

THE HUMAN FACTOR IN MEDIATION

Although it may seem strange, twenty years ago, just prior to the passage of the Texas ADR Act, the only mediations were at the dispute resolution centers (DRC), and even they were new. In 1983 they were authorized, there are now seventeen, and the centers in Fort Worth and Dallas were two of the first. Arbitration had been around for many years; other forms of “alternative” dispute resolution procedures were generally unknown. In the early 80's the few practicing mediators came from the mental health field. Some attorneys knew what mediation was; those that did were usually resistant to it, yet today the introduction of ADR has been termed the most significant change in the practice of law in Texas in the last quarter century.

The style of mediation until 1987 came from the DRC's with parties communicating in joint session, facilitated by mediators. After 1987 newly trained attorney mediators used a different approach, formed by their legal education (no one knew what it was in law school) and experience as litigators. Predictably, the style that is often seen today resembles a judicial settlement conference: attorneys have primary responsibility for getting a compromise agreement, based on the strengths of their legal case. Mediators are told to eliminate the joint session and shuttle between caucus rooms. Is either approach better for a particular case? Experienced mediators now believe the forum should be flexible, custom designed by the attorneys, parties and mediator. As one Ft. Worth mediator, Beth Krugler, advertises “When you want a mediator, not a messenger.”

The adage “If it ain't broke don't fix it” may spring to the mind of readers. Haven't the courts benefitted by the institutionalization of ADR? Yes, although many judges believe the actual rate of settlement is not much higher than in 1987. Hasn't this given attorneys a way to settle a case sooner and without having to get an appointment with a busy judge? Yes. So why change the way we conduct mediations? According to the father of ADR in Texas, Judge Frank Evans, the Act wasn't intended to benefit attorneys or judges but was designed to help parties enjoy the benefits already being achieved at the DRC's: to be really heard, to have their “day in court” in *mediation*, a confidential, not public forum; to get a collaborative, creative resolution rather than a win-lose outcome. Maybe that is why the Act defines mediation as facilitated communication, not facilitated bargaining.

Consider the benefits of having a joint session early in the mediation and letting the parties participate actively in communicating and negotiating, at least in caucus. Many commonly expressed concerns (the client will say the wrong thing, will get upset and the hostility already present will escalate, the lawyer will not look prepared etc.) are minimized if the attorney and client spend some time together before the mediation for preparation, far less time than is typically necessary for a trial. Even if it is deemed too risky to let the clients speak in joint session, they could at least share a physical space with their opponents in a safe, structured environment prior to caucus, listening to the mediator together. Skillful mediators, trained in facilitating communication, not just in facilitating offers and counter-offers, who are experienced in collaborative problem solving, see great benefits to the *parties* in allowing everyone to come together at the beginning to establish ground rules, hear the mediator's opening statement, make opening statements themselves (prepared during that period together before mediation), clarify the issues, resolve any data disputes and create an agenda for the day. More and more mediators

are also trained in collaborative law - a process that promotes the presence of parties throughout the negotiations. Expert *mediation* advocates similarly experience benefits in negotiating directly with the other party, at least for a few minutes, rather than having their persuasion filtered through a mediator or the other lawyer. They relish the opportunity to speak directly about their case to the other party. The more experienced the mediator and the mediation advocate, the more these benefits occur.

A recent mediation illustrates those benefits. Two neighbors had not spoken for years. The plaintiff sued his neighbor, demanding he comply with the neighborhood deed and zoning restrictions concerning the number of dogs owned. The defendant had at least fifteen dogs at the time of mediation. In caucus each neighbor said the following: no compromise or negotiation is possible, the other guy is a jerk, I have a terrible temper, he should have just come over and talked to me, we are just wasting time here. Plaintiff's attorney requested that the mediator get defendant attorney's agreement to a joint session in which the parties would talk to each other directly. Each party agreed to follow strict mediation ground rules: no accusations nor fault statements, clear and personal statements of concerns, feelings and interests, a time limit on the initial opening statements (up to 10 minutes) and communication directly to the other party, who would not interrupt and would summarize what he heard at the end. This was done very simply and eloquently by both parties.

The defendant said his dogs were family; he slept with them and could not part with any. The plaintiff summarized. The plaintiff said that when they became neighbors he was diagnosed with a terminal disease and had been undergoing grueling treatments. He explained he had nothing against dogs, or his neighbor. He described clearly the strong ammonia smell from next door after being in chemotherapy, the constant yapping when he went outside. He was concerned that his property values were diminished by living next to a "puppy mill." He apologized for being so frail he could not confront his neighbor earlier. He was articulate, appropriate, succinct and sincere. The defendant looked sad, empathetic and embarrassed as he summarized what he had heard, just before offering to buy the plaintiff's home for full market value.

In thirty minutes the case was resolved, though not by one party buying out the other. The change occurred when each had to see the case from the other person's perspective: not the legal case - the human plight of people caught in sickness, anxiety, love of pets and fear of confrontation. This does not happen in the courtroom. It happens in mediation with just a mediator, two conflicted humans, their two wise attorneys and some simple ground rules - and, oh yes, a joint session.

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