

WHY MEDIATE?

*Presentation by Kelly A. Lazerson and Timothy L. Salazar
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Disputes among people are inevitable. Different life experiences and personal expectations will conflict. Public agencies (and private business) now realize that many disputes can be managed early, before they turn into costly, and sometimes damaging, conflicts. Through the use of alternative dispute resolution (ADR) processes, like mediation, conflict prevention and avoidance can occur. Mediation is a form of dispute resolution in which a neutral third party facilitates communication between the disputants to help them reach a mutually acceptable agreement. While mediation has been around for decades, its benefits are more readily acknowledged in times of fiscal constraint and crowded court and administrative dockets.

At the judicial level, trial and appellate courts have implemented mediation programs to, in part, preserve scarce judicial resources. As recently as 2008 and 2011, respectively, the Kern County Superior Court and the Court of Appeal, Fifth Appellate District, have added no-cost mediation to the list of services provided in certain civil matters.¹ The goal of these programs is to reduce costs for the litigants and the publicly funded court system.

In government, mediation has become a vital part of agency process for dispute resolution, not only for internal conflict, but also to enhance the quality and efficiency of governmental functions.² A good model of mediation use is found in education. Special education,³ personnel management,⁴ labor relations,⁵ public relations,⁶ student discipline,⁷ and public contracting⁸ are all areas in education which utilize some form of mediation. This article will highlight various

¹ Kern County Superior Court, Local Rule 3.14, et seq.; Fifth District Court of Appeal, Rule 2.

² Government Code §§11420, et seq.; 1 CCR §§1200, et seq.

³ Education Code §56500.3

⁴ California Department of Fair Employment & Housing (Government Code §12965); Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement

⁵ Government Code §§3501(e), 3505.2

⁶ California Department of Education, Uniform Complaint Procedures, 5 CCR §§46-4687

⁷ Education Code §48900.5(b)(6); California Department of Education, *Bullying at School*, 2003

⁸ Public Contract Code §20104.4

aspects of the mediation process, from the roles and responsibilities of the participants to the benefits of a mediated resolution.

THE MEDIATOR'S ROLE

One of the most critical roles in mediation is that of the mediator. Unlike in arbitration, settlement conferences or neutral evaluations, the mediator does not decide the result or coerce settlement. Instead, the mediator's role is to aid in party communication, clarifying issues for them, providing options and, where possible, assist in documenting the resolution. Mediators use a variety of techniques (or tools) to assist the parties in coming together and fashioning their own resolution.

When deciding who should mediate the dispute, keep these factors in mind:

- | Mediation is a voluntary process. All parties must agree to participate and are free to terminate the mediation at any time.
- | Mediation is a confidential process. With limited exceptions, all communications, including negotiations and settlement discussions, between the participants in the mediation are in confidence and not subject to disclosure. (Evidence Code §1119) All participants, including the mediator, should execute a confidentiality agreement as a first step in the mediation process. This assurance of confidentiality allows the parties to brainstorm and negotiate in full confidence and good faith.
- | Mediation is guided by self-determination. Resolution of the parties' dispute is achieved freely, willingly, and knowingly, without coercion. Resolutions crafted by the parties themselves have a tendency to last without the need for external or court enforcement.
- | The mediator should be impartial and have no interest in the outcome or resolution of the dispute.
- | The mediator should be well trained in negotiation and mediation technique, experienced, professional, creative, an active listener, confident, and . . . well, you get the picture. As a general rule, good mediators do not necessarily have to be attorneys and not all attorneys necessarily make good mediators. The qualifications necessary for effective mediation will vary with the type of dispute and any legal, cultural or other factors involved, including the parties' expectations.
- | With conflict comes emotion. A good mediator will allow the expression of emotion but not blame or directed anger. The job of the mediator is to manage the process, provide a safe environment for often difficult conversation to occur and identify party interests so that mutual problem-solving can be achieved. A good mediator will have effective ground rules and de-escalation tools.
- | An important quality in a mediator is, as some say, "an iron rear-end." A good mediator will not give up and is there until the end.

- | Mediation styles will vary from mediator to mediator. Some mediators will keep the parties together through negotiations while others will caucus — separating the parties and shuttling back and forth between them during negotiations.
- | A good mediator will hover above the dispute — seeing the big picture, the parties' interests and the impact the dispute has on each of them and others connected to the dispute.
- | A good mediator is flexible.

THE PARTIES/COUNSEL ROLE

Mediation is unique in that the parties will often directly engage in discussion with the mediator and each other. If attorneys are involved, their role will often be seen as initially one of advocacy, then counsel and, toward the latter half of the mediation, problem-solving and formulating the written agreement. A well-known southern California mediator, Lee Jay Berman, provided some helpful tips for mediation participants in his article, "13 Tools for Resolving Conflict in the Workplace, with Customers and in Life," published in the *Brilliant Results Magazine*, November/December 2004 issue.

Those tips, or tools, are:

- | Stay calm
- | Listen to understand
- | Accentuate the positive
- | State your case tactfully
- | Attack the problem, not the person
- | Avoid the Blame Game
- | Focus on the future, not the past
- | Ask the right kind of questions — open-ended (not "Why did you do that?" or "What were you thinking?")
- | Pick your battles
- | Link offers - giving choices between two positives
- | Be creative - brainstorm - open-minded
- | Be confident - the process really does work
- | Celebrate agreement

An additional encouraging tip presented by the California Department of Fair Employment & Housing (DFEH) is to "mediate early and often."⁹ Once parties become familiar with the mediation process and experience success in dispute resolution, they realize the benefits of

⁹ The DFEH Dispute Resolution Division, *How DFEH Mediation Works and Why You Should Try It!*

mediation and are more apt to use mediation again, and resort to it first, when another situation arises.

FACTORS TO CONSIDER

An agreement to participate in mediation should include the following considerations:

- | Participation is voluntary — the fact that one decides to mediate does not preclude access to the courts or administrative agencies unless one has legally waived that right.
- | Consent to participate is freely given — a participant to mediation should retain the right to withdraw at any time during the process.
- | Self-determination — this is a critical element of a mediated resolution. The participants have control over the outcome.
- | Cost and time savings to all involved in the dispute — some courts and administrative agencies, like DFEH, Labor Commissioner, EEOC offer mediation services at no cost.
- | For government agencies, mediation not only resolves internal conflict, but can aid in improving the quality and effectiveness of governmental decision-making and public services generally.

The Orange Story

Once upon a time there was a mother who had two children. One day, the kids came to the mother fighting. There was one orange left in the house and they both wanted it--typical of small children. What is a parent to do?

Some parents say that they would take the orange away and send the kids to their rooms for fighting. Most parents say that they would cut the orange in half, giving each child an equal share. Finally, the parents with more experience, anticipating a further argument over which half each child wants, would improvise. By allowing one child to carefully cut the orange in half, and then letting the other child choose the half he or she wants, parents give the incentive to the child who cuts the orange to be as fair as possible, since he or she suffers the loss if the halves are not equal. Seems fair.

Luckily, this particular mother is a mediator. She takes the orange from the crying children and asks them why they want it. When asked, one child expresses the desire to make orange juice. The other is baking muffins and needs to shave the peel into the recipe. The children, with the help of their mother, compromise. By allowing one to make all the juice he or she wants, giving the leftover peel to the other only once every drop of juice has been squeezed out of it, the other gets the entire peel intact. Both are therefore satisfied.

In our society, we are raised to think that when there is a conflict, one person has to win and the other has to lose. We are not accustomed to working out win-win solutions. It is harder to do. It requires more effort. The outcome, however, is worth it. By working together, cooperatively and collaboratively, we can come up with better solutions, whether in parenting, in employment settings, in business transactions or even in lawsuits.

By asking what people in a dispute want, a mediator is able to allocate resources more efficiently, without waste, making everyone more satisfied with the outcome. Had these children hired legal counsel and fought this out in a court of law, the only possible outcome is for one to end up with the whole orange or to split it as the judge sees fit. The same goes for arbitration. Only in a mediation setting do the disputants get to discuss what they really want and why. Only in mediation is anything possible.

Lee Jay Berman is the President of THE MEDIATION ALLIANCE, INC., a full-service mediation firm dedicated to utilizing the talents of field-specific, professionally certified mediators. Mr. Berman and his firm also teach mediation skills and consult to businesses teaching conflict resolution skills in the workplace. Contact Mr. Berman at (800) 395-6495.

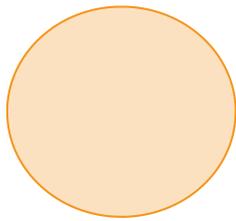
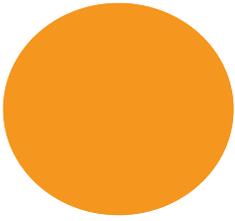
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The Orange Story

As a Study in Negotiation Processes



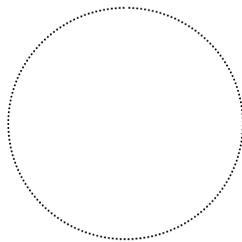
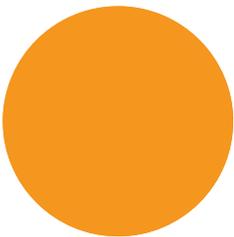
100% _____ 100%
WIN _____ WIN
“Resolution”

COLLABORATION



50% _____ 50%
WIN SOME/ _____ WIN SOME/
LOSE SOME _____ LOSE SOME
“Settlement”

COMPROMISE



100% _____ 0%
WIN _____ LOSE
“Closure”

COMPETITION