

Mediation: An Option to Consider

by *Laura A. Athens*

Most attorneys are acquainted with the benefits of facilitative mediation.¹ The advantages to the parties include having an opportunity to express interests and concerns directly to the opposing party, taking an active role in the negotiation process, participating in the design of the final agreement, maintaining privacy and confidentiality, and, in many instances, expending less time and money than in a fully litigated case. When parties are actively involved in formulating the mediated agreement, they tend to be more invested in the result and less likely to pursue future litigation on the same issues. Mediation is advantageous to parties who will have a continuing relationship; because the process facilitates communication and cooperation, preserves the relationship, and teaches fundamental negotiation skills.

Mediation also benefits the attorney in numerous ways. Litigation can create perverse incentives. The longer it takes to resolve a matter, the more the attorney earns in hourly fees. This may not, however, be the reason many attorneys seem reluctant to pursue mediation. Some attorneys may be reluctant not because they would earn less money, but because the entire philosophy underlying mediation is enigmatic to them. In litigation, attorneys zealously advocate and

defend the client's position. Attorneys do not focus on the other party's interests and concerns and have little training in developing creative solutions to a dispute. Litigation, by its very nature, is divisive. A win-lose philosophy permeates the adversarial process. Mediation requires a shift in focus to interest-based negotiation. In mediation, the needs and concerns of the parties are paramount, and joint problem solving replaces positional bargaining. Innovative solutions and mutually satisfying results are more likely to occur because the parties and their advocates are encouraged to cooperate rather than compete. A win-win philosophy prevails.

Those who are reluctant to try the mediation process should heed the old adage: "Try it, you may like it." Once an attorney has experienced a successful mediation, even if the success is merely a partial resolution, a means of informal discovery, or a clarification of the issues, the attorney is more likely to appreciate the benefits and consider using mediation in subsequent cases.

It is possible that some attorneys may be confused by what has been called mediation; but is, in fact, non-binding arbitration or neutral evaluation by a panel of experts. Mediation takes a number of forms. In facilitative mediation, an impartial, neutral facilitator assists the parties in identifying and communicating their

interests and concerns, generating a variety of options, evaluating the alternatives, and reaching a mutually agreeable solution. Parties are encouraged to reach a creative agreement that meets the needs of all concerned. A resolution is not imposed upon them by attorneys or judges; instead, it is created by and for the parties.

Some attorneys may worry about obsolescence. If parties can reach their own agreements, then they might perceive no need for an attorney. This concern is analogous to a parent's concern that a child might outgrow his or her need for the parent. In reality, an adult child continues to need the parent, but in a different manner. Parties still need attorneys to inform them of applicable legal standards, advise them of their legal options, protect them from being exploited, counsel them regarding the chance of success through more customary legal channels, and assist them in formulating legally binding agreements. Mediation is voluntary; a party may decide to terminate mediation at any time to pursue litigation.

Fewer clients are willing to tolerate the extraordinary costs and excessive delays associated with traditional litigation. Litigants are seeking more expeditious and economical ways to resolve disputes. Facilitative mediation allows parties to be masters of their own destiny. Attorneys, by

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presenting facilitative mediation as an available option, will enable their clients to take a more active role in the process of dispute resolution and have more control over the ultimate outcome of the controversy.

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Footnotes

- 1 Facilitative mediation refers to the process in which the mediator, a neutral, impartial third party, helps the parties to reach a mutually agreeable solution to the issues in dispute. The mediator has no power to impose a decision on the parties; the parties must mutually agree. Facilitative mediation differs from court mediation pursuant to MCR 2.403, which involves case evaluation by a panel.

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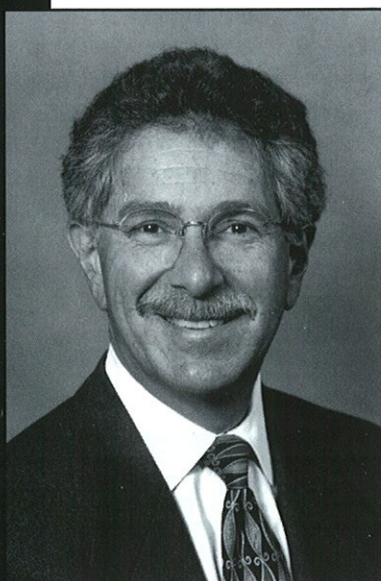
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