thinking about strategies, bring your client into the process discussing with your client your thoughts on how to settle the matter – what you believe you might have to "give up" to get there.**

- **Share this with the Mediator so that the Mediator can help you implement it, or suggest an alternative approach – this avoids you and the Mediator working at cross purposes – and let's the Mediator suggest modifications as the process proceeds and the mediator develops a deeper understanding of your and the other side's thoughts, tactics and strategies. The experienced Mediator remains neutral and concurrently leads all sides to a solution.**

- **MIRROR NEURONS (the "tit-for-tat" knee-jerk reaction)**

Reciprocative behavior – can "set the tone"

Usual movement in a mediation hearing:

First one-third: communication, new information, sets attitude.

Noontime: people beginning to feel a fatigue / hunger; wondering if there will be a lunch break; distraction.

Lasts one-third (post lunch): greater energy and fight regarding the last percentages of money; most everything has already been discussed; more rapid fire offers back and forth.

Do not just communicate with only numbers (e.g. sending a message "you are too high" or "outlandish" – these are received by the other side as "attacks" and only serve to strengthen their resolve.

Formulate skillful proposals which send a clear message by transmitting a commentary along with your numbers.

Give opposition counsel something to "work-off of" in motivating a client towards settlement.

Facilitate the flow of information in a strategic manner

Facilitate case analysis ; risk, BATNA, ZOPA.

A party can be directive or annoying; suggest to the Mediator good questions to be raised with the other side ("how did you come to this?; "why do you think this is reasonable?")

- **Facilitate the movement where movement has stopped prematurely.**

Signs of when the case analysis has stopped and the matter becomes inappropriately "personal" when you hear statements like: "I hate their proposal"; "should I stay or leave?"

Use the Mediator's questions to keep the process moving.

The amount in question is not as important as having movement.

- **Work with the Mediator to build momentum towards a resolution and "deal".**

8. What is really going on at the Joint Session?

Joint sessions have been a staple of mediation and there is much controversy within the Mediation community over whether they are useful.

Unless there is a reason for not having them – such as the parties hate each other and it will inflame the situation – they are primarily useful to accomplish the following

- **Giving the parties the opportunity to tell their story – which in some cases is very important and probably the only time they will be able to do so to a neutral third party. Remember 98.5% of cases settle**

- **Giving one party the opportunity to apologies where appropriate**

- **Letting the other side understand a parties views of the facts and legal issues – which the other party often does not know**

- **The usefulness of the joint session to the Mediator is not to learn the facts, issues or legal arguments – if the mediation has reached this point and he does not know that he is not doing his job.**

The value of joint sessions is giving the Mediator the opportunity to

observe and understand the dynamics of the parties across the table and on each side of the table.

- **How the parties interact with each other, how opposing counsel work with each other, how each party works with its counsel, who is in charge the lawyer or the client – who is the decisions maker. Joint Sessions can provide the Mediator with a lot of valuable information and therefore can be useful.**

- **The Art of Apology**

9. Reaching settlement

The mediation process in most commercial cases generally involves two steps:

- **Getting the parties settlement offers within a range that it no longer makes any sense for either party to walk away**

Providing a face saving approach to closing the gap

- **Closing the settlement gap**
- **There are numerous approaches Mediators use to closing the gap from:**
  - **Flipping a coin (my favorite but rarely used)**
  - **Charitable donations**

- **Mediators proposal**

- **Though Mediators have a lot of experience in doing this some of the most effective approaches can come from counsel.**

a. Mediator Proposals

- **This is the most used approach to closing the gap since it takes the responsibility for coming up with a solution or caving out of the parties hands and places it on the Mediator.**

- **The proposal is generally at a midpoint between offers and may have some other aspects that a party may need to agree to the settlement.**

- **Most experienced Mediators have presold a proposal before they make it.**

- **If you have anything specific you really need in a proposal let the Mediator know before he floats the proposal – no one likes to re-trade a deal.**

- **WE TRADE IN UNCERTAINTY**
- **DON'T PUT THE OTHER SIDE IN A POSITION OF "BIDDING" AGAINT THEMSELVES**
- **HELP THEM TO ENHANCE THEIR MESSAGE – WORDS MATTER**

- **EXAMPLES FOR OPENING WORDS WITH ENHANCED PROPOSALS:**

a. WE HAD A HARD TIME WITH YOUR PROPOSAL;

b. WE ARE STARTING WHERE WE WOULD HAVE IF YOU WERE REASONABLE;

c. WE ARE NOT COMING TO MIDDLE GROUNDS…

- **HELP THE OTHER SIDE FIND A PLAN WHICH YOU HAVE SUBTLY SUGGESTED TO THE MEDIATOR: SUGGEST WAYS TO TAKE MONEY AND "CHINK IT INTO PIECES"**
- **MEDIATION IS A REPETITIVE PROCESS**
- **WHAT IS THE MESSAGE YOU WANT TO SEND THEM.**
- **AVOID THE POSSIBILITY THAT THE OTHER PARTY "IS NOT GETTING THE MESSAGE" FEELING – TAKE CARE TO CLEARLY EXPLAIN WHY YOU ARE MAKING A PARTICULAR PROPOSAL.**

10. Bring a Settlement Agreement.

It is interesting that lawyers can work on a case for years, drafted numerous pleadings and memos; but upon settling their case in mediation, which is the culmination of all their work, often sit together and draft a settlement agreement on a lap top in the middle of the night off the top of their head.

This has to do with Mediator rule one – if they settle don't let them leave until it is in writing and signed.

- **Bring a settlement agreement in Word that you have given some thought to how you want to structure the actual settlement.**

- **Most experienced Mediators will request that each party brings a settlement agreement – but if they don't – bring one anyway.**

- **If the other side does not bring one you have an advantage because you will most likely use your document**
- **You will not have to spend half the night drafting an agreement**

- **You are less likely to be sued for malpractice.**

- **Do not depend on the Mediator to provide a settlement agreement.**

- **Many experienced Mediators will not participate in the drafting of the settlement agreement unless there is a specific issue that needs to be mediated.**

- **In my practice I do not even read the final agreements or take a copy.**
- **Review boilerplate ahead of time**

11. Impasse

- **Generally, if there is an impasse experienced Mediators will wait a few days and follow up with the parties to continue settlement talks.**

- **Since 98.5 % of cases are settled prior to trial it makes sense to continue to have the Mediator attempt to help the parties reach settlement.**

- **In many states this can create an issue that the Mediator and the parties should be aware of – once an impasse is declared the mediation is concluded and the mediation confidentiality may no longer exist.**

This can be structured around with confidentiality agreements but should be addressed.

IMPASSES IS ALWAYS TO BE EXPECTED AND NOT BE FEARED

- **SOMETIMES CAUSED BY LANGUAGE, SOMETIMES BY NUMBERS; CHANGES THE ENERGY OF THE PROCESS; INHIBITS THE MAGIC**
- **DISCUSS WITH THE MEDIATOR HOW BEST TO FRAME A COUNTER-OFFER**
- **HOW TO MAKE THE PROCESS MORE THOUGHTFUL RATHER THAN MERELY " REACTIVE" (REFLEXIVE)**
- **RETHINK WHAT ADDITIONALLY TO DIVULGE TO MEDIATOR; LOOK AT THE REASONS TO DIVULGE "AT TIS TIME":**

a. **TO MEDIATOR IN CONFIDENCE;**

b. **TO MEDIATOR TO BE REVEALED IN MEDIATOR'S DISCRETION;**

c. **TO OTHER SIDE DIRECTLY**

12. Med-Arb / Arb- Med

- **There has been some attempts to use Med-Arb where the Mediator serves as Arbitrator in the event of an impasse and Arb-Med Where the Arbitrator acts as a Mediator after deciding the case and issuing a sealed award.**

- **Though it creates additional work for the Mediator or Arbitrator we believe it is a terrible idea.**

- **Med-Arb**
  - **Does not result in a real Arbitration**
  - **Prevents the parties from being fully open and honest with the Mediator**
  - **Permits ex parte confidential communications with the decision maker**
- **Does not motivate the Mediator to get the case settled**

- **Arb-Med**

- **A decision has been made, the money for the arbitration has been spent, there are no savings to be realized – why mediate**

Results in a situation where the Mediator has to lie to one of the parties by not telling them that they won and indicating they may have lost.

Jerome Allan Landau

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The Multi-Party Mediation

"With more than two parties in the mix the battle lines become more confusing"

Jerome Allan Landau

Preparing for a mediation hearing requires of all parties, including the Mediator, Counsel and each participant ("Party") both preparation, patience and insight. Given the number of parties, and usually diversity of issues, there is, of necessity, greater confusion, delay and potential for "sabotage."

Attorneys for each participant must consciously and skillfully maintain their professionalism throughout – the negotiations require advocacy and a level of problem-solving skills.

Also, to properly serve a client requires a level of courage – courage to speak with a client honestly, without cow-towing. A business client respects an attorney who is honest and does not lead the client astray with unreasonable projections and promises.

Also remember that at times opposing counsel can become an ally if counsel is truly seeking a reasonable resolution during the mediation, rather than delaying such a solution in hopes of an extended litigation proceeding. This is especially true when there are multiple plaintiffs or multiple defendants.

Careful attention must be given to the myriad of cross-claims appearing in a multi-party mediation; separating and analyzing each opens the way for negotiating and the give-and-take that often leads to resolution.

Preparing a good "issues" chart – outlining all known issues which have arisen (and parenthetically those anticipated to arise ("hidden agendas"), with room to handwrite notes as the mediation proceeds, creates an excellent tool for keeping track of the multiple issues and better serve counsel in creatively posturing solutions.

A separate chart which identifies each claim and cross-claims also keeps counsel and client "focused" as the hearing proceeds.

A third chart memorializes "the hints", subtle and otherwise, which come out at all phases of the mediation- these might be counsel or a party's "slip of the tongue" which might later have significant meaning and give a "hint" as to a hidden agenda, a reason for a party's seemingly unreasonable position and so forth. The key here is to always "listen" – with ears and eyes.

Listen and observe – the gamblers call it a "tell" – and counsel and parties always give-away "something" as the mediation proceeds. Beware of your own tell, and be alert for the other party's tell.

When there are multi-parties and multi-issues, sometimes only some issues can be resolved – do not be afraid of a partial settlement. This reduces the litigation or arbitration expenses and costs, as well as the emotional costs, and aids the parties in "getting back to business."

Often a Mediator will suggest that the mediation hearing should be after a certain level of discovery is finalized; yet often it is wise to begin the early stages (pre-mediation hearing) so that the parties are already mentally ready for the mediation process to proceed. They have met they and counsel have met the Mediator, have a better idea as to the process, and

psychologically are better attuned to the mediation moving forward as a "saving grace".

This also assists the parties in stating the issues to the Mediator, a trusted third party. It also lays a bit of the groundwork for the Mediator to begin to assist counsel in "stepping-back" from what to a client originally might appear to have been lawyer promises (you've got a great case; a winner) when as discovery proceeds the truth of the matter might case some clouds on counsel's original assessment.

In any event- mediation is no longer merely "another discovery opportunity" – it is the number one method for resolving conflicts. The sooner the process begins, the more it's potential has a chance to grow.

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(somewhat)

NEW AND EMERGING ADR PROCESSES

A Brief Overview

PRESENTED BY

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ALTERNATIVE DISPUTE RESOLUTION (ADR)

Any method of settling a dispute that does not utilize the court system. (Flipping a coin, rock-paper-scissors, drawing straws, duel to the death, mediation, arbitration, etc.)

Two parties may agree to settle a dispute in any manner as long as it is not contrary to law.

MEDIATION

1. **Typically one mediator**
2. **Usually a voluntary process**
3. **Sometime mandated by the courts**
4. **Sometime mandated by regulation or law**
5. **Typically non-binding unless the parties come to an agreement**
6. **Totally confidential and private**
7. **Usually conducted with provider rules**
8. **Usually far faster than using the court system**
9. **Usually far less expensive than going to court or arbitration**

ARBITRATION

1. Typically one arbitrator (three optional)
2. Usually a voluntary process agreed to by the parties
3. Non-binding arbitration sometime mandated by the courts
4. Sometime mandated by regulation or law
5. Typically binding
6. Generally not subject to appeal other than on procedural grounds
7. Totally confidential and private
8. Usually conducted according to the Federal Arbitration Act and/or State Uniform Arbitration Act
9. Usually less expensive than going to court
10. Usually far faster than using the court system
11. Usually less expensive than using the court system

TRADITIONAL ADR HYBRIDS

MED-ARB – Usually selected by the parties prior to signing a contract. There are two standard forms of Med-Arb:

1. **Single ADR Specialist – The mediator will first attempt to get a full settlement utilizing the mediation process. Any unresolved issues will then be resolved through the arbitration process conducted by the same ADR Specialist. (This is the least preferred method of Med-Arb as the parties may not be as open and truthful with the mediator if they know that the mediator will have the authority and responsibility to issue an arbitration award if the mediation is not totally successful)**

2. **Two ADR Specialists - A mediator conducts the mediation. Any unresolved issues will then go to a formal arbitration with a new arbitrator. The selection of the arbitrator usually does not happen until the end of the mediation so that the parties will have a better understanding of what qualifications and expertise will be required of the arbitrator.**

<u>ARB-MED</u> – Usually selected by the parties prior to signing a contract. There are two standard forms of Arb-Med:

1. **Single ADR Specialist – The arbitrator will conduct the arbitration and write his/her award. The award will be sealed by the arbitrator. The arbitrator will then conduct a mediation with the expectation that the parties may try to settle the dispute now that they have had the opportunity to see the presentation of the other party(s) and have observed the reactions and questions of the arbitrator. At the end of the mediation, the issues that are settled in the mediation are written on a Mediation Settlement Agreement and signed by the parties. The arbitration award is then opened and the arbitrators award related to the unresolved issues become binding on the parties. Between the Mediation Settlement Agreement and the Arbitration Award, the parties will have a full settlement on all disputed issues.**

NOTE: If the parties reach a full settlement on all issues during the mediation, the sealed arbitration award will not be opened and will be destroyed.

EXPANDED TRADITIONAL ADR PROCESSES

Co-Mediation – Two mediators share the responsibility of mediating. Co-mediation has proven very effective in construction matters where there are two major issues to be mediated where the expertise of two mediators is helpful. Co-mediation is often utilized in mediations involving multiple parties. Co-mediation has been used on all types of issues including divorce and matrimonial matters.

1. **Mediators must decide whether they will remain together or will each work with one or more of the parties**
2. **Only one mediator can be the principal mediator**
3. **The parties must allow the mediators to share full information with each other especially if they do not work together as a team**

Multiple Mediation – Three or more mediators share the responsibility of mediating. Multiple mediation is most often utilized with multiple parties and when there are various issues that require a special expertise of the mediators.

1. **Mediators must decide whether they will remain together or will each work with one or more of the parties**
2. **Only one mediator can be the principal mediator**
3. **The parties must allow the mediators to share full information with each other especially if they do not work together as a team**

SPECIALIZED ADR PROCESSES

BINDING MEDIATION – Mediation process where the mediator is empowered with the authority to render a final and binding decision on any unresolved issues at the end of the mediation process. Those decisions of the mediator are added to the Mediation Settlement Agreement and signed by the parties.

1. **May be agreed upon prior to signing a contract or may be selected after a dispute develops**
2. **Offers the least expensive standard ADR process to arrive at a final and binding decision**
3. **Offers the most expeditious standard ADR process to arrive at a final and binding decision**
4. **Offers a deterrent to parties trying to take advantage of each other**
5. **Specialized forms**
   a. **Binding Mediation Agreement**
   b. **Binding Mediation Addendum**
   c. **Subcontractor Binding Mediation Agreement**
6. **Two separate Settlement Agreements to be signed (Second Agreement is binding on the parties by virtue of signing addendum)**
7. **Nationwide attorney search of the acceptance and use of binding mediation**

SPECIALIZED ARB-MED – A standard arbitration is held with either one or three arbitrators. At least one trained and experienced mediator is present during the entire arbitration process. At the end of the arbitration, the arbitrator leaves but will not issue an arbitration award until he/she/they have heard from the mediator. The mediator(s) conducts a mediation with the expectation of having the parties settle

some or all of the issues covered during the arbitration. The arbitrator will be notified by the mediator as to which issues were not settled in the mediation and will need an arbitration award issued for those unresolved issues at the end of the mediation. The Mediation Settlement Agreement and the Arbitration Award together will finally settle all disputed issues.

ANOTHER HYBRID FORM OF MEDIATED ARBITRATION – Similar to Specialized Arb-Med with the exception of a mediation being conducted after each issue is covered in the arbitration. This process is used on arbitrations that have multiple issues that are expected to take several week or months to cover during the arbitration.

DISPUTE REVIEW BOARDS ("DRB") – Typically three neutrals with specialized construction knowledge render recommendations and advisory opinions the assist the parties in preventing and settling disputes. The DRB recommendations and advisory opinions are not binding and are issued to give the parties a beginning point to begin negotiations. A DRB is very similar to a tripartite non-binding arbitration panel.

EXPANDED DISPUTE REVIEW BOARD – A DRB that also offers both mediation and arbitration services that can be final and binding on the parties.

CONSTRUCTION SETTLEMENT PANEL – One or more neutral individuals who are available upon request to render a recommendation, advisory opinion or to serve as a mediator or arbitrator.

PRE-PLANNING – THINKING OUT OF THE BOX

ONE PERSON DRB OR ADVISOR – Parties can mutually agree on a Specialist to utilize to render recommendations or opinions to assist the parties to prevent or settle a dispute.

GENERAL CONTRACTOR FAST TRACK AGREEMENTS – Prior to beginning construction, the parties to a construction contract can pre-select a mediator(s) or and arbitrator(s) to use if a dispute develops. The parties will also pre-sign mediation agreements or arbitration agreements. By pre-selecting ADR Specialists and pre-signing ADR Agreements, the parties afford themselves the opportunity for an expedient settlement on any disputes.

THE USE OF EXPERTS

1. **Judges and Juries base their decisions on the best and most convincing presentation, not necessarily which presentation is right or wrong**
2. **Doctors cure and remedy medical problems – Construction Experts should cure and remedy construction defects and construction-related issues**
3. **Attorneys should be used to settle legal issues**
4. **ADR SPECIALISTS SHOULD BE USED IF THEY ARE THE RIGHT PERSON(S) TO HELP THE PARTIES COME TO A FAIR AND EQUITABLE RESOLUTION TO THEIR DISPUTE**

SUMMARY

THE PRIMARY BENEFIT OF ADR IS TO ASSIST PARTIES TO PREVENT OR SETTLE THEIR DISPUTE AND TO HAVE

REACHED A FAIR AND EQUITABLE SETTLEMENT TO THEIR DISPUTE.

SECONDARY BENEFITS INCLUDE THE DISPUTE BEING SETTLED THROUGH A MORE SIMPLIFIED PROCESS THAT IS LESS EXPENSIVE AND MORE EXPEDITIOUS THAN USING THE TRADITIONAL COURT SYSTEM

TRAINED AND EXPERIENCED ADR SPECIALISTS ARE THE BEST INDIVIDUALS WHO CAN HELP THE PARTIES TO REACH THEIR PRIMARY AND SECONDARY OBJECTIVES.

Jerome Allan Landau

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The Mediator as Facilitator of Solution

Jerome Allan Landau

Parties in a commercial mediation often recognize that it is in their financial best "self-interest" to maintain business relations in spite of their dispute. Choosing mediation is the most sensible and non-antagonistic method they can use to resolve their conflict and also continue a working business relationship.

Mediation is an attractive and efficient process for resolving disputes amongst business professionals because it permits them to personally participate in the decision making process, n opposition to surrendering one's power and control into the hands of a third-party arbitrator or judge.

Throughout my service as a Mediator of commercial disputes I often use a facilitation model called the Technology of Participation ("TOP") Focused Conversation Model. This model was developed by the Institute of Cultural Affairs, a private, non-profit organization specializing in organizational development and problem solving. The ToP Conversation Model works with four "categories": objective, reflective, interpretive and decisional. These categories function as guideposts through which the Mediator (or facilitator) can draw the parties from superficial, subjective, anger-tinged remarks towards an environment that empowers objective, in-depth, creative responses and "inspired ideas" for solutions to the conflict.

The Mediator begins by asking the parties to objectively review the facts of their history together; including those facts "appearing" to underlie the dispute.

This is followed by leading the parties to subjectively reflect upon their emotional reactions and thoughts related to their history and the present dispute.

This is then followed by their interpretation of their own emotional reactions and thoughts; including their consideration of the meaning, value and significance of such reactions.

The fourth step is dependent upon the earlier three whereby it is anticipated that through the first three each party has had a shift in perception of the dispute and is open to creatively moving towards overcoming that which previously would

have been an impasse or block to solution. This is done through securing each party's cooperation and "response to creating a solution", rather than that party falling-back on its previous "reaction" to the existing situation.

Throughout the Conversation Model, the Mediator moves to inspire a sense of joint effort and mutual reliance in accomplishing an agreed-upon goal.

This model permits the Mediator to lead, rather than "herding" participants from the usual positions of distrust, anger and frustration to an environment where agreement can be reached within a new set of values. The model also endeavors to help participants reframe their own emotional predispositions.

Historically parties often arrive at a mediation "dragging the luggage" of their own perspectives, prejudgments, fears and survival considerations wrapped in the robes of their personal human qualities, aspirations, egos and foibles.

The timing of the steps in the Conversation Model assists the Mediator, as Facilitator, to more skillfully lead the individuals beyond themselves into a joint effort at solution - a balance and harmony which all ultimately seek, whether or not they are aware of this human inner impulse.

This is also an ideal tool for situations where there is a desire to avoid moving the parties into separate caucuses.

The Objective Step permits the Mediator to ask questions that lead participants to express specific objective facts concerning the subject of the misunderstanding between them The Mediator encourages participants to present the facts without embellishment, fervor or expression of emotions and to express a willingness to be open-minded throughout the process. The Mediator might ask participants to answer questions such as "What were the actual steps taken to arrive at the financials?" or "What effect did the shipment's failure actually have on the production process?"

Throughout the process, we are both subtly and not-so-subtly reminding participants that they each come with a personal belief about the facts underlying the situation and that although these positions might seem quite different, all participants can still be speaking what is true for them. Participants are encouraged to "leave their pre-judgments at the door" along with their expectations and prejudices. To reduce the frustration of not being permitted to "get it all out" at the beginning, the parties are reminded that they will be given

the opportunity to be subjective and to reflect upon the matter with a wider perspective at a later step, but in this step the participants are seeking to maintain objectivity.

The objective step encourages people to work as a team to achieve a solution for common challenges, which at present are viewed through their differing points of view. Here is where a skillful Mediator can inspire a spirit of unity for addressing the issues together and redefining "winning" as a "group" goal. The Mediator leads the participants to a resolution of the issues and, at the same time, empowers them to recognize the mutuality of their relationship and its financial and economic benefit to both.

The Reflective Step involves asking participants to reflect on their thoughts and feelings about the dispute. There are often strong, unspoken emotions that need to be explored and resolved before a final resolution can be achieved Mediator interventions during this phase of the process might include questions such as "How did you feel when this occurred?" or "What was the reaction from your staff when this was announced?" By hearing the answers to these questions, both participants are able to better understand the impact that the dispute is having on the other person. Business persons can: if properly led, sense the feeling of 'walking in the other's footsteps.'

The Interpretive Step encourages participants to reconsider the dispute in light of new information that they have heard from the other side. During this phase, the Mediator might ask questions such as "How would your employer evaluate the impact upon your firm's bottom line?" or "What problems did your staff experience as a result of this dispute?" Antagonistic parties often overemphasize the impact of an event, become defensive when they are challenged, and then go on the offensive in order to protect themselves. But after progressing through the first two steps of the ToP Model, we often find that disingenuous negative energies begin to dissolve and that people are better able to understand and empathize with the other. Reality begins to set in, answers become more realistic, and with that comes a more respective leniency in demands for solution.

The Decisional Step occurs when participants are ready to resolve the dispute. They have acknowledged that neither will obtain everything he/she may have wanted and that compromise is necessary for a successful resolution. Representatives at a commercial mediation often come with instructions from their boss about what they should say and do. The Mediator needs to inspire participants to think out of the box and beyond their initial positions or

instructions from their employers. If the employer has given the participant the authority to make a final decision, then the Mediator must help that participant feel empowered to do so as thinking professional. During this final phase, the Mediator might ask What could we do that would give a sense of completion to this situation? or What would you be willing to do to help John bring something back to his boss and fellow employees as a solution to this problem? This tatter question encourages a joint review and outline that has them working' together for the answer.

I have implemented the I C.A. Conversation Model in my own professional practice as well as my interactive workshop training for conflict resolution professionals. I have found that this model generates ownership, creates clear goals, opens lines of communication, broadens perspectives and motivates people to adapt to their changing environment while still honoring their respective needs to 'return home,' report and explain. These qualities are all attractive signposts along the Mediators path toward solving problems. Properly facilitated, the process decreases adversarial animosity, increases opportunities for the parties to understand better the other's challenges, and inspires participants to join together to find solutions. I trust that you will also find this model to be beneficial to your professional ADR practice.

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Conflict as an Emotional Destabilizer
And
The Mediator as a Professional yet Unlikely Balancer

Jerome Allan Landau

I have found that even in commercial and business mediations parties and their counsel bring their own personal agendas with them.

Counsel might want to show the client how "powerful a litigator' s/he is.

Everyone, from a company owner to an Officer, will "report" to a partner, other Officer or Board, or even a spouse, about "how did it go?" Some feel an embarrassment if they had earlier said they would go to the mediation and "kick-ass" – only to have appreciated during the hearing that often a negotiated solution is far better that protracted litigation or arbitration.

How do you explain that to someone who "was not there" – and that adage "you had to have been there" can sound very weak, and hence embarrassing to a participant who needs to "maintain face" in his organization (or household.)

The honesty of counsel is crucial at this time. Sharing these thoughts and concerns with the Mediator will enable a skilled Mediator to guide a participant to better and more skillfully being able to explain why the solution was really a "Win!" for that party.

Often counsel will add a lot of "gloss" to a conflict, assuring a client (or a prospective client) that their case is a "Winner!" – on the plaintiff's side the retainer agreement is usually followed by a powerful Complaint which, often does not appear so strong to counsel as discovery proceeds and "the rest of the story" is uncovered.

This is another reason for counsel to be open and honest with the Mediator who, with understanding and skill will be able to assure each participant that their respective counsel is a very strong litigator yet is tempering their power at the Mediator's request so that the mediation process is given a chance to search for and achieve a solution. This can

be done in a joint session and then supported in caucus. The Mediator is the key to solution and relies upon counsel to facilitate the process, rather than impede same.

Some of the unresolved emotional issues that people bring to these meetings?

- Business partners can harbor the same anger as divorcing couples; sometimes with more intensity.
- It is the business which supports the family and so an attack on one's business is directly an attack on one's ability to support one's family.
- People bring their personal agendas and baggage with them, notwithstanding that "this is just a business dispute."
- Business conflicts interfere with business; they cause "personal agendas" to arise and this translates to emotional issues that carry beyond the workplace.
- Unrecognized agendas include fear of loss of position, dignity, money, business, family, prestige and others – all must be intuitively considered by counsel, and if suspected, shared with the Mediator – who usually can help.
- These emotional issues can affect a party's home-life. I have witnessed senior executives reach a point of "weeping' during long protracted mediation hearings … and seen this "bursting of a dam" of pent-up emotions be acknowledged as somewhat "life-changing" for a participant's personal life ("now I understand something that has bothered me for years, that has nothing to do with my business.")
- Often businesses rely upon each other and yet find themselves in open conflict over an issue. I have witnessed this in the aeronautics industry where there was protracted litigation, ending up in court orders to arbitrate the matters and yet concurrently each needed the other's business and so continued to do business even while the litigation and subsequent arbitration proceeded.

Tools the Mediator (and counsel) can use to move the tide from conflict to cooperation?

1. Nurturing
2. Giving each participant the opportunity to be heard (a skillful Mediator will lay a groundwork for these in the earliest meetings with counsel and

a participant and during a joint session – securing "buy-in" from the beginning. Sessions can become emotional, even in the business / commercial realms – and we want a participant to recognize that this might happen, and not to "react' merely because another participant is reacting with strong emotions. This is the best time to "watch and listen" – a time to learn weaknesses in the other's arguments and positions, and to better understand "where they are coming from" – just knowing that has resolved numerous conflicts.

3. Keep the playing field neutral
4. Try to address each participant's concerns even though the other(s) discounts it.
5. Recognizing that each participant's thoughts and concerns are of importance to that participant – even if the other(s) do not understand or agree with them.
6. Neutralize shame, guilt, embarrassment that occasionally occurs in court process.
7. Give participants selected information about the other(s).
8. Following-up during the caucuses to solidify support for a participant encourages the participant to trust counsel and the Mediator.

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MEDIATION GUIDELINES, CONFIDENTIALITY AND AGREEMENT TO MEDIATE

Jerome Allan Landau

PURPOSE OF MEDIATION

The purpose of Mediation is for parties to be facilitated to creating an agreement resolving all, or some of the issues of their dispute. The agreement must be acceptable to all parties except that in a multi-party mediation, when there are more than two parties, it is possible for some, yet not all of the parties to reach separate agreement on one or more of the issues at conflict.

Any agreement is reached through an interactive process in which the parties identify common areas of conflict, and also individual areas where one "feels a conflict" that is not recognized as such by the other(s).

Any resolution must be reasonably "workable" and agreeable. As such, and to avoid future conflict about the seemingly "resolved" area of conflict, the agreement should be specific in all aspects (including "what ifs")

The mediation process facilitates and encourages positive communication between the parties and is aimed to minimize the stress and antagonism that may accompany litigation in court. This same stress and antagonism usually enters the mediation door with the parties, yet the skilled Mediator is equipped with tools that aid in reducing these challenges.

A basic awareness is nurtured with the parties that they are far better equipped to resolve their own situation and future than any Judge, Court Commissioner or attorneys.

Each party must ensure that a "decision maker" for that party is present throughout all aspects of the mediation process, including the hearing. This is someone with full authority to resolve the issues and enter into a Memorandum of Agreement on behalf of a party.

ROLE OF THE MEDIATOR

The role of the Mediator is to facilitate this communication and problem solving process. The Mediator serves as a Neutral who should not judge either of the parties or impose his decisions upon the parties. The Mediator will facilitate the process by aiding the parties to explore alternative, and sometimes creative options; however, the decisions made are those of the parties, not the Mediator.

The Mediator is responsible for the structure of the session and the direction of the resolution process. This is why the Mediator's engendering and earning the "trust" of each party is crucial.

Even if the Mediator is an attorney, in the Mediation setting the Mediator does not serve as a legal counselor for either of the parties; nor should any party expect the Mediator to do so. This does not mean that the Mediator cannot express an opinion, under the proper circumstances, or even express the Mediator's prior experience in a "similar" circumstance. It does mean that the Mediator is not giving legal advice to a party – even if the party is unrepresented.

CONFIDENTIALITY

All information and records created during the Mediation process are confidential. The Mediation Agreement should require all parties to agree that the Mediator will keep all such information as confidential, unless there is a mutual consent to disclose information to a designated third party. Release of information to designated third parties must be accompanied by a written release of information form, signed by all parties and counsel to the Mediation.

The parties agree not to use any information disclosed in the Mediation process against the other party if either terminate the Mediation process and pursue litigation or arbitration. Each party, and counsel, should agree not to call the Mediator to testify in court, arbitration or any court or other procedure; and not to subpoena the Mediator or any documents regarding any

communications that developed as a part of the Mediation process.

The mediation agreement should include provision that any party to the mediation would be responsible for the Mediator's attorney fees and costs if that party endeavors to subpoena the Mediator or the Mediation records.

Many mediation agreements include provision that at the conclusion of the Mediation process, the mediator will return to the parties any documents that party has provided to the Mediator, and the Mediator will destroy the Mediator's case notes.

COMMUNICATION GUIDELINES AND GROUND RULES:

A positive and non-adversarial environment is conducive to the mediation process of problem solving and construction of a resolution and agreement. Therefore, the parties should agree to follow general guidelines regarding behavior and communication throughout the mediation process:

- **Each party will have an opportunity to express their thoughts and feelings without interruption.**
- **All parties will treat each other with respect and maturity; we are adults.**
- **Verbal abuse such as name calling, put-downs, or shouting will be avoided at all costs.**
- **The parties are responsible for the decisions made, not the Mediator.**
- **The parties will listen to the concerns of each other with an open mind.**
- **The parties will stay in the room until the Mediator agrees to end the session or allows a break.**
- **The parties agree that the Mediator will not take personal sides for either party and that a party will not attempt to prejudice the Mediator by making confidential disclosures to the Mediator.**
- **Parties and the Mediator will work collaboratively to identify agreement.**
- **"Caucus" or "Shuttle Negotiation" (when the Mediator meets separately with a party) is fundamental to the Mediation process and the length of time the Mediator may spend with one party does not indicate the Mediator's favoring of that party.**

- **Counsel's presence and participation can be of great value to the mediation process and is not a time for counsel to "show-off" counsel's litigative and combative skills. The Mediator should explain this to the participants so that they are not disappointed when their counsel "participates" in the process instead of causing dissension.**
- **Phone Mediation or consultation will only be used when the Mediator determines that face-to-face interactions are not feasible. Parties acknowledge that phone Mediation represents a special case that does not allow for the best level of communication.**
- **Phone Mediations will be scheduled when other third parties are not present to overhear conversations.**

AGREEMENT

None of the agreements reached in Mediation are binding until a formal written Memorandum has been signed by both parties. The Mediator reserves the right to postpone or cancel the Mediation if it is determined that there is a significant impairment to the process.

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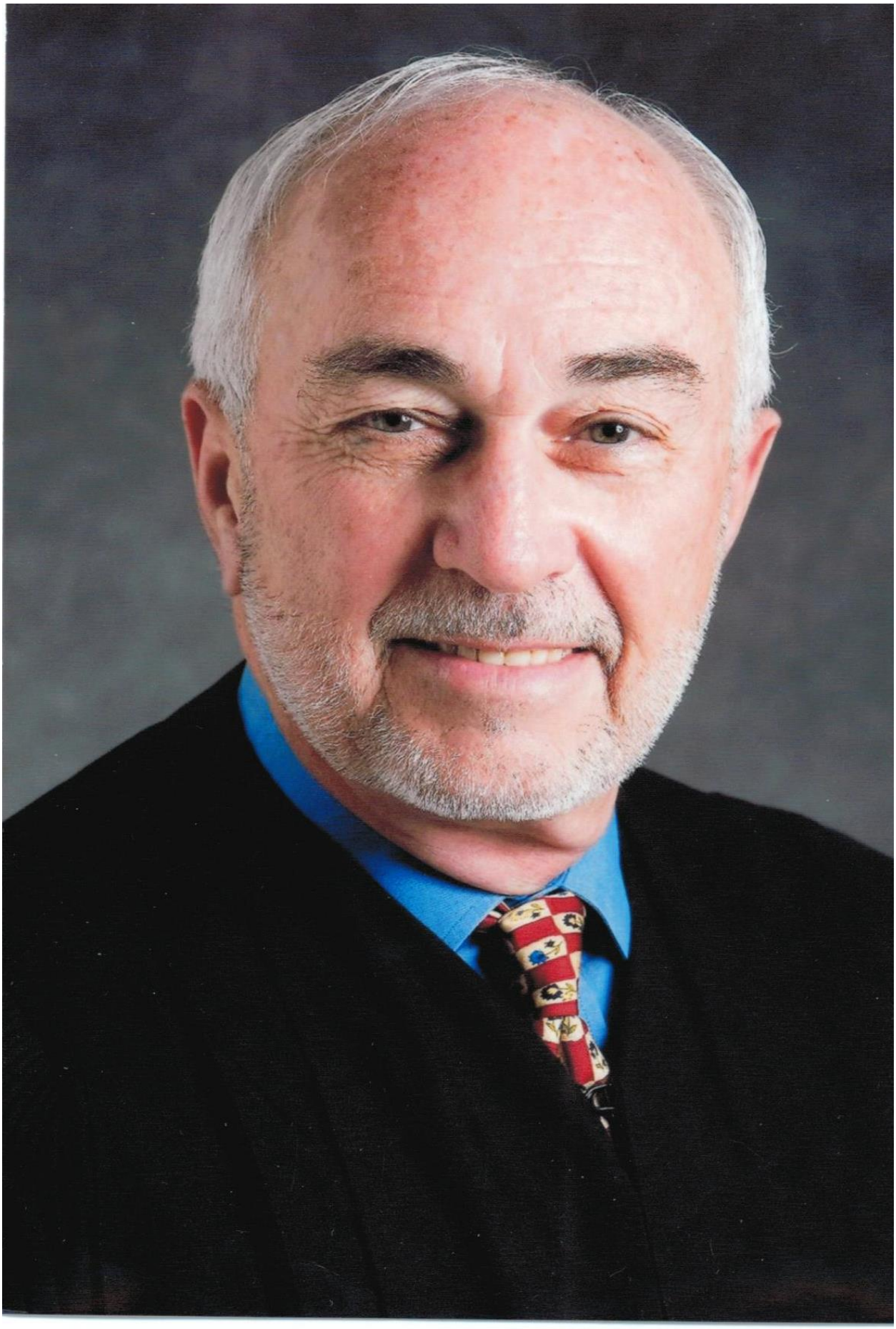

Judge Kenneth (Ken) L. Fields is a retired Judge of the Superior Court of Arizona in Maricopa County, Phoenix, Arizona. He presided over civil, juvenile, criminal, probate, special assignment and family court calendars. From February 1993 through June 1995, he served as the Presiding Judge of the Domestic Relations Department (Family Court), Superior Court of Arizona, in Maricopa County. From Nov 29, 2002 to June 2007, he was one of three (3) judges state-wide assigned to the Complex Litigation Court.

Judge Fields, a native of Louisville, Kentucky, obtained a Bachelor's Degree in Political Science in 1968 from the University of Kentucky and as a Distinguished Military Graduate from ROTC was commissioned as a Regular Army Officer. From 1968 to 1971 he served in the U.S. Army as an armor officer in cavalry and infantry assignments. On separation from active duty, he joined the US army Reserve.

While serving in the U.S. Army Reserve, he was part of the adjunct/non-resident faculty of the US Army Command and General Staff College, Ft. Leavenworth, Kansas and commanded the 10th Bn, 6th Bde, 104th U.S. Army Reserve Division. Judge Fields, an Army Ranger, retired from the US Army Reserve with the rank of Colonel in 2003.

Upon his return from Viet Nam, he attended the College of Law at the University of Kentucky where he obtained his J.D. in December 1973. Judge Fields was a member of the Law Journal at the College of Law.

He is the presiding commissioner for a 5-person arbitration commission deciding disputes between the Navajo Nation and the Hopi Tribe (both Native American Indian tribes). In addition to civilian courts, Judge Fields was a Military Trial Judge for the Arizona National Guard presiding over Courts-Martials until September 15, 2015.

He taught Mexican Judges, prosecutors and public defenders in 2007-2008 as a member of a U.S.-Canadian team as well as teaching Alternative Dispute Resolution at the Faculty of Law, Belgrade, Serbia in 2013, U. S. Business Law in Pristina, Kosovo in 2014 and Comparative Law in Izhevsk, Russia in 2015. In April 2014, Judge Fields had a paper presented at the Azov Legal Conference in Berdyansk, Ukraine on Business Courts in the United States.

In 2014, he was a guest lecturer at the University of South Wales, Cardiff, United Kingdom, on Alternative Dispute Resolution. He also was co-chair of the

symposium on International Mediation for the Center for International Legal Studies in Salzburg, Austria.

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JUDGE PRO TEMPORE TRAINING-MARCH 18, 2016

I. Appointment as a Superior Court Judge Pro Tempore, Not as a Mediator

a. Article 6, Section 31, Arizona State Constitution
b. ARS 12-141 et seq
c. Informal Court Proceeding allowed under the Rules of Court Procedure; for example, Rule 16.1, AZ Rules of Civil Procedure
d. Arizona Rules of Judicial Conduct applies (at least in part)
e. Understand this is a Court-Ordered Conference

II. Suggested Techniques/Characteristics for a Successful Settlement Conference

III. Establish Boundaries

a. Time limits
b. Page/document limits
c. Use digital media if at all possible
d. Develop a definition of a Successful Resolution to Settlement Conference (s)
e. Manage expectations of Counsel and Client for the Settlement Conference
f. ALWAYS OBEY MEL'S RULES!!
g. Be as flexible as possible on all of the above (except Mel's Rules)to suit the circumstances since flexibility enhances creativity

IV. Personal Preparation for the Settlement Conference

a. Take a basic mediation course plus advanced training
b. Develop a mentor relationship with experienced Judge Pro Tempore, Mediator, Retired Judge or other respected neutral
c. Insure that your insistence on your Rules (pre-hearing conference, joint opening session, etc) is not an impediment to the dispute resolution process
d. Develop and hone your listening skills to improve your intuitive ability and awareness

BIOGRAPHY OF ALONA M. GOTTFRIED

Alona M. Gottfried is a mediator**,** attorney**,** collaborative divorce attorney and conflict resolution trainer in Arizona. Alona, a native of Arizona, obtained her bachelor's degree in psychology from Arizona State University (Summa Cum Laude) and her law degree from the College of Law at Arizona State University (Cum Laude). She received advanced mediation training at Pepperdine School of Law**,** and she has taught mediation to new and experienced mediators across the state of Arizona. Alona also facilitates conflicts between groups and trains employers to help them improve employee relations and avoid employee lawsuits. Alona is a State Bar of Arizona Alternative Dispute Resolution Executive Council Member at Large and the CLE committee chair for the Council. She previously served as an executive officer of the Arizona Dispute Resolution Association.

Minimize Negative Effects of Divorce on Children

There have been a number of studies on the effects of divorce on children. Divorce has been found to be "an intensely stressful experience for all children."[1] Children often are frightened, confused and feel a loss of control and security.[2]

The amount of parental conflict during and after a divorce is the single most important factor in determining children's well-being.[3] The American Academy of Child & Adolescent Psychiatry concluded:

> Children will do best if they know that their mother and father will still be their parents and remain involved with them even though the marriage is ending and the parents won't live together. Long custody disputes or pressure on a child to "choose" sides can be particularly harmful for the youngster and can add to the damage of the divorce. Research shows that children do best when parents can cooperate on behalf of the child.[4]

Parental conflict and custody battles can result in serious and long term problems for children.[5] For example, children who had parents in high conflict were more likely to experience feelings of "loss and regret" even as adults.[6] Young adults of divorced parents also experienced renewed "anxiety, fear, guilt, and anger" in adulthood when they had to make important decisions, including those involving their own relationships.[7]

Children who do the best in life after a divorce are those whose parents "can communicate effectively and work together as parents."[8] Parents who want to minimize the negative impact of divorce on their children should, therefore, look to mediation.

Litigation only increases animosity and decreases focus on the needs of the child. As stated by Dr. Kathleen O'Connell Corcoran: "On the average, it takes family members approximately four to eight years to recover from the emotional and financial expense of a bitter adversarial divorce. In an adversarial divorce, there is no possible resolution of the emotional issues, only decreased trust and increased resentment."[9] In litigation, parents often spend their time and money publically attacking the credibility and parenting of the other parent. It is difficult to foster cooperation and co-parenting after that.

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[1] Sara Eleoff, *An Exploration of the Ramifications of Divorce on Children and Adolescents*, SEASIDE NANNIES INC., (Thursday, Oct. 30, 2008), http://www.seasidenannies.blogspot.com/2008/10/exploration-of-ramifications-of-divorce.html.
[2] Children And Divorce, AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY, (Mar. 2011), http://www.aacap.org/page.ww?name=Children+and+Divorce&section=Facts+for+Families.
[3] Kathleen O'Connell Corcoran, *Psychological and Emotional Aspects of Divorce*, MEDIATE.COM, (June 1997), http://www.mediate.com/articles/psych.cfm.
[4] AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY, *supra* note 2.
[5] Robert Hughes, Jr., Ph.D., *The Effects of Divorce on Children*, PARENTING 24/7, (Apr. 10, 2009), http://www.parenting247.org/article.cfm?ContentID=646
[6] *Id.*
[7] Eleoff, *supra* note 1
[8] Corcoran, *supra* note 3.
[9] *Id.*

Mediation, by contrast, is a process in which parents put their children's needs first by communicating, cooperating and fashioning a parenting plan that is in the children's best interests. The mediated agreement addresses how the parents will peacefully address future changes and future conflicts, if any. Mediation allows participants to forego the economic devastation that often follows acrimonious litigation, and that also benefits the children.

Divorce may be accompanied by feelings of rage, pain and hurt for the adults involved. While attacking the other party in litigation may seem more satisfying in the short term, the long term impact on children should make parents want to avoid litigation whenever possible. Mediation allows parents to quickly restore stability and control in their lives and the lives of their children. Choosing mediation may be the single most important gift divorcing parents can give their children.

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The Benefits of Mediation to Share with Clients

- **Cost-effective.** Mediation can end a conflict without the high cost of trial preparation. The earlier mediation is initiated, the more the clients potentially save. The best time for many litigants to begin mediation is after enough disclosure has taken place that both parties can make educated decisions regarding the case. Parties can mediate before that point to address temporary issues.

- **Time-efficient.** Litigation can take a year or more to complete. Mediation can take a day or less.

- **Amicable.** While litigation destroys relationships and often causes participants great stress and disruption in their lives, mediation often preserves relationships and eases stress.

- **Flexible.** With mediation the participants are in charge of the resolution, and the participants have flexibility in crafting "win-win" solutions. Courts are limited in how they can decide the case, and often there is a winner and a loser.

- **Certain.** Litigants always risk losing in Court. There are many shades of gray in family law. There is no attorney out there who can guarantee a client a particular result. If a party found an attorney willing to argue a position, there is a good chance that party's argument has some merit. That means that, often, either party may prevail on a contested issue. Therefore, going to court means that a party is spending substantial time and money and may not get what he/she wants. It is certainly unusual to get everything one wants through litigation. With mediation, the participants control the outcome, and they do not have to gamble on the result by leaving their fate in the hands of someone else. Even if someone prevails in Court on all issues, that may not be as positive an outcome as one may think. The 'loser' in this hypothetical situation is not going to be happy. He or she may do whatever he or she can to make the other person's life difficult. And, both parties would have still likely spent significant time and money to get that result through litigation. As an aside, most people do not want to "crush" their former loved-one or the parent to their children. That benefits no one. George Herbert, a poet and orator, said it best: "A lean compromise is better than a fat lawsuit."

- **Confidential.** Mediation offers confidentiality – the opportunity to maintain your privacy. In litigation, with few exceptions, anyone can attend trials, peruse the case file and access Court decisions. For personal matters, like family law cases, parties often say and write disparaging things about each other, and most people would not like their family, friends, employers, co-workers and children (once they are old enough to obtain court records) to know about those accusations. In short, many actions include embarrassing or private information. Confidentiality is also important because it allows parties to speak freely and make offers without worrying that their comments and offers will come back to haunt them. Open communication facilitates resolution. A.R.S. § 12-2238 protects: "[c]ommunications made, materials created for or used and acts occurring during a mediation…" Arizona Rule of Family Law Procedure 67(A) confirms confidentiality in family law mediation. There are exceptions to the confidentiality rule. For one, the parties to a mediation can agree to a disclosure. A.R.S. § 12-2238.

Disclosure may also be necessary pursuant to another statute or to enforce an agreement to mediate. *Id.* Threats of violence and violence are not protected. *Id*. A written and signed agreement reached in mediation can be used to enforce the agreement. *Id.* Parties can reach agreements in mediation further restricting the release of information. Most mediators require a separate Confidentiality Agreement signed by all participants in the mediation, thereby creating a contractual obligation for confidentiality.

- **Effective.** Mediation is highly successful. The American Arbitration Association has found that mediation results in settlement over 85 percent of the time. It is hard to argue with results. Mediation works in even difficult cases. Mediators help both parties develop reasonable settlement requests and reach acceptable agreements in a confidential and comfortable environment. Many mediations start with one or both parties believing it will never settle. Mediation takes time and energy, but it is usually time and energy well-spent.

The Benefits of Mediation for Attorneys

- **Clients Are Happy.** All attorneys want their clients to be happy. We achieve a sense of accomplishment from a case well-handled. Further, happy clients refer future clients. Clients who, through mediation, save time and money, preserve relationships and control the outcome of their case, tend to be more satisfied. Further, there is no risk of a negative ruling.

- **Less Outstanding Balances.** As many clients cannot afford contentious litigation these days, attorneys are often left with the decision of either withdrawing from a case before it is done or amassing a significant bill that the client may never pay. Mediation helps keep cases affordable, which benefits the attorney as well.

- **Help Dealing With Unreasonableness.** If the other party or attorney is being unnecessarily contentious or unreasonable, involving a mediator often helps. Mediators know how to help parties to consider their positions in a fresh light and assist parties in gracefully backing away from unreasonable positions.

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How Do Mediators Help Parties Reach Agreements?

Mediation works through the mediator's use of conflict resolution skills. A good mediator is one that is trained in and experienced using these skills. Mediators use a number of conflict resolution techniques. For example:

1. Mediators help participants generate ideas for resolution and help people consider all aspects of a conflict/agreement.

2. Mediators know how to help participants figure out what they really want. Sometimes people are angry and cannot clearly see what solution would be best for them. Sometimes people's egos get in the way of a resolution of the dispute. Mediators help people tweak their positions without losing face.

3. Mediators help people communicate with each other in a way that promotes resolution. Sometimes conflict is simply based on a misunderstanding. When people communicate, misunderstandings can be cleared up. Litigation rarely provides that opportunity. Also, when emotion is involved, communications may only lead to more conflict. Mediators know how to take the sting out of communications in a manner that encourages parties to see other points of view.

4. Mediators can manage emotion. Mediators know how to address angry people, shut down people, and weepy people. Mediators help people move past the emotions and focus on solutions.

5. Mediators can help people be reasonable. In mediation people explore the best and worst alternatives to a mediated agreement (is settling better or worse than not settling?). Mediation sometimes includes the use of experts to help people determine what a reasonable solution is.

6. Mediators provide a forum for quick and easy negotiations. Sometimes mediation comes down to a negotiation (for example – a dollar amount). The mediator goes back and forth between the parties, conveying offers, helping the parties explore the offers and helping the parties create methods to break impasses.

Mediation is based on the concept that, with the help of a trained professional, people can resolve their own conflict best through communication, rather than litigation. As Winston Churchill stated: "To jaw-jaw is always better than to war-war." Mediators help make those communications effective.

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Material for Clients

How To Prepare Yourself For A Successful Mediation

The Boy Scout's motto - Be Prepared – applies to mediation. Below are eight ideas of how you can prepare yourself for a successful mediation.

1. **Understand what is not worth fighting about.** Before refusing to bend on an issue, ask yourself: Is this an issue really worth fighting about, or is it something I am willing to concede to get some other benefit? Some people spend thousands of dollars fighting over an issue worth fifty dollars. If the issue is not worth the cost of litigation, be willing to give. Do not let ego or stubbornness prevent you from reaching a good settlement. Keep your eye on the prize: the resolution of your conflict, so you can move forward in your life without the risk, cost and suffering involved in litigation.

2. **Know your risks and your risk tolerance.** Before you mediate, you should have some understanding of what your life may look like if you do not settle. What are the costs involved if I do not settle? What are my chances of success? What happens if I lose at trial? Am I okay with risking a bad outcome?

3. **Know the issues in dispute.** If you are going to be dividing assets, educate yourself on an approximate value of those assets. Mediators cannot give legal or accounting advice, so if you have those kinds of questions, get them answered. If you do not know how to get the answer to your questions, the parties and the mediator can address methods of obtaining knowledge in mediation. For example, the parties may choose to jointly hire an appraiser to value a business, a home or a piece of art. If only one party has necessary information, that information can be shared through the mediation process.

4. **Keep your emotions in check.** Conflict can make us all crazy. However, if your goal is to settle a dispute, rather than to, say, seek vengeance, do your best to keep a clear mind. Treat mediation as a business negotiation, and rely on your loved ones to help address the pain you are undoubtedly feeling.

5. **Think creatively.** Mediation allows you to consider options that the Court would never address. For example, you can contract for the payment of a common child's college education in a mediated agreement. You cannot do that at trial. Thinking "outside of the box" may result in a much more satisfying resolution of your conflict.

6. **Be ready to compromise.** If you come to mediation with a position from which you are unwilling to move, then not much benefit may be derived from mediation. Come in with an open mind. Most people have an ideal settlement in their heads. However, people should also consider their worst case scenarios and reasonable compromises.
7. **Take deep breaths before reacting to something you do not like.** If the other mediation participant makes an offer that you find insulting or insane, ask clarifying questions instead of blowing up. It could be that the two of you just have a misunderstanding that can be cleared up through conversation. Through a calm

discussion, the other person may determine that the offer he/she made was not fair, or you may see that the offer was not so bad after all.

8. **Make it easy for the other person to say "yes."** Your goal is to get the other person to understand your point of view and agree with it. If you are insulting, demeaning, dismissive or otherwise rude, do you think that other person is going to be motivated to agree to what you want? If your suggestion benefits only you, will the other person agree to it? Think about your delivery and demeanor and be able to tell the other person what they have to gain from your proposals.

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While mediation benefits almost all people in conflict at almost any stage of the conflict, the following is a list of times when mediation may be particularly helpful.

- **The other party is unrealistic about his/her chances at trial.** While a mediator will not proclaim who will win or lose or who is right or wrong (a mediator has to be neutral), the mediator can help parties get to reasonable positions by using guiding questions and other techniques. These temperate strategies allow people to come to their own conclusions as to the strengths and weaknesses of their case and the pros and cons of litigating. Therefore, people are more likely to embrace those conclusions.

- **The other party is emotional.** Mediation helps parties separate the emotion from the conflict. Emotion often gets in the way of resolution, clouding the issues. Conflicts are often really just business negotiations lost in the emotions of hurt feelings and indignation. Trial is actually very emotionally unsatisfying for most parties. In mediation, the emotional party has the opportunity to feel like someone has listened to his/her concerns, which often allows them to put the conflict behind them.

- **Trial and trial preparation will be expensive and time consuming.** Mediation allows parties to resolve conflicts quickly and inexpensively. Mediation works a majority of the time.

- **The trial is set too far off.** The wheels of justice turn slow. Courts are busy. Some conflicts just can't wait the months or years for a trial. Mediators can often schedule mediations within one or two weeks.

- **Confidentiality will benefit the parties.** Unless sealed, all filings with the Court are available to the public, and anyone can observe most trials. Even if a party is not a public figure or a professional, most people do not want private or embarrassing facts that sometimes come out during litigation to be public. Mediation offers the confidentiality that many people seek in conflict resolution.

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Donna Williams is an attorney for over 20 years with a law practice now dedicated to conflict resolution and management since 2010. Ms. Williams has mediated workplace, family and other conflicts affecting both individuals and organizations. She has taught mediation and conflict management skills and conducted neutral workplace investigations.

Ms. Williams honed her mediation skills while volunteering as a mediator for the Arizona Attorney General's Civil Rights Division, mediating complaints of discrimination, sexual harassment, retaliation, public accommodations and housing discrimination. She currently mediates special education matters through the Arizona Department of Education/Dispute Resolution and just recently became a contract mediator mediating workplace issues within Veteran's Administration facilities nationwide. Ms. Williams also serves as an attorney member and settlement officer for the Arizona Supreme Court Attorney Discipline Panel, helping to resolve some of the most challenging attorney discipline matters. She has served as a Judge Pro Tem in Superior Court since 2012.

Ms. Williams holds a Bachelor of Arts degree in Sociology from the University of California, San Diego, and earned her law degree from the University of California, Davis. She is a licensed attorney in Arizona as well as Maryland and Nevada. Her commitment to alternative dispute resolution is further enhanced through her involvement with the American Bar Association's Dispute Resolution Section, State Bar of Arizona's Alternative Dispute Resolution (ADR) Section Executive Council, Arizona Association for Conflict Resolution (AACR) and the Maricopa County Association of Family Mediators (MCAFM).

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JUDGE PRO TEM DOs & DON'Ts

By Donna Williams, Esq.

- DO prepare for the settlement conference by thoroughly reading the settlement conference memoranda and case history.

- DO pre-conference with the parties separately before the conference if the case is particularly complex, highly emotional or has very high-stakes.

- DO use your introduction of the process to explain your role, set the tone for negotiations, transition the parties from advocacy to problem solving, build rapport, and point out any obvious areas of agreement.

- DO create an agenda with the parties of the issues that need resolving. Decide which issues to tackle first.

- DO spend time allowing the parties to "have their day in court" by allowing them time to tell their story.

- DO help the attorneys and parties see beyond the case they have built so they can become advocates for settlement. (i.e., explore BATNA, WATNA, costs/benefits, pros/cons, strengths/weaknesses, risks/rewards, contested facts, etc…)

- DO help the parties understand that the goal is not to "win". Each party will dislike some aspects of the settlement agreement.

- DO use caucusing to check-in with the parties, provide some breathing room, manage emotions, explore interests and discuss areas of impasse.

- DO play Devil's Advocate when the parties become too entrenched in their positions.

- DON'T allow parties to highjack the process by drawing arbitrary lines in the sand.

- DON'T forget to acknowledge areas of agreement along the way.

- DON'T allow empathy to affect your neutrality.

- DON'T evaluate a position/offer until you are asked to. Instead, ask how they believe the other party will view their position/offer.

- DON'T believe an offer is final until the parties have walked out the door. You never know what will fly until you present it. Always encourage a counter.

- DON'T work harder than the parties are willing to work towards resolution.

- DON'T forget to memorialize the agreement BEFORE the parties leave.

BIO SUMMARY OF KEN MANN

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Ken Mann currently focuses on serving as a court special master, mediator and arbitrator -- primarily on complex contractual and business/statutory tort disputes (*e.g.*, fraud, fiduciary breach, wrongful discharge, etc.) involving real estate, business, financing, M&A, securities, and executive employment, including accounting and valuation issues . He is also available as an evaluative, forensic, or strategic consultant for other attorneys.

Ken is AV® Preeminent (AZ, FL); a member of the peer review organizations National Academy of Distinguished Neutrals and Arizona's Finest Lawyers; a member of the American Arbitration Association's Large Complex Commercial Arbitration and Mediation Panels and FINRA's Arbitration and Mediation Panels, including employment disputes; a volunteer attorney panel member and settlement officer panel member for the Arizona Supreme Court's Attorney Disciplinary Panel; and a former Judge Pro Tem and Settlement Officer for the Superior Court In Maricopa County. Before law school Ken was a CPA (FL, NC) and audit senior for the Miami office of Price Waterhouse (*nka* PriceWaterhouseCoopers *dba* PwC), focusing on publicly held mortgage and equity portfolio REIT's and a South Florida privately held securities broker-dealer.

Ken's 20+ years of ADR services also draw upon his extensive experience as a former business, real estate, and estate planning transactional attorney and trial and appellate litigator in civil, probate and bankruptcy courts (including seven state and federal civil jury trials and over 15 state and federal published opinions) – plus insights drawn from his having served as jury foreperson in a case that went to verdict and from observing a two-day mock jury trial .

Ken received his law degree from the Walter F. George School of Law, Mercer University, Macon, GA, where he was valedictorian, editor-in-chief of the law review, and a member of the intra-state moot court champion team. He majored in accounting at the University of North Carolina – Chapel Hill, where he was a member of the Order Of The Old Well, an honorary society.

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Requests and Suggestions for Effective Mediations

1. Whether your mediation occurs before or after the filing of a lawsuit or an arbitration claim; whether the forum or potential forum is a state or federal court or an arbitral forum such as the American Arbitration Association, FINRA, etc.; and even when I not only conducted paid mediations but also conducted *pro bono,* court-ordered settlement conferences when I served as a Judge *Pro Tem*/Settlement Officer, I have always used the terms "settlement conference" and "mediation" interchangeably, and always treated them all with equal seriousness, as elaborated upon below. Accordingly, I have always also encouraged the parties and their counsel to do likewise.

For example, although I rarely need a full week to review the parties' respective settlement memoranda and exhibits, I encourage counsel to use the seven day cut-off to in all mediations, including pre-suit mediations, to ensure that you and your client(s) as well as your opposing counsel has adequate time to both: (i) review your materials and (ii) be able to provide **your memorandum and key enclosures to their client(s)** sufficiently in advance of the mediation that *their* client(s) will also have an opportunity to review those materials before the mediation. I therefore recommend that parties' counsel exchange via email **and U.S. mail**, with cc's to me, at least seven (7) calendar days before the mediation, a settlement memorandum similar to the topics that are addressed in court-ordered settlement conferences, namely:

(a) A general description of the dispute, the key issues in the dispute, and your position with respect to each issue;

(b) A description of the primary evidence you anticipate you would present with respect to each issue stated in item (a) based on the facts currently known and anticipated to be established through discovery;

(c) A summary of all settlement negotiations, if any, that have previously occurred;

(d) An assessment of the anticipated result if the matter proceeds to final disposition;

(e) Any other information that you believe would be helpful to impart to the opposing side to advance the settlement process.

2. Please accompany your emailed **and U.S. mail** settlement memorandum to opposing counsel and me with any *key* exhibits, cases, etc. that you deem appropriate, subject to the following. I do **not** typically need or want copies of any pleadings, motions, depositions, etc. nor in most instances, excerpts thereof, nor copies of cases, statutes, etc. However, if your dispute involves not only factual disputes, but also involves issues over ***what is*** the applicable case law and/or the applicable statutory/regulatory/constitutional law to be applied to the disputed and undisputed facts, then please also provide opposing counsel and me copies of *your key leading* case(s)/statute(s), etc., with the most relevant portion(s) highlighted.

3. Although I do not have a page limitation, I share with you my observations from the countless mediations I have participated in as an advocate over more than 30 years , and the countless mediations I have successfully conducted as a mediator for more than 20 years. In the vast majority of disputes, an experienced mediator can usually be brought up to speed so as to be able to facilitate effectively with an informative, single-spaced, letter memorandum of three to five pages (or six to ten pages if you prefer 24-point line spacing), accompanied by two to five *key* exhibits or excerpts of *key* exhibits and, if applicable above, any *key* legal authorities. I will read whatever you send me. I am simply reminding you that I do not need nearly as many details and materials *to assist* you in trying to settle a case *as mediator* as I do when I am *adjudicating* a case *as arbitrator* of a binding arbitration. *Also, my observations and recommendations in ¶ 10 below regarding the tone and tenor of opening statements apply with equal force to settlement memoranda.*

4. If there is any sensitive information you believe is best communicated *ex parte* so as not to create any additional obstacles to settlement (*e.g.*, any potential cultural or religious issues, an uneducated, over-educated, or particularly difficult or idiosyncratic client, opposing party, or counsel, etc.), and that my early awareness (rather than waiting until caucus) may facilitate my effectiveness as mediator, please feel free to email me *ex parte in a separate informal memo* from the memo you serve on opposing counsel, or call me *ex parte,* as you prefer.

5. For attorneys with entity clients or multiple or out-of-state individual clients, I encourage the personal presence of an entity representative with full settlement authority, and the attendance of all individual clients, even if not required by court order. Although I have settled a number of cases over the years with key persons appearing telephonically, those mediations are typically much more cumbersome, difficult, and time consuming to accomplish than face-to-face mediations.

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6. I generally recommend we begin at 9:30 a.m. Phoenix time to avoid rush hour traffic for clients. However, I am agreeable to starting at 8, 8:30 , 9 a.m. or 10 a.m. if all counsel prefer --and, assuming, of course, that if you choose earlier than 9 a.m., your chosen location for the mediation permits an earlier starting time.

7. To be on the safe side in planning, I request that you and your clients block the *entire* day on your calendars, and not just three hours. Although if I declare an impasse, it is at least conceivable that we may conclude within three hours, please be advised:

(a) As noted above, I take seriously *all* mediations. Accordingly, I never rushed to impasse even when serving as an appointed "Judge *Pro Tem*/settlement officer," therefore conducting the mediation *pro bono;*

(b) I do not charge for any hours not actually utilized on the day of the mediation beyond my overall minimum charge of three hours (which minimum, however, also includes my pre-mediation preparation time); and

(c) I have found that a majority of mediations conducted in good faith take at least four hours, and often much longer. Equally important, I have observed, both first-hand on follow-up mediations and anecdotally from parties' counsel on their subsequent feedback, that on those mediations which did not reach a full or partial settlement initially, they often did settle in the not-too-distant future – and *specifically because* we had all initially blocked off our calendars to be available the entire day if needed, and because we had made productive use of our time on that first day instead of rushing to impasse.

8. Unlike most other mediators you likely have used, please be aware that I prefer to begin my mediations in joint session. It worked for me for roughly thirteen years as a certified civil mediator in Florida (as it has for the vast majority of Florida mediators and some California mediators I know); and those attorneys in Arizona for whom I have mediated cases over the past ten years have found to their pleasant surprise that it ***does*** work if done effectively. I will elaborate in my opening remarks at our mediation why, with all due respect for the "Arizona model" of "rush to caucus," I believe a joint opening session generally works better in achieving a settlement, and also achieves higher client satisfaction with the mediation process whether the case settles or impasses. This is so even with (and sometimes especially with) highly contentious parties. It forces clients to hear and come to grips with the fact that there ***is*** another perspective that will be presented to the judge, jury, or arbitrator(s).

9. After my opening remarks of approximately ten minutes, I typically invite each counsel, beginning with counsel for the plaintiff(s), to give a five to ten minute opening statement setting forth your perspective to the opposing party(ies). Depending on the circumstances, I may then facilitate a clarification and dialogue and/or ask the parties if they themselves would like to say anything beyond their attorneys' comments before breaking into separate caucus sessions with each party and their counsel.

10. Having used the joint opening session as a mediator for over 20 years, and having advocated for clients in joint opening session mediations since approximately 1986 (when metro Orlando civil judges began requiring mediations in most civil disputes), I offer you my following observation of achieving a successful mediation. The CNN tone and approach in presenting hotly disputed issues, both in one's opening statement as well as in later dialogue with the opposing side at the mediation -- are usually far more effective in reaching adversaries' hearts and minds and in accomplishing a successful outcome in mediation than the FOX or MSNBC squawk and screech, or the drama, tone and tenor often used with an impartial jury or judge. I am your impartial mediator; but *your ultimate audience is your opposing counsel and their client(s)*. ***They*** are ***not*** impartial, and your goal is to persuade, not to anger.

11. Because I now focus my practice on ADR, I am able to minimize my overhead (and thus my hourly rates on billable mediations and arbitrations) by utilizing a virtual office. Accordingly, I defer to counsel, whether by concurrence or coin-flip, to agree upon the location for mediations and arbitrations. In those rare instances where counsel cannot agree on using one of their offices, then subject to space availability on the date you select: (a) the Maricopa County Bar Association has conference rooms for daily rental, or (b) conference rooms may be available at no charge at the Arizona State Bar or the Downtown Justice Center. However, their hours of operation are less flexible than at most law firms, and the DJC's accommodations are rather austere.

12**.** *I request counsel for the plaintiff(s) to please advise me as soon as you reach agreement with defense counsel on the location and starting time of the mediation.*

Advocacy Tips for Mediation

by Ken Mann | ADR Office of Kenneth L. Mann

TAKE IT SERIOUSLY

Prepare yourself, but also YOUR CLIENT(S), *AND THE OPPOSING CLIENT(S)*. Bring hard copy and DVD or thumb-drive of draft settlement agreement or key points. I'm the facilitator. ***You're*** the scrivener & it's ***your*** agreement. Don't say later "omg, I forgot to include a clause about . . ." and ***Get It Signed***.

FOCUS ON INTERESTS, NOT POSITIONS

Think Needs, Not Wants: **BATNA** AND **WATNA**.

It's Compromise – Israel/Egypt 1979

- They Got What They Needed, Not What They Wanted.

CAUCUS CONFIDENTIALITY

But downside of not sharing smoking guns with adversary – No Bullets.

EDUCATE THE MEDIATOR...

Including Weaknesses – in your facts, law, difficult client, etc. – ***(Credibility is important.)*** Use your mediator to say what your client needs but doesn't want to hear. But we don't need the minutiae; we're not ruling.

REMIND YOUR CLIENTS

- Explain procedure to newbies.
- Informal; client can break for medications, consulting w/counsel, etc. if desired.
- We facilitate but we don't force settlements – they can opt for Vegas, i.e., take their chances on the judge or jury.
- ***Explain pros & cons of inadmissibility of unaccepted offers.***

REMIND CLIENTS OF MEDIATOR'S ROLE

- It isn't judge, jury, arbitrator, clergy; won't be passing judgment, but merely testing your assumptions – and similarly testing your adversaries' assumptions in my caucuses with them.
- DON'T SPECULATE on my time spent caucusing with opponents. The reasons vary.

WHY MEDIATE?

- **This May Be The Last Time You and your client(s) Are In Control Of The Outcome**
- Flexibility & creativity no judge or jury could legally give, e.g., refi; commercial annuity or other creative payment terms; sincere apology; immediate letter to big 3 credit reporting agencies.
- Certainty of outcome vs. "litigation is a luxury sport."
- Time, money, anxiety, distraction, unintended consequences of contingent outcome and delay.
- Usually, privacy of settlement terms.
- NYC: "This case will settle over my dead body." He was sooo right – 7 years later: after a two-week federal jury trial verdict; an appeal; a published opinion exposing their *modus operandi*; a 2nd mediation after reversal & remand – and his death.

YOUR CASE, NOT MINE

I'm a farmer. I simply plant enough impartial seeds for each side to reflect on the potential consequences of continued combat versus compromise. Sometimes it takes more time than one day for the seeds to sprout. But it's up to counsel and parties to water the seeds if you want to harvest a settlement. As a mediator, I'M NOT A WAITER; I'M A CHEF. I don't just run offers back & forth. Negotiations are like a meal. ***It's not just what's served, but how and when – garnish, fine china, etc.; no dessert first.*** The ceremonial negotiation dance takes everyone's time, but IN LIFE, TIMING IS EVERYTHING, including when and how to frame the acceptable offer. The mediator usually has the best view.

MEDIATION RULES

I have two rules: No interrupting when someone *IS* talking, and only one person mad at a time.

TIP: Anger should be saved for caucus. It is usually counterproductive in joint session.

THINK OUTSIDE THE BOX

Frequently, non-monetary solutions or partial solutions help, *e.g., sincere apologies*, creative payment terms, *e.g.*, gift to charity by defendant in honor of plaintiff; or ingenious equitable solutions.[1]

JOINT OPENING SESSION. WHY??? BECAUSE IT WORKS!

Clients see, hear, and observe the opposing perspective(s) first-hand. It forces your opposing counsel to educate themselves **and their client(s)** earlier than otherwise.

- You'll be seeing lots more of each other later, if the case doesn't settle. It has worked successfully for over 25 years in Fla. and elsewhere.
- Try it – ***done right***, you'll like it. THE KEY IS TO MAKE CNN-type OPENING STATEMENTS, NOT THE FOX OR MSNBC SCREECHES AND SQUAWKS. You're trying to open their minds and/or wallets, and you don't get that by bullying. Think courtship (the romantic not the judicial kind).

APPENDIX TO PROCEDURE AND REASONS FOR JOINT SESSION FIRST

We start with opening statements by attorneys.

- I caution clients to listen carefully to other side, not becaause they'll be persuaded – **but because the judge, jury or appellate court may be!**
- Slam dunk??? I formerly cited "the OJ factor"– now, "the Casey Anthony factor."
- Judges, juries and witnesses are human – hidden or oblivious biases and errors – even in criminal cases and high burden of proof.
- Professor Walden: "The only thing that makes the Supreme Court right is that it's last in line."
- And juries also make good faith honest mistakes on the law – My blonde juror's good faith confusion on the "beyond a reasonable doubt" jury instruction when I served as jury foreperson (true story). Although the juror felt sure the defendant was lying like a rug in his testimony that he had borrowed a friend's car and he didn't know the drugs were there, she nevertheless interpreted the jury instruction to mean that the mere fact he testified *automatically* created reasonable doubt. It took 45 minutes for her "aha moment" and her light-bulb to turn on *after* I asked her: "if testifying *automatically* created reasonable doubt, even if clearly lying, how could the State *ever obtain a conviction when a defendant testifies?*"

endnote

1 Although it was not mediation but a judicial order at a Saturday evidentiary hearing on our emergency motion for affirmative injunctive relief, the following creativity by the late Hon. Roger Barker exemplifies the imagination suggested for mediation. At the 11th hour, the ex-wife had told our client, a professional athlete, she would not let their daughter fly to the Midwest to attend his second wedding. Only the ex-wife attended and testified. J. Barker ordered: (i) ex-wife to let her attend; (ii) that my partner or I ***personally*** drive the daughter to and from our local airport and escort her until boarding (and upon disembarking on her return)(this was pre- 9/11); and (iii) that her father ***personally*** provide 24/7 supervision in the Midwest from her arrival to her departure. The wise judge elaborated on his ruling by explaining to the ex-wife that he was confident her opposition was not from any jealousy over the re-marriage, but was driven purely by heartfelt motherly love and concern for her daughter's safety and welfare. And in that spirit, because of her legitimate concern, and her obvious deep love for her daughter, he deemed it imperative not only that the daughter's safety be protected 24/7 as above – but also that he preserve the very special mother/daughter bond. He explained that if he denied our motion, he was fearful it might damage the mother/daughter bond and the daughter might resent her mother later for having deprived her of attending. The mother/ex-wife left the hearing feeling as if she had won. (**Tidbit:** The ceremonial courtroom where the infamous Casey Anthony murder trial was conducted is named after Judge Barker. Would that the jury and others have had his wisdom).

about the author

Ken Mann (AAA, FINRA, and Private Mediator & Arbitrator; Court Special Master; Attorney; Former CPA; Member, National Academy of Distinguished Neutrals) is an AV® Preeminent® rated Attorney (FL, AZ) for over 25 years. Ken focuses his current practice on alternative dispute resolution utilizing his education, training, temperament, maturity, experience as a mediator, panel chair, member and sole arbitrator since the 1990's, to assist parties and their counsel in achieving civility, certainty, and more efficient and expeditious closure by settlement or arbitral adjudication, as applicable. Ken can be reached at:

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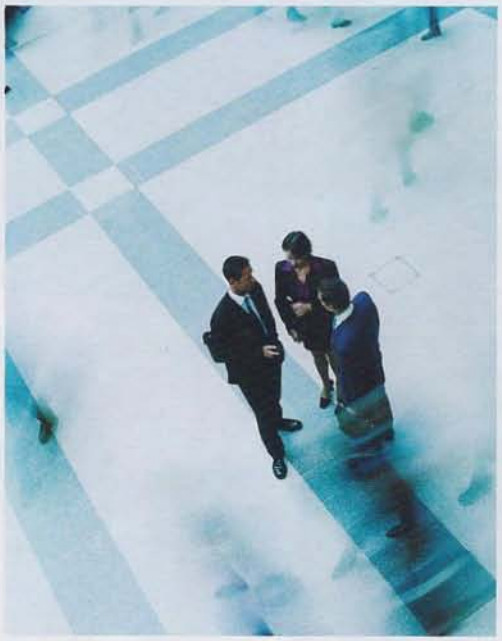

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MEDIATION and *CPAs*

by Ken Mann, Esq.

"This case will settle over my dead body!" snarled the adversary's general counsel during a break in my deposition of his boss – responding to the reasons I offered why both sides would be better served by settling than going to the mat. Unfortunately, his defiant words proved prophetic. It took about seven more years, including a two-week federal jury trial, an appeal, a reversal, and, oh yes, his fatal heart attack, before the case settled in a second mediation before the second trial.

So why should CPAs care about mediation? Because you, your employer, your company or your client may become involved in a dispute and what you know about mediation may save you money or make you money. For in-house CPAs, the examples here can be extended by analogy, so that depending on context, the employer may variously be viewed as the CPA or the client.

CPAs as Parties

CPAs may become parties to a lawsuit, whether to sue for unpaid fees, or if sued by unhappy clients (or occasionally, by third parties asserting some basis to sue), or both – e.g., where a sued client not only denies liability, but also files a counterclaim that your services were deficient. Even assuming you recoup (or your carrier pays) some or all of your legal fees, the CPA loses – forever -- the billable time that you devote to that litigation. I fully understand fighting as a matter of principle; but don't lose sight of the interest.

Physicians are probably the most steadfast profession in reluctance to settling when sued, often to the consternation of their insurers. However, in recent years, several well-known and highly respected self-insured hospitals have begun using pre-suit mediation of medical disputes, among them, Rush Hospital in Chicago, University of Michigan Medical Centers and Drexel University in Philadelphia, with remarkable results.

Not only did disputes get resolved much more quickly, inexpensively and privately, but the vast majority of patients, physicians and attorneys who participated were pleased with the outcome even when the mediation failed. (Not surprisingly, these pre-suit mediation programs typically screened out cases of gross malpractice; but the hospitals also made good faith, concerted efforts to settle those as early as possible, in post-suit mediation.)

Often, the mere presence of the physician at the mediation, and an "I'm sorry," were enough to satisfy the patient or the deceased patient's family with the mediation process, even when accompanied by no money and only the physician's frank *but empathetic* explanation of why bad things can and did happen without conduct below the applicable prevailing professional standard of care (and sometimes, accompanied by the hospital's agreement to improve certain protocols going forward). This stood in contrast to the "conspiracy of silence" that often pervades bad medical outcomes. Additionally, the hospitals received the advantage of early input into how they might improve their procedures where the conduct didn't quite rise to negligence, but could have been better.

The State Bar of Arizona has a long-established, voluntary, no-cost, successful, binding arbitration program for resolving attorney/client and attorney/attorney fee disputes, but unfortunately does not currently have a formal mediation program for fee disputes. (However, it does use volunteer "settlement officers" to mediate disciplinary complaints filed by the Bar after an independent, volunteer committee of attorney and public members has found probable cause of an ethical violation.)

Some attorneys' retainer agreements/engagement letters require their clients to agree to binding arbitration of any future fee disputes. Some offer it after a dispute arises. Regardless, suggesting or requiring ***mediation*** as a first step - if not in the engagement letter, then at the first hint of a dispute—may be the best option for lawyer or CPA/client relationships.

If the above sounds attractive, ASCPA members can seek a mediator or arbitrator themselves, or obtain one through the American Arbitration Association. I understand there is currently no provision in the CPA licensing statutes expressly addressing alternative dispute resolution.

CPAs As Experts

Prudent parties consult their CPAs, and sometimes other financial experts, before (and occasionally during) an important mediation.

For example, a CPA's advice before settlement is prudent regarding potential significant tax consequences and/or GAAP reporting requirements under various settlement alternatives; and if a structured settlement via annuity is contemplated, a knowledgeable insurance broker is also essential— for quotes, carrier ratings and options. Similarly, "a picture's worth a thousand words." Timely brainstorming with counsel and one's CPA in preparation for mediation often generates visuals, compilations, etc. that clearly and persuasively demonstrate the key financial matters for opposing parties, counsel, and the mediator. (Most lawyers don't take accounting courses as an elective. Accordingly, your informational charts, etc. should usually assume all parties' lawyers have the accounting knowledge of the average judge and juror—zero.)

In general, mediators are bound by confidentiality unless waived. Furnishing the mediator "smoking-gun" documents in strict confidence often accomplishes little besides mediator education. After all, the mediator is the neutral facilitator to persuade one's adversary, and necessarily cannot be as persuasive if his/her lips are sealed regarding the confidential documents.

Closing Observations

I recall mediating a dispute (before our current economic tsunami) between a managing partner and his less sophisticated silent partner over their numerous and diversified real estate holdings. Both parties brought their CPAs, and both parties had outstanding attorneys and CPAs. I believe the parties' counsel, and I did a worthy job in effecting a mediated settlement (signed near midnight); yet, I'd have to give the MVP award to the parties' CPAs.

Mediation won't work if conducted in bad faith, or, as occasionally occurs, if a party or its counsel inadvertently sabotages the process. (For example, "you're a crook and we'll prove it at trial" rarely endears a defendant into cutting a settlement check – even if he is a crook.) However, properly and timely utilized —sometimes pre-suit, other times after some preliminary judicial or arbitral skirmishes, but usually before tempers and positions harden into steel and "scorched earth" has become the battle cry— mediation can be a valuable tool. Mediation can minimize the time, professional fees, related costs, executive and staff distraction, publicity, emotional baggage, etc. devoted to conflict resolution, and yield the best overall outcome. To litigators, combat is exhilarating, and there are some matters that simply can't be resolved any other way. But for most parties and disputes, closure and control over the outcome are usually preferred. Using a trained and experienced mediator can enhance the odds of closure on acceptable (and often creative) terms. Trials are a little like do-it-yourself open-heart surgery. You have the right; but the results may prove disappointing. AZ CPA

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