THE MAGIC OF MEDIATION

by Michael Palmer

Sarah was not about to pay for wrong-sized, custom-made cans. George was in a mood to pursue his collection suit all the way to . . . well, you know. In a cool-headed moment, though, George and Sarah were persuaded to give this new-fangled mediation thing a shot. Neither knew anything about it.

After the lawyers made brief presentations, the mediator asked them to go outside. The mediator then let the parties tell their versions of the story. He began talking to George and Sarah about matters that seemed unrelated to whether George had shipped the right cans or whether she had a legal duty to pay for them.

Over several hours, George and Sarah discovered how to solve their problem. Having recognized that the interests of each party were better served by cooperating as opposed to fighting, they fashioned an agreement. Sarah would buy cans for 5 years from George at a 10% surcharge over his normal price. Sarah would actually save money with this arrangement because her alternative supplier's price was significantly higher than George's adjusted price. George would recoup the price of the wrong-sized cans over time. Sarah would use those cans for odd lots.

The mediator functioned more as a catalyst than as an architect of the agreement. The parties came up with the terms on their own.

Together George and Sarah saved at least $25,000 in legal fees, which was the amount in controversy. Each got a much better outcome. And neither was grumbling about the legal system and their expensive lawyers.

At the celebratory dinner later that evening, George heaped praise on his perplexed lawyer. The lawyer had done little more than arrange for the mediator and sit outside during most of the mediation. Yet he got credit for the remarkable outcome.

That was over 15 years ago. Sarah is still buying cans from George. They both continue to put the profits from their relationship in the bank.

The Litigation Paradigm

Mediation can sometimes be best understood against the backdrop of the litigation model. Our adversarial system reaches back to ancient times when two champions would engage in trial by combat to determine the winner of a legal dispute.[1] No matter how much we have gentrified this duel with rules and ethical restrictions, it is still a fight.

[1] *See* F. Pollock and F.W. Maitland, *The History of English Law* 51 (Cambridge 1899). W. Scott, *Ivanhoe* contains a classic description of this form of dispute resolution.

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In the hands of its best practitioners litigation is an effort by each side to win, to overcome the other, to crush the adversary, to reduce the other party to rubble. Our most vicious instincts are aroused—all the while a judge exhorts the combatants to "behave toward each other like adults instead of children." Judges seldom have the discretion to decide matters Solomonically. In the courtroom it's winner take all.

Litigation enflames disputes. It tears open fresh wounds. And it does so at great financial and emotional cost. At the end of it all, the parties' relationship is more severely strained than ever, perhaps destroyed. Nowhere is this more evident than in divorce cases. People who by definition could not solve their shared problems are thrown into a process that fans passion's embers into a roaring fire that engulfs husband, wife, and children.

Litigation:

- looks backward only;
- encourages fighting;
- elicits defensive behavior;
- fosters demonization;
- promotes an us/them mind set;
- increases alienation;
- breeds dishonesty;
- rewards deception.

Litigation fragments the people and the problem. People are treated as objects, being made to sit around while lawyers carry on private caucuses with the judge.

The litigation ideology rests on the legal fiction that cold, objective facts can be known and that a pristine reason applied to those facts will lead to in justice. In actuality, as Judge Irving Younger observed, the purpose of trial is to bring legal disputes to an end. Justice is an accident.

"We'll show them" gives way to the tedious, dreary job of slogging through the swamps of discovery and pre-trial motions. Time doesn't pass; it drips like a Chinese water torture. Costs mount . . . and mount . . . and mount. By the time the case gets to trial, the initial anger has often turned into bitterness that poisons the parties' lives.

No wonder Learned Hand feared litigation more than major surgery. Lewis W. Dilwyn likened those who go to law for redress of grievances to "sheep running for shelter to a bramble bush." As for the profit thereby, Ambrose Bierce summed up the minuses when he defined litigation as "[a] machine which you go into as a pig and come out as a sausage."

What is Mediation?

During the last 25 years, an alternative paradigm has been forming alongside the fight model. In this alternative, parties resolve conflicts by discovering options that provide a better deal for each party than the best possible outcome under litigation. Mediation is not the only form of this paradigm; but it is perhaps the most powerful and unquestionably the most wide-spread.

The mediation model is altogether different from litigation. It is informal. It is nonbinding. The parties are encouraged to focus on their interests instead of demanding their rights. Parties come to see their conflict as an opportunity to create mutual gains, new value.

The parties have a forum in which a neutral person listens to their feelings and concerns as well as to their respective views of the facts. Where the judicial process is hostile to the emotional reality that pervades most disputes, mediation explores and investigates the emotional face of conflict. Mediation recognizes that “le coeur a ses raisons que la raison ne connait pas.”[2]

The mediation process permits the parties to vent emotions, to tell their respective stories to a receptive listener and to fashion solutions without regard to legal rules. No one forces them into an evidentiary straight jacket that excludes all hearsay and irrelevant testimony. Mediation recognizes the legitimacy of conflicting perceptions without engaging in the self-deception that there is always one objective truth.

Mediation is third-party assisted negotiation of a dispute. It is voluntary and nonbinding. The mediator is *not* a judge or an arbitrator. Her role is not to find facts or impose a result.[3] Instead, the mediator listens to each party and helps both parties explore creative ways of resolving the conflict.

Mediation can transform relationships.[4] In getting together with the help of a skilled third party, the disputing parties often transform their fight into a relationship of mutual gain. As with George and Sarah, destructive energies are frequently rechannelled into positive endeavors.

Mediation:

- looks forward to what can be done from here;
- seeks to satisfy each party’s interests;
- encourages creative problem solving;
- promotes mental health;
- fosters openness;

[2] Pascal, *Pensées*, 1670; no. 423.
[3] Mediation is frequently confused with arbitration, which is a private form of the adversial, adjudicative model. Mediation does not include fact finding or an adjudication.
[4] *See* R. Bush and J. Folger, *The Promise of Mediation* 79-188 (San Francisco: 1944).

- helps repair damaged relationships;
- conduces to honesty;

Litigation and Mediation Complement Each Other

Mediation is not a panacea. Litigation has a legitimate and necessary role to play in deciding constitutional questions, handling class actions, establishing precedents, and resolving conflicts involving severe power imbalances or physical abuse. Where the determination of rights is the paramount need, the parties will continue to submit their dispute to a court.

But mediation is not merely an adjunct of the adversarial system, a quick, cheap, and dirty way of clearing the court's calendar. Mediation and litigation differ in fundamental ways. The techniques are different, the goals are different, and the outcomes are different. It is a mistake to view them as being merely different manifestations of the same dispute resolution system.[5]

To go to law, as the English put it, is to admit that we cannot solve our problems. It is to surrender that aspect of self-determination to someone else. To mediate is to affirm our ability, with a little help from a neutral party, to work it out together.

Which is the better model for the future? Would you rather live in a society in which everyone goes running to the courthouse mommy every time a dispute occurs or one in which mature adults know how to manage and solve the conflicts that occur in their lives on their own?

Lawyers are universally disliked, I am convinced, not because we behave any worse than people in other professions or occupations. Rather, people associate us with the unpleasant—for some, embittering—experience of a lawsuit. We are seen as people who hide or twist the truth, who enflame passions, who drain our clients of valuable resources while engaging in skirmishes that do little to bring the matter to a close, and who conspire with the system to prevent them from having their day in court. That perception is largely brought about by the structure of the adversary system itself. It is perhaps instructive that 15 years ago my client George thought I was a hero for having done nothing other than introduce him to different paradigm.

[5] Done properly, mediation is not simply a compromise between two conflicting positions. Unfortunately, too many lawyers, former judges, and others set themselves up as "mediators" without taking any training. Untrained "mediators" often practice a brand of baby splitting based on positional bargaining that seldom leads to the transformative benefits of mediation.