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ESSAY

WHY MEDIATION WORKS

Joseph H. Paulk*

Attorneys are trained by some of the most prestigious instructors in the world to solve other people's problems. If this is so, then why is it that lawyers need others to assist them in resolving disputes? Therein lies the ultimate difficulty of practicing law and being a dispute resolver. The dichotomy of representing a client's interests and respecting an attorney's self-interest create problems and obstacles that all attorneys must overcome. It is very difficult for an attorney to shift between roles on a moments notice while appearing consistent to a client. Sometimes lawyers are warriors, other times lawyers are counselors and occasionally lawyers are babysitters. In the business of litigation, the work is slowly shrinking as clients search for alternatives to traditional avenues in

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In addition to his ADR and litigation practice, Mr. Paulk has published numerous articles. Mr. Paulk was appointed as an Adjunct Professor of Law at both the University of Arkansas Law School and the University of Tulsa Law School where he taught Mediation and Negotiations, respectively. Additionally, Mr. Paulk serves in the Adjunct Settlement Judge Program for the Northern District Court of Oklahoma and is an approved panel member of mediators for the Western District of Oklahoma. His professional affiliations include: Charter member of the Alternative Dispute Resolution Committee of the Oklahoma Bar Association; American College Civil Trial Mediators; where he serves on the national Board of Directors; Society of Professions in Dispute Resolution, where he served as international Co-Chair of the Court Sector; Professional Responsibility Committee of the Tulsa County Bar Association; American Bar Association; Alternative Dispute Resolution and Litigation Section; American Inns of Court; American Board of Trial Advocates; Oklahoma Bar Foundation; and Former President of the Oklahoma Association of Defense Counsel.

litigation, such as mediation.

The popularity of mediation is perplexing. The process itself is simplistic in form. Yet, the dynamics that occur during the process are often dramatic. Disputes in which attorneys and parties may believe have no chance of resolution often do come to an amicable resolution. How does this happen? Why did it not happen earlier in our legal system? What elements were missing in the negotiation process with the attorneys that hindered its development? Finally, who is the person, the mediator?

In theory, the profession of mediation should involve only highly trained and skilled individuals with multiple talents to assist all parties in resolving their disputes. However, this theory does not stand up in real practice. Anyone may represent to the public they are a mediator. There are no education minimums. There are no professional standards. There are no requirements of experience or licensure, excepting those who choose to work via a court-sponsored program. Therefore, selecting the correct mediator is important and may take a considerable amount of time in researching the backgrounds of the mediator to find the appropriate match.

To aid an attorney in choosing the correct mediator, an attorney should inquire into the mediator's special training in the field. Also, an attorney should research the mediator's practical experience in the specific areas in the dispute. Finally, ask for references from the mediator. As consumers of the mediator's services, an attorney and a client must search for the best mediator for the situation that is involved.

Again, why does mediation work? Simply put, the parties trust in the process and the parties desire to reach a conclusion through a negotiated settlement.

I. LITIGANTS FRUSTRATION

Why do parties to litigation trust mediation over our judicial system even when parties to litigation have less of an understanding of the process of mediation? Often the parties quickly realize that unlike television sitcom programs, lawsuits are not resolved in a one hour time period. Parties become frustrated with the delay and expense of the traditional litigation process. Ethically, lawyers must advise the client of options which may obtain the client's desired objectives.

The option of mediation requires involvement of both parties and the desire of both parties to maintain some level of control over the solution. In traditional litigation, parties realize quickly that they cannot control the outcome of their litigation and become frustrated with the expense and constant delays. Parties in litigation become open to alternatives and view mediation as a reasonable and viable alternative. Perhaps before the litigation began the parties would unlikely sit down in a face-to-face discussion of their positions and differences in an attempt to resolve their dispute in a non-adversarial setting. However, after two or three years of litigation the parties are perhaps more than willing to participate

in mediation.

II. SCARCE OPPORTUNITY / SELF DETERMINATION

Mediation is also successful because it is a scarce opportunity for the parties to resolve their differences in a rational fashion rather than turning over the control of their dispute to twelve strangers with no interest in the outcome. Mediation and settlement conferences, if forced upon the parties have a dramatically lower success rate compared to those when the parties participate voluntarily.

This is explained by considering the importance of self-determination of the parties. Many of us, when we were younger, rebelled against ideas that were “good” for us when these ideas were presented by an authority figure. Although it may be the best thing for us, we didn’t like the message because we had no choice. This is analogous to a rebellious young person.

However, when in litigation, the same goes for adults regardless of experience or educational background they may have. Generally, people who are accustomed to being in control, hate to be ordered to do certain things. This is so even if doing what the parties are ordered to do is the best for them in the long run.

Voluntary mediation is more successful due to the willingness of all parties to participate. It is often viewed as an oasis away from the traditional litigation process to which they must return if the mediation session fails. The mediation process emphasizes collaboration of the parties. All parties of a dispute should understand that the goal of the process is a joint exploration of options to resolve the disagreement.

Sometimes, for some parties, neither the incentive nor the objective of a lawsuit is about money. The recuperative power of an apology, either orally or in written form, may solve many cases. In traditional litigation, neither a judge nor a jury will order the party to apologize. Often these non-monetary issues impede the progress of amicable resolution. Lawyer to lawyer settlement negotiation rarely induces an apology as a term of resolution. In the mediation context the need can be identified and included in the ultimate resolution.

III. PERCEIVED AUTHORITY

No matter how often the attorneys advise their clients that the mediator has no “authority” they often see the mediator as a judge or decision-maker to whom at least initially some deference is afforded. Often people in disputes feel they need their “day in court.” To those parties, the mediator is viewed as an authority figure and fulfills that need. It is the mediator’s job to maintain independence and refrain from practicing law or giving definite legal opinions and expectations.

However, in the real world of mediation, parties often look to the mediator for guidance. It is ironic that opinions expressed through the aura of neutrality and independence are sometimes more powerful than advice given by an advocate paid by the party to represent them in the dispute.

IV. CONFIDENTIALITY

All communication is protected in a mediation setting. The parties in a mediation proceeding trust that the proceeding is confidential. They can literally; 'bare their soul,' to a mediator and nothing of which the party mentioned will be discussed with the opposing party unless directed to do so. This allows the parties the opportunity to vent which, in some instances, is all that stands in the way of a negotiated settlement. Often times, lawyers do not have enough time to listen to their clients vent over all of the client's problems, some of which may have little if anything to do with the litigation. Judges and juries do not respond well to a client's venting either. Confidentiality is critical to the trustworthiness of the process.

The parties in a mediation proceeding view the mediator as objective and impartial. They are told this by their attorneys and expect it. The art of being neutral does not necessarily eliminate the opportunity for the mediator to ask difficult questions. Often the answers are not as important as the questions in bringing around a thought provoking process in both the attorney and the party.

V. CONCLUSION

Clients are much more sophisticated today and demand options that are not attainable in the traditional court-based process. As advocates and counselors, attorneys have a duty to provide the client with appropriate options to resolve their disputes. Mediation is not the 'silver bullet' to resolve all disputes. Yet, it is a tool to hasten resolution and promote increased client satisfaction by utilizing a process in which all parties actively participate. Most clients will benefit from mediation because it works for most situations.

So why does the mediation process succeed? Perhaps it is because it allows parties to a dispute an opportunity of self expression in a risk free environment and that is enough. No risk of losing or winning just finality. Sometimes the healing can occur without a long expensive journey.

Clients come to attorneys to solve their problems. They rarely want the most expensive, public and inefficient option to resolve their dispute. Mediation, at the appropriate time and circumstance, provides clients with the opportunity to avoid these less attractive features of our traditional litigation system. For attorneys, it offers the opportunity to gain or confirm a client's trust. Trust leads to client satisfaction, repeat business and referrals, which is a win-win result not only the legal profession as a whole, but most importantly, for the client.