

WHY MEDIATE?

*Presentation by Kelly A. Lazerson and Lee Jay Berman
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Dispute and conflict among people is inevitable. We are human. Different life experiences and personal expectations will often collide. 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 recent as 2008 and 2011, respectively, 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 aspects of the mediation process, from the roles and responsibilities of the participants to the benefits of a mediated resolution.

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 California Code of Regulations §4660.

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

⁸ Public Contract Code §20104.4.

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 on 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. Co-presenter, Lee Jay Berman, a nationally and internationally acclaimed mediator from southern California, has 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*, Nov./Dec. 2004 issue, and which is included in this booklet. Some of the notable tips, or tools, encouraged by mediators 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, using the right words (not “Why did you do that?” or “What were you thinking?” or “Were you out of your {fill in the blank} mind?”)
- 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 that I have seen 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 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.

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

13 Tools for Resolving Conflict in the Workplace, With Customers and in Life

By Lee Jay Berman

Conflict happens. It is inevitable. It is going to happen whenever you have people with different expectations. This makes conflict management critical, whether avoiding arguments, disputes, lasting conflict or ultimately, litigation. Conflict can be avoided if steps are taken early in a discussion to diffuse anger and facilitate communication, and it can be resolved by applying a series of thoughtfully applied steps.

As a full-time mediator and trainer in the fields of negotiation and conflict resolution, I see conflict in its final stages - full blown litigation or on the verge of it in pre-litigation mode. What I have learned in seeing these disputes for 10 years is that most of them could have been resolved in the earliest stages if the people involved applied some of the skills that mediators use to resolve conflict. And wouldn't it be great if companies could resolve these disputes before each side spent hundreds of thousands in litigation costs, before the employee was terminated or before the customer or working relationship was gone forever?

Here are some tools for avoiding and resolving disputes in the early stages, before they become full-blown conflicts:

1. Stay Calm.

Thomas Jefferson said, "Nothing gives one so much advantage over another as to remain always cool and unruffled under all circumstances." The thing that leads to conflict is escalation. What starts people escalating is their anger. Most of us stop listening to understand as we get angry. Instead, we start listening in order to argue back. Remaining calm is essential for performing these tools. To remain calm, it helps to look at the big picture. If you think about it, most every dispute gets resolved eventually. So when conflict inevitably happens, it is helpful to stop and think that, chances are, it is going to be resolved eventually. As such, why not begin problem solving now?

Finally, it is a fact that in our busy lives with rush hour traffic, cell phones, PDAs, overfilled e-mail boxes, too many clients and not enough support, that we are all a little more stressed than we would like to be. When a conflict arises, one of the most beneficial things you can do is to ask yourself, "What might I be bringing to the dispute?" We can usually look at another person and figure that maybe he/she had a conflict at home or that he/she has been under tremendous pressure. However, we are not usually self-aware enough to ask ourselves what we might have

going on. It is important in avoiding later embarrassment by checking in with our own personal boiling point before responding.

2. Listen to Understand.

Now, picture a dispute in which you were recently involved. Maybe it was this morning leaving the house, with a co-worker or client or even with a family member. As you replay that experience, ask yourself how much listening was going on. My bet is that any listening was only being done to formulate an argument back to prove your point. When most of us get into a dispute, the first thing we do is stop listening.

The only way to settle a dispute or solve any kind of a problem is to listen carefully to what the other person is saying. Perhaps they will surprise you with reason, or their point is actually true. In the mediations that I do, I often learn what people's underlying interests are by letting them go on and on telling their perspective of an issue until they give me the one thing that is standing in the way of them resolving it. They may start out by degrading the product and personalizing it by saying those of us who delivered it are all incompetent, but I find that this is little more than their anger speaking. What they really want is their product fixed, not to insult us personally.

Psychologists tell us that anger is a secondary emotion and that it is usually triggered as a defense mechanism to cover up hurt or fear. When someone is angry, there is usually some hurt or fear that he/she is embarrassed about, or perhaps even unaware of because the anger is so all consuming. In order to diffuse people's anger, you must listen to them. Hear them out. Let them go until they have run out of gas. Let them vent as long as they can until they begin to calm down. You then will see a person start to slow down some, and begin to feel safe enough to finally tell you that what frustrated him or her so much was that the salesperson never returned any phone calls, and/or the customer service person kept trying to place blame elsewhere, rather than taking responsibility and apologizing for the product being unacceptable.

The best thing you can do to get people to the point where they are willing to show some vulnerability and trust you with some of the real reasons why they are upset is to engage in "Active Listening." Active listening means giving them active physical and verbal signs that you are with them and understand what they are saying. Simple things like nodding and saying, "Uh huh" or "OK, go on" can make the speaker feel as if his/her story is welcomed by you and that you want to continue. On the phone, people hear dead silence and cannot read your reaction to their complaints and thoughts. Given that we all sometimes fear the worst, people tend to shut down and stop feeling it is safe to continue telling their story.

My friend and colleague Jim Melamed, a divorce mediator and trainer based in Eugene, Ore., said: "You cannot effectively move toward conflict resolution until each participant experiences him/herself to be fully heard with regard to their perspective - what they want and why." That means, if someone says that the product he/she bought from you is unacceptable, and they are interrupted and asked what would be acceptable before they have finished telling all about the problem, that person gets the message that all you want to do is fix the problem. The impression is that you do not care about them or the problem you had with your product, and that can feel a little like being swept under the carpet. A good customer service person in a situation like this would let the client finish before asking if there were any other problems. This may seem counter-intuitive because it might bring on even more of the same, but this is what you want. People build trust as they are listened to. If they had another problem with the delivery timing or any other facet of the transaction, this is when you need to hear it - at the outset, not later once you feel as if you have met all of their original concerns. The only way to solve a problem is to get all of the broken pieces on the table at once before you begin trying to "glue it back together."

The most useful phrases in this part of the process (what mediators call the "Opening Statement") are questions such as, "Can I ask you - what about that bothered you so much?" or "What about that was so important to you?" These invite people to go deeper into the problem and tell you what the "real" problem is. Usually, this is where you hear that their boss is upset and they are afraid for their job or some underlying concern. This is a problem that might be handled with something as simple as a letter of apology, from you, the salesman or the president of your company, addressed to them with a copy to their boss, taking full responsibility and apologizing for the problem. Then, you will have a customer you might be able to keep.

3. Accentuate the Positive.

It is important to find some commonalities, or create them, between you and the person on the other end. It is helpful and empathetic to say, "Oh boy, I know what you are going through. I've had a similar situation just recently. Let me see what I can do about this." This serves to normalize the situation. It tells someone that he/she is not the only one who has gone through this and that his or her reaction to it is normal. That calms people right away.

4. State Your Case Tactfully.

The key here is to help people understand your perspective on things without making them defensive. To the extent you can disarm them, they will be more able to hear what you are really saying. A couple of tips are to own what is yours - apologize for what you or your team did wrong and do it first. This enables them to hear what you have to say next. Also, try not to state issues of difference as fact. Leave a little benefit of the doubt. Rather than insisting something arrived on schedule, it is better to acknowledge any room for doubt by acknowledging, "My information

shows them arriving on schedule. I'll have to take a closer look into this." While you may still be right, clearly you have to gather more information to convince them of that, and if you are not right, then you do not have to apologize for misstating things.

It also is helpful to state your position along with your interests. What that means is that instead of maintaining that there is nothing wrong with your product, which is purely argumentative and does not offer any support for your position, it is better to offer something helpful, such as providing another perspective by sending someone over to inspect the product in person. That way, the customer can show and describe exactly why the product is not working as necessary. Your position is the bottom line of what you are willing to do. Your interests are the reasons behind that decision. For example, it might be your position that you cannot take any product back or rescind the contract. However, your reason for that - your interest - may be that your bonus is tied directly to your returns, and that you have every incentive in the world to solve this problem another way. You may also offer what some of those things are, so that you are not just taking away something from them or denying their request, but offering positive alternatives in its place.

One way to do this is to use "I Messages." An "I" message sounds like, "When you didn't come home last night, your father and I got really worried. What we would like you to do next time is call if you're going to be late, so that we know you're OK because we love you and care about you." That is how most of our parents were when we were teenagers, right? Seriously, can you imagine how we would have reacted if they had put it this way instead of the scenario we remember of being grounded for life while stomping off to bed? "I" messages are important because they describe the experience through the speaker's eyes, rather than simply the position (in this case the punishment). That disarms the person you are speaking to, and it takes the fight out of their next statement back to you.

5. Attack the Problem, Not the Person.

Your points will be heard more clearly if you can depersonalize your comments and point only at the issue. Rather than accusing people of "always messing things up," it is better to say, "We'll have to take a closer look at why this keeps happening." In most statements that we make in a dispute, we are fighting with our own anger and are tempted to put a zinger into the point we are trying to get across. You will be heard better and improve your chances of resolving the issue the way you want if you can catch yourself and take the zinger out. Obviously, this is easier with e-mail and requires great concentration when in a face-to-face disagreement.

6. Avoid the Blame Game.

Assigning blame is only helpful in one instance in problem solving - if you assign it to yourself. Generally speaking, figuring out whose fault something is does not do any good if the goal is to fix a problem. It is a diversion and sometimes a costly one because if a person feels blamed, he/she often checks out of a conversation. The trick to resolving clashes is to focus on problem solving, rather than pointing fingers. Focus on what you and the others can do to solve a problem and make it better, and it will be behind you before you know it.

7. Focus on the Future, Not the Past.

In the past tense, we have the purchase order, the contract, the agreement and the deal as it was understood by all involved. The present and future tenses are where the solution ends. Rather than focusing on what went wrong or who should have done what, the secret to dispute resolution is to treat it like problem solving and focus on what can be done to resolve the problem. Once that is done, companies can look to the past tense to analyze what went wrong and how to improve quality control and efficiency. However, when there is a problem that has an angry customer or a disgruntled employee, the solution is all that anyone is interested in.

8. Ask the Right Kind of Questions.

Questions such as "Why is that?" or "What did you think it would be?" make a person who you are talking to defensive. They inherently question the person's judgment or opinion, as well as coming off as curt. More often than not, people ask these short, direct questions, the type that can sound like a police officer's interrogation or a lawyer's cross-examination. These questions are designed to get just what you want from someone, rather than to permit them to tell you what they want you to know about something. If you want someone to answer you with real information, rather than just arguing back, it is best to give them a little information first. For example, "Since I don't have a copy of the P.O. in front of me, it would help me to investigate this if you could tell me more about how the colors on your order are described." Telling them why you are asking, puts your intent first, so they don't have to guess it. This questioning style tells a person that you are trying to do your job and to figure out some facts to get to reach a solution. By delivering your request in a poised and attentive tone, , it makes the person you are asking less defensive and gets you more of what you want.

The other type of question that is especially helpful when you are trying to gather information is an open-ended question. These are the opposite of directive questions, and they invite the other person to tell you what he or she thinks is important about the situation. "Can you tell me what happened from the beginning?" or "Sounds as if this was really frustrating for you" can give you information that you might later use to problem solve.

9. Pick Your Battles.

It is also important when asking questions to remember to Pick Your Battles. Human nature makes us want to be right, even to the point of being defensive or arguing points that do not matter in the big picture. It is even fair game to ask the other person, "On a scale of one-to-10, how important is this issue to you?" If an issue is a five to you and a nine to the person you are talking to, it is best to give that point up and use the same scale when an item is really important to you. After all, business relations are, like my brother's future father-in-law once told him about marriage, a "60-60 proposition." Most people think it is supposed to be 50-50, but the truth is, when adjusted for each person's perspective on how much they give vs. how much they receive, it really is a 60-60 proposition. Another marital proposition is also helpful here, do you want to be right, or do you want to be happy?

10. Link Offers.

Car salesmen do this all the time. They ask you what you want your monthly payment to be and then set the price of the car and the interest rate on the loan or lease so that they can match your monthly payment. Essentially, it's a way of saying, "I can either do this or that, which would be better for you?" It really is just sales skills - giving people the choice between two positives, so that they feel as if you are trying to help.

11. Be Creative.

Brainstorm. Remember that everything is negotiable. Feel free to think outside of the box in order to expand the pie. Make it so that no idea is too far fetched. Being creative with resolutions takes longer, but can yield a true win-win solution. The best solution to a dispute is to get more business out of it. As such, one common problem-solving technique is to propose that instead of a cash refund, giving clients a deep discount on future orders in order to show what a good job you are capable of doing for them. Many of the lawsuits I settle come away with win-win solutions, where instead of just compromising, we actually collaborate to reach a solution that benefits everyone. This requires listening when asking the open-ended questions and gathering morsels of good information that you will later use to formulate proposals that meet their interests. For example, you might learn about particulars that affected an order. From here, you can propose creative solutions that replace things such as broken items, or instead of using the money to re-do the entire order, you can use less money to ship a few dozen shirts with their logo on them so that your counterpart can look like a hero in front of the boss. These kinds of fixes make clients look good and keep them loyal to you, even after an initial dispute.

12. Be Confident.

You can do this! Many people are afraid of confrontation and shy away from it. I have taught everyone, from housewives and high school grads to named senior partners in law firms and CEOs, how to do these simple steps. The process works. All you have to do is follow the steps.

Furthermore, you must do this. Now that you have these tools, it is imperative that you do something about it. You owe it to your customers and your co-workers.

13. Celebrate Agreement!

This kind of negotiation is a hard process. It requires two people to remain in an uncomfortable, potentially confrontational position for a long time to rebuild trust and be creative while trying to figure out the best, rather than the fastest, solution. Once it is accomplished, both you and the person you are talking to deserve a good pat on the back. There is nothing wrong with going to lunch or dinner to celebrate the resolution of a dispute that could have been destructive, but that ended with a win-win solution where everyone was satisfied. This is an important process for avoiding more serious disputes such as lawsuits and losing hard-earned customers. Congratulate yourself and your partner in this solution. After all, nothing is more important than your company and its survival. Nothing is better for your company's survival than learning to make peace and resolve the inevitable disputes that will arise. Learn to cultivate peace with customers, suppliers, employees, labor and management.

Utilizing these tools takes patience and generally requires changing old behaviors. However, if people on the front lines, in human resources, customer service and client relations, use simple tools such as these, they would resolve most disputes at that level, keeping them out of the legal department and out of the mediator's office.

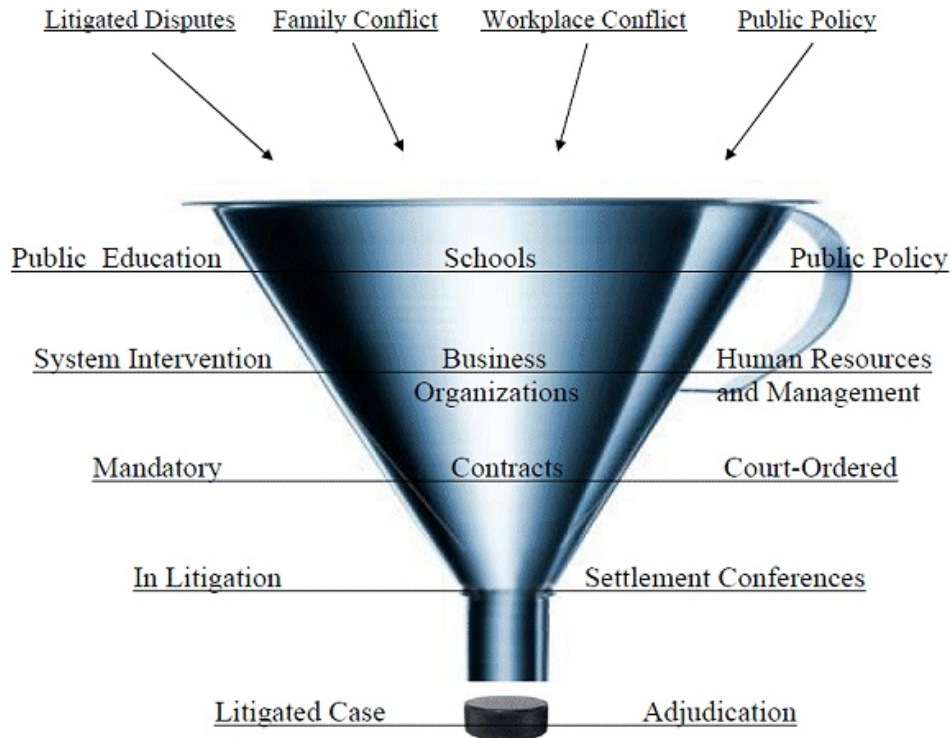
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The Funnel of Conflict Resolution - Part One: The Stages of Conflict and Opportunities for Resolution

By Lee Jay Berman



The Stages of a Conflict

The world of conflict can act like a funnel, in that disputes can enter from any of a variety of areas of life and can take all forms (arguments, disputes, accidents, cultural trends). As a society, and as a mediation community, we can address these disputes at many different stages.

Early intervention of conflict resolution requires that either those people in dispute are aware of mediation, or that mediators can find them early in their process. The best way to reach people early in the dispute is through generalized public education about mediation, increasing public awareness, and making it generally accessible and available to them. This can best be done in schools, as we try to teach youngsters about conflict resolution. It can also be approached through public policy measures, promoting and funding dispute resolution centers.

Most disputes that continue beyond this early stage, become more serious and formalized, in that they can begin to affect additional people (in businesses or organizations) and can require intervention through systems, including human resources, management and sometimes organizational consultants. Disputes at this stage can often be resolved in face to face negotiation, without the advent of additional parties.

Disputes that are not resolved at the system level, generally require more formal intervention, if not even a push or a mandate to seek out dispute resolution. This level often requires mandatory intervention, either through contractual requirements or public policy or a court order to attempt mediation before parties can take the next step in the escalation of the conflict (often arbitration, litigation, or administrative hearings). This is often what mediators call “the last rational moment”, meaning that it is the last opportunity for the disputants to engage in conflict resolution or problem solving before they have engaged in the polarizing activities of an adversarial process.

It is never too late to attempt to resolve a conflict. Often in the middle of the litigation process, even just on the eve of trial, parties can still engage in a form of conflict resolution, either through a late voluntary mediation or a settlement conference (either voluntary or mandatory). Seasoned mediators have even seen cases during trial, post-verdict, and upon and during an appeal. By this time, a compromise for the sake of avoiding risk is generally the best case scenario.

Finally, while self-determined resolution can happen at most any phase, some disputes (and some disputants) simply require a third-party determination. In this case, an arbitrator or judge decides the case for them.

How Conflicts Get Resolved at These Stages

When a conflict begins, it is often about the people involved. The conflict at this stage is often driven by, “I don’t like the way you treated me” or “You stopped returning my phone calls, so you left me no choice” or “I’ll show you. . . .” Resolutions at this early stage of the conflict can often take the form of correcting misunderstandings, better managing expectations, apologies and forgiveness, and reconciliation of the parties. The primary dispute resolution methods in this early phase often involve mutual dialogue, collaboration, creative problem solving and brainstorming.

As disputes remain unresolved and enter the next stage of the conflict, it can begin to center around the secondary effects of the dispute. This is where people act upon their assumptions about the motives they ascribe to the other person and begin to take retaliatory steps or even what they perceive to be an uneven score between the parties. It sounds like, “Well, he did this to me, so I did that to him because he deserved it.” In complex organizations, it can take the form of passive-aggressive behavior such as torpedoing a project headed by that person or of more

direct action like asking for a transfer. If it hasn't been exposed by this time, this can be where the underlying conflict surfaces – the conflict that is driving the dispute. It can sound like, “You don't like people like me, I've heard you say it before, so that's why I know it was you who told so-and-so that I did this.”

By the more compressed stages of the conflict, it has generally been stated out loud, denied, and remains unresolved. The parties now clearly know what they are fighting about and have refused or been unable to have the kind of dialogue that can resolve the dispute. The parties' stubbornness has been triggered, their competitive juices are flowing and each refuses to “back down”, and they both see a settlement as backing down. Each is now showing their bravado by escalating the fight, whether it is in a formal way by increasing the temerity of their discovery demands, or less formal by back-stabbing the other with friends and playing “social politics”. In this stage, they often need to be sent into a mandatory dispute resolution process, where the intervention is much more involuntary, and must be done with more strength. Sometimes, conflict resolution can occur at this level, but often times, resolving the instant dispute is the best that we can hope for. Sometimes, kindness and transformative mediation methods can work at this level, but more often, compromise, distributive negotiation and risk assessment are the prevalent dispute resolution techniques at this stage.

Finally, in the late mediations and settlement conferences, the only reasons that people will tell a story is to vent and get it off of their chest, and to attempt to justify their demands. They rarely tell a story at this stage because they are interested in reconciling the events or in restoring a relationship. Here, the dispute resolution method generally more closely resembles getting a settlement done and bringing an end to an otherwise distasteful experience.

What Happens to the Dispute (and the Disputants)

One reason for the shape of the funnel is that disputes are being resolved at every stage of the process, so by definition, fewer and fewer of them filter down to the next level. And at each declining level, the disputants become more hardened and more of the juice gets squeezed out, where the juice is the flavor, the seasoning, the softness of a dispute (and disputant), so much so that by the time it gets to the bottom and has been through the litigation process and is ready to be adjudicated, it has become so much about “just the facts” that the human element is almost removed.

By the end stage, the lawyers and jury consultants have sometimes squeezed all of what matters to the disputant out of the story, and reduced it to the most relevant and compelling facts. “Why” doesn't matter any longer, only “What” does. The stories have been told so many times, that they don't carry any feeling with them any longer, and to the extent that they do, it's more

the aggravation of the process they have been through (or perceive the other as having put them through) than their real outrage or hurt over the original event.

The Disputants are no longer in it to heal, and most aren't in it to right a wrong at this stage, they are mostly still in it because they want what they think is fair (in the form of a resource – money or some other thing), or because at this stage, they are simply resigned to winning at all costs.

Simply put, the earlier in a dispute it can be resolved, the better it is for all involved. Outcomes tend to be more creative, collaborative and restorative. People work together to resolve a problem, rather than oppositionally. And the mediator can be creative and can be involved in building something, rather than surgically removing two people for once and for all.

How We Grow Mediation

Because mediators who work at all of these differing levels of the funnel understand this, and assuming that while it may make logical sense to a person if it is explained to them, the reality is that when involved in a dispute of their own, they will abandon all such understanding and act as anyone does who is involved in a dispute – emotionally.

In many markets in the United States and abroad, mediation of litigated cases has hit a point of saturation. Like ants to a picnic, mediators ran to the courts first in an effort to demonstrate the value of mediation in a litigated setting. Like when the reporter once asked Willie Sutton, the famous bank robber, why he robbed banks and he answered, "Because that's where the money is.", mediators will answer, "because that's where the disputes are." Truth be told, though, like money, disputes are everywhere. What Sutton meant is that banks were the place where the most money was consolidated together in one place. The same goes for disputes, while the courts certainly hold a consolidated mass of them, they actually only hold a very small percentage of them. Think about every dispute in your life – does it rise to the level of litigating? Only a small percentage of them really do. And if we're following Warren Berger's advice, we're only using the courts as our last resort.

Building on this logic, if mediators everywhere are running to the courts to find disputes to mediate, and given that at least in California, civil filings are down, that means two things. First, it means that we are intervening into disputes at the latest and toughest stages, often allowing mediators to utilize a small portion of their skill set to hammer out compromises (or, worse yet, causing mediators to only develop those skills that they need for that purpose). Second, it means that there is a limited number of matters available to be mediated, as there is a fixed number of litigated cases filed each year, and in some mature mediation markets, if you divide those cases by the number of mediators, there is not much of a career there.

The latest studies say that of all of the cases filed these days, only 1.5% of them actually go through trial. That means that 98.5% of all cases are disposed of at some time between filing and trial. I believe that the same proportion applies to disputes – that of all of the disputes that happen in the world, only about 1.5% of them end up being filed as lawsuits. The rest, like the lawsuits, are resolved somehow, or people just walk away from them. When two basketball players get into a fight on the court, or a teenaged boyfriend and girlfriend have an argument, or a parent gets upset with a child, the public rarely hears about it. So, if only 1.5% (or some number like that) of all disputes make it to the court house, that would imply that the overwhelming majority of disputes live outside of the courthouse, or upstream in our funnel.

In order for mediation to grow as a profession, it has to push back up the funnel closer and closer to the top. If what comes out the bottom of the funnel, after it had been through litigation as well as all of the processes along the way, is a juice-less, hardened, dried out, densely compressed disk like a hockey puck, then for every one of those there are dozens or hundreds or thousands coming into the top of the funnel. They enter the funnel fluffy and pliable like cotton candy, and that is when mediators should want to get to them.

For mediators, this means connecting with (from the bottom, up) insurance adjusters for claims that haven't yet reached litigation, to human resource professionals, to leaders of religious congregations, non-profit boards and organizations and through mass media, volunteering in schools, and working with public policy and non-profit dispute resolution providers to help spread awareness of the availability of mediation and mediators.

In the end, while a small number of disputes will always be headed on a bee-line right for the bottom as they enter the funnel, the majority can be resolved much earlier, if mediators can intervene earlier and educate the public more broadly, both by empowering them with conflict resolution skills and by making them aware of the availability of mediation early in the dispute.

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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.

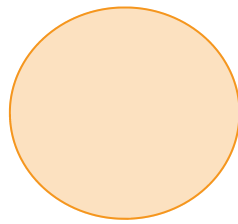
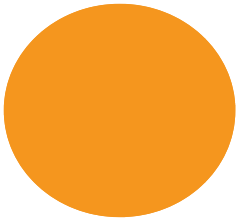
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The Orange Story

As a Study in Negotiation Processes



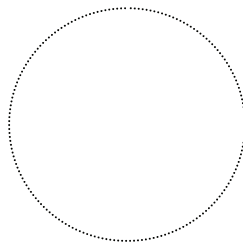
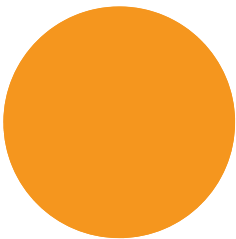
100% _____ 100%
WIN _____ WIN
“Resolution”

COLLABORATION



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

COMPROMISE



100% _____ 0%
WIN _____ LOSE
“Closure”

COMPETITION