

Why Do You Need a Mediator?

Recently a lawyer asked me a deceptively simple question. “If negotiation works in the majority of cases, why do we need mediation?”

It is true that before mediation became institutionalized in the courts of Texas, 95% of cases settled before trial. It is also true that in some small counties in Texas the courts do not have a huge docket and the lawyers know each other well enough to work out many disputes during the litigation process. It is also true that mediation exacts a cost from all participants, time, money, preparation, with no certainty of resolution.

Many attorneys, business professionals, ranchers, and other folks successfully negotiate (or believe they do) many issues. Who is to say what a “good deal” is anyway? If both parties are satisfied enough to turn their energies in another direction, why turn to a professional facilitator? I offer three answers, and you can decide whether they make sense to you.

First, but not necessarily in order of importance, many people have never been taught to negotiate like an expert. A tiny percentage of college students get practical, usable, effective coaching in the art and science of negotiation. Since the 1970's, right here in the “good ole” USA, intensive research has been funded and published concerning what works and what doesn't in negotiation. An early breakthrough occurred at Princeton many years ago when the now famous Nobel Laureate, John Nash, had an epiphany in a bar. (No kidding!) It occurred to him while watching his fellow male students compete with each other for the **one** sensational girl in the room, while twenty other girls were present, that this was not an efficient way to get a date. Instead, he explained to his eager friends that they should use a cooperative strategy, ignore the sensational blonde, thereby preventing jealousy among the other girls, and each pick a different girl in the room to pursue. For this “game theory” and its corollary truths he eventually won the Nobel Prize in economics. In most conflict situations, such as the marketplace, the universal tendency is to behave competitively— that is to assume scarcity of resources (what we are buying or selling), to assume we must “haggle” with the buyer/seller because their interests are opposed to ours, and to take rigid positions at extreme polarities of the bargaining range, and reluctantly reach mini-compromises as we move toward each other, until we reach the final compromise or split-the-difference deal. Sophisticated research demonstrates that we often get inefficient, skewed results with this ancient customary and competitive approach. In fact, if we used more game theory and less “gaminess” as in the “Beautiful Mind” scenario above, we would be much more likely to both get **value** from the transaction— whatever that means to each party in the transaction. Mediators help people get more value by negotiating more effectively.

Second, shifting, at the beginning of the negotiation, to a more cooperative style actually **creates** value that can later be allocated to both parties. Value that would not be there if we assume scarcity and compete for it. Mathematicians call the assumption of scarcity “a zero sum” or “constant sum” encounter. If there is a dispute between two business partners and their competitive nature is aroused (fondly called the dinosaur

brain) they often move directly to dissolution of the fixed sum (the partnership) and compete over who gets what assets. This is destined to produce a positional approach that we often see in family cases— I'll take the pans, you take the pots. While each person may secretly believe that he or she got the better deal, it is not a particularly effective way to settle a business or family dispute. A mediator might suggest, for example, that the business partners move apart, (say one wanted to go to Colorado anyway or just another part of Texas), keep the business, open a branch office in the new location, and restructure the relationship so as to expand the revenue source, which can then be allocated equitably. The same may be true in a family situation when children are involved. Cooperating early in the negotiation/mediation by finding common objectives, such as co-parenting the children responsibly and respectfully, not liquidating assets in a bad market, but funding family members' needs by looking for tax advantages, and using assets efficiently, shifts the focus from "getting a bigger slice of the pie" to "lets concentrate on more pie for both of us." Left on their own, many people react to stress, even the marketplace kind of stress, by arguing, competing, and compromising. Coaching, either in the form of negotiation training or using a mediator as a coach, can produce very different behaviors and therefore very different outcomes. Negotiation and mediation research proves that some cooperation as well as some competition produces measurably better outcomes for both parties. Mediators change the conflict process to cooperative behaviors.

Third, we do not **connect** with people with whom we are in conflict. We try to convince them we are right and they are wrong. "Well," you may be thinking, "am I going to start from the premise that I am wrong and they are right?" Of course not. You are instead going to make a paradigm shift. You are going to begin by communicating, verbally and nonverbally, in "non-adversarial" language. Most of us talk at, not with, each other. We do this even in non-stressful situations. We do not seek to understand before we insist on being understood. We do not summarize and reflect back what other people are saying to us. We do not take off our shoes and try to see ourselves and our positions as they do. Instead we spend our time arguing our points (price, terms, conditions, facts, law, moral rightness of our position) or waiting for our turn to speak while we mentally frame our response and defend our egos ("how can they treat me this way?"). Mediators help people connect at the heart **and** the head.

In the vast majority of conflicts everyone is talking about their own perception of reality, competing for scarce resources and believing their position is better, more defensible, than that of anyone else. If these statements are untrue, then what prevents people from cooperating in conflict to achieve mutual gain? It is our nature to pursue what we need and to have conflict when our needs appear to be, or actually are, unmet.

There are many elegant and highly effective methods of getting a better deal. We just do not learn what they are in school, and trial and error does not teach us much either. How good a deal could we get by negotiating better? Using a mediator enables parties to negotiate better if only because the mediator has had negotiation training and is neutral.

What can mediators do to help parties get efficient outcomes that are demonstrably better deals than they could have without mediation?

1. Get parties to agree to cooperate in the early part of the process by expressing their feelings and needs and by brainstorming options and sharing information about such things as priorities and preferences.
2. Shift the focus to “create value” first by really exploring many creative solutions to the issues on the table.
3. Monitor and choreograph the “dance of competition” to produce trade-offs by which each party gets what it values more and gives up what it values less (relative value preferences).

Parties do not need mediators to solve their problem. They need mediators to solve their process. Experts (accountants, attorneys, physicians) solve problems for their clients. They are good at it. But after the expert solves your problem, it may not go away if your real problem is with another person. You can get a family divorce or a business divorce. But what if the real problem is the relationship that cannot end (parents) or should not end (profitable business)? Value creation methods and empathetic communication are better long term techniques for resolving the sources of those problems, which then won't come back to bite you. Mediators solve people problems in a people focused process.

If you have a problem that needs attention-- call a mediator.