

## Dispute Resolution Section Profile

### Learn to swim in the deep end of mediation—but if you prefer wading, that's fine too

By Simeon H. Baum

As we enter the 10th year of NYSBA's Dispute Resolution Section's existence, it is gratifying to see how our field has grown. We see growth in the use of alternative processes—mediation, neutral evaluation, and arbitration. We witness greater sophistication even in the use of that granddaddy of dispute resolution processes—negotiation.

In arenas ranging from corporate to family matters, both parties and counsel demonstrate knowledgeable application of principles of cooperative, mutual gains, joint problem-solving approaches to negotiation promoted nationwide in law schools and CLEs, and through such bestsellers as Fisher & Ury's "Getting to Yes" and "Getting Past No."

While many make good use of mediation, there remains a range of opportunities in mediation that counsel are invited to explore. Mediation is a deep lake layered with varied zones for meaningful engagement and reflection.

#### Facilitated negotiation

Mediation is most commonly seen as a confidential, facilitated negotiation. Unlike its dispute resolution cousins, arbitration and litigation, mediation does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision-making.

The mediator is a special type of neutral party. He or she is a deep, compassionate listener; less on one's side, and more on everyone's side. The mediator models active listening (validating, empathizing, clarifying and summarizing) and helps reframe communications in a constructive direction.

Mediators, under this model, serve parties by greasing the wheels of negotiation. From this vantage point, the mediator conversant with contemporary negotiation theory can support parties and lead them through a problem-solving approach to resolving their dispute.

Counsel representing parties in this process also benefit from a sophisticated understanding of negotiation theory and skills.

#### Win-win negotiations & deal-making

Fisher, Ury and other contemporary proponents of negotiation theory and skills offer excellent advice to negotiators and users of the mediation process. They posit that parties are driven by interests. Like the Italian economist Pareto, who defined the optimal deal as that which most satisfies the interests of all parties, contemporary theorists urge negotiators to seek to design deals along these lines.

As Fisher and Ury taught, we discover interests through productive discussions. Being "soft on the people" by constructive communication; avoiding *ad homina*, threats, gamesmanship and dirty tricks; and building trust are more likely to induce ones counterpart to reveal interests that can be the building blocks of a deal. Being analytically "hard" on the issues—learning what stands in the way of satisfying parties' interests—reveals clues that enable parties to

fashion options meeting the parties' interests.

Negotiations are kept on track if parties consciously identify standards that everyone can accept. Parties are further aided in deal-making by considering where they would be left by not taking the deal on the table. Fisher and Ury termed this concept the "BATNA," i.e., the best alternative to a negotiated agreement.

**'Mediation exemplifies humanism,'**

— Simeon H. Baum

#### The BATNA and evaluation

As parties in mediation assess whether a proposed deal makes sense, they might consider whether other deals are possible or whether the gains offered in a proposal on the table equal or exceed their condition should they reject a deal altogether. When parties are in litigation, a primary alternative they might consider is litigation itself.

Mediators can be very effective in helping parties and counsel engage in dialogue and contemplative reflection concerning the risks and transaction costs associated with litigation. This can be cultivated in joint sessions, with all parties around the table, or in private sessions—known as caucuses—where the mediator can help parties reflect on case risks and costs without the need to save face or display strength and commitment level to maintain strategic leverage.

Depending on their orientation, different mediators might be more inclined to have parties arrive at case and transaction cost assessment by facilitating their own communications and reflection or by sharing the mediator's own prediction or evaluation.

#### Empowerment and recognition

While problem-solving and deal-making, aided by the parties' analysis of risks and transaction costs, are valuable indeed, mediation may have more to offer. Surprising though it might seem, Baruch Bush, Joseph Folger and other proponents of "Transformative Mediation" see the mediator's purpose not as settling cases or solving problems, but as fostering party empowerment and recognition.

Transformative mediators are pure facilitators. They follow the parties, reflecting back their communications with a "micro-focus" that takes its cues, meanings and directions from where each party is.

#### Understanding in mediation

Jack Himmelstein, Gary Friedman and their colleagues have spent over two decades developing an approach that sees deepening understanding as the heart of mediation. As parties move beneath the "v" in *Jones v. Smith*, they come better to understand themselves, each other, and their contexts—legal, economic, relational, hierarchical, and more. This growth of understanding is seen as the most fundamental opportunity offered by mediation, and as the source of real resolution.

To avoid reinforcing the divide embodied in the parties' dispute, Himmelstein and Friedman urge a transparent approach in mediation that maintains joint session throughout, dispensing with separate, private caucuses. Parties to mediation in this model "contract" to stay together and seek to understand, despite the emotions this might stir and the frustration this might engender.

Mediators in this model listen and communicate with a loop of understanding, embracing and reflecting back the speaker's meaning until the speaker acknowledges that he or she has been fully understood.

#### Navigating mediation's waters

Mediation can be seen and used in many ways. Practitioners and counsel might, e.g., think of using a Transformative Mediation approach for a family matter or an embedded employment dispute. Perhaps, counsel or parties might seek an understanding-based practitioner for a partnership matter, where a continuing relationship is desired. In a complex commercial dispute, counsel might seek out a mediator who is skilled at enabling parties to encounter and assess the risk and transaction cost associated with litigation. Or, in a distributorship dispute, perhaps a mediator skilled in problem solving approaches would be ideal. These examples are not prescriptive. Different counsel might seek different mediator styles and orientations for the same matter.

Mediated matters need not fit neatly into one theoretical box. Mediator Lori Matles coined the term "360-degree mediator" for one who draws on a range of theories, and applies a variety of skills and techniques, as is needed and appropriate in a given set of circumstances.

#### Take the plunge

There are many ways of understanding the rich potential of mediation. As parties search for fairness and grapple with the actualities of imperfect human behavior and the limitations of circumstances, we may recognize mediation as a forum for the working out of the norms of justice and harmony.

As people struggle to make choices and be heard—and as we build understanding and acceptance of ourselves, each other, and circumstances—we may see mediation as a gateway of freedom and compassion.

There are times when mediating parties achieve moments of deep insight, appreciation, truth and acceptance. And there are times when people leave the table irked, but with a deal.

However it is used, mediation has much to offer. The waters of mediation beckon us to bring parties for a swim, and see where the current leads. ♦

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