

The Master Mediator

How Mediation Can REALLY Allow The Clients to Talk and Decide

BY ROBERT A. CREO

In the July/August issue, Master Mediator columnist Bob Creo explored meeting with the disputants off-site, without counsel being present. See "How Mediation Field Trips With All Participants Can Open the Process and Improve Settlement Prospects," 37 Alternatives 106 (July/August 2019) (available at <http://bit.ly/2kwd1po>). This month's column explores the benefits of conducting joint sessions, and caucusing during site-visit portions of the mediation without counsel being present. Master mediators Paul Monicatti, of Michigan, John Leo Wagner of Los Angeles, Judith P. Meyer of Philadelphia, and Orit Asnin of Israel, share stories and insight about when mediation succeeded without lawyers being handmaidens at each step of the process.

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Master mediator **Paul Monicatti**, of Impartial Dispute Resolution in Troy, Mich., say that he has "conducted an entire mediation with only the clients present while their lawyers sat in an adjoining conference room just gabbing."

Alternatives' Master Mediator columnist is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is the principal of Happy Effective Lawyer LLC, an initiative focusing on lawyer contentment, core competencies, soft skills, and peak performance, which publishes The Effective Lawyer (<https://happyeffectivelawyer.org/>) Blog. He is a long-time member of Alternatives' editorial board and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com. He can be reached at rcreo@gmail.com.



He also has used crossed caucuses with only clients usually near the end, or at a turning point in the day. He says he has done this many times in personal injury, commercial, and probate disputes.

Paul was asked to travel to London to conduct three days of mediation in a large and complex insurance coverage dispute involving one company and its excess insurer. He recounts, "We dismissed a whole platoon of attorneys halfway through the first day, and proceeded without them for three more days while counsel were sightseeing or doing something else. A tentative settlement in principle was reached, leaving it to the lawyers to work out the details later."

Lessons Learned or Confirmed: Despite the great expense for the lawyers to travel to London, and to be compensated for their preparation and the days that were set aside for the case, these sunk costs did not dissuade the mediator from seeking to exclude them so that direct negotiations could proceed in a productive manner.

Just because the parties set the mediation table a certain way, mediators should not shy away from a different arrangement after being seated.

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Master Mediator **Judith P. Meyer**, of Haverford, Pa., had a business dispute where the lawyers spent four hours arguing over the merits of their clients' positions and haranguing each other.

The clients were silent. The lawyers were unstoppably loquacious.

At 12:30 p.m., the attendees agreed to break for lunch. Judy suggested that the lawyers head back to their offices to check emails and collect telephone messages on

THE THEME

Master Mediator Columnist Bob Creo is examining the good, bad, and ugly of the mediation process and mediator practices in a series of columns on storytelling. Each column provides case profiles and contributions from master mediators about what actually occurred. The stories are analyzed for process points and human behavior indicators to explore lessons learned from triumph, failure, or the unknown consequences of alternative mediator choices or controversial mediation techniques. The current storytelling theme is on conducting portions of the mediation process without lawyer participation.

the many cases they handled. They were delighted.

Judy went to lunch with the clients who were visibly relieved to be unburdened by counsel. She recounted how, over the course of an hour's lunch, she "was present, attentive and observant but not intrusive, and the parties came to a settlement."

After returning to the mediation location, the clients explained their settlement to counsel. Their attorneys were delighted and relieved. The settlement was documented and it was done.

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This author was retained to mediate a commercial dispute between two Palestinians, one living in Lebanon and the other in Northern Virginia, arising from work done for the U.S. Defense Department in Iraq.

The two disputants had long-time business and personal relationships. The amount

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in dispute was hundreds of thousands of dollars, which was a significant amount for each of them since neither was among the super-rich, having spent their childhoods in refugee facilities as a result of the Israeli-Palestinian conflict.

During the course of the joint session, I explored the past relationships and concluded that the conflict had not descended into a cycle of hatred and revenge. I observed the eagerness of each of them to talk across the table directly to each other.

During a caucus, one of the parties asked if it was appropriate for him to meet with his counterpart without either of their lawyers being present. I encouraged the concept and stated that my typical practice was for me to be present as an observer so that I was informed enough to recommend the next appropriate steps.

The lawyers insisted that no enforceable oral agreement could result without their input and drafting of written documents.

The three of us moved to a small room and they started to speak to each other in English—for a bit, when they reverted to their native dialect.

I felt like I was in a foreign film without subtitles. Often they raised their voices and vigorously gestured. The facial expressions were varied, with some of which I interpreted as positive, and some negative.

Thirty minutes later they stood up, looked at me, and said in English that we could all reconvene, lawyers too, in joint session. They announced settlement terms and asked the lawyers to draft a term sheet to sign without the necessity of a longer, more formal document.

I commended them on their wisdom and thanked them for allowing me to participate as the mediator to moderate a productive negotiation.

Lessons Learned or Confirmed: During my opening statement, I explained that mediation was flexible and not a formal legal process that moved along in a mechanical or predictable way. I always say that if any participant has a process suggestion, to please offer for

consideration in either in joint session or caucus. Although I have shortened my opening statement significantly over the years, this is one aspect I have kept to promote flexibility and creativity in what is at heart a process of improvisation.

Get Out Of the Way!

The departure: Mediation practice has returned to lawyer-dominated advocacy commonplace in litigation. Rather than silencing or accommodating the lawyer as a mouthpiece, mediators may remove their voices entirely—even at critical times.

The extra insight: It's not just about paying lip service to empowering the clients' voices. In commercial disputes, executives are competent to make their own decisions about resolving conflicts affecting their business interests. In interpersonal disputes, often clients know best what works for them after the litigation is closed.

What to expect: Removed from the constraints of holding the line at 'best case' legal and bargaining positions, effective compromises can be made so that the disputants can get back to their businesses and lives.

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Master mediator **John Leo Wagner**, of Los Angeles, shares a story of three siblings, each of whom, with their respective family trusts, collectively owned about half of a highly successful company.

Although the company was hugely profitable, with more than enough to go around, there was a longstanding dispute about an issue between two brothers that required agreement of the blood sister of one brother—step sister to the other—who was aligned in a trust with her blood brother.

She had delegated the negotiation to her husband, the brother-in-law of her other two siblings.

John learned that the brother-in-law was absolutely furious with his wife's blood brother for keeping the entire family in turmoil for the decade the dispute had been raging. Her brother, who shared the trust, had no idea the others were so angry.

John coached the brother-in-law to let it all out. John put him in a room with the brother. The brother-in-law vented and dressed him down for the better part of an hour before John excused the brother-in-law.

After he left, John debriefed her remaining brother, who was shocked. That brother had no idea the lawsuit had generated that much smoldering family strife and resentment. He concluded it was not worth it, and promptly settled the case with his brother.

Lessons Learned or Confirmed: Master Mediators know that emotions and values drive decisions. The calm of closure, especially the removal of the hassle of litigation, motivates settlement.

Here, everyone had enough economic resources that the delta, regardless of which way it went, would have no significant impact upon any of the participants. The interpersonal aspects of the conflict, however, took a toll on the family. John acted on his mediator sense to explore the awareness of the depth of emotions, especially the anger generated by the litigation, without the distraction resulting from the lawyers being present in the room.

The key takeaway: Sometimes, it is not all about the money!

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Orit Asnin of Haifa, Israel, sums up the potential benefits of conducting sessions without lawyers present, noting, "I find that clients-disputants' direct meetings often have a potential to create the desirable business or emotional breakthrough, as long as it is used carefully, at the right timing and with the representing lawyers' consent and blessing."

During her 20 years as a full-time mediator, Orit has suggested direct meetings, both with and without her presence in the room.

Sometimes she (passively) stays in the room, in order to create a “safe environment” for the parties to talk directly, or in order to ensure that the conversation is going in the “right direction” and does not cause an irreversible deterioration.

Whenever she stays in the room, Orit says she often asks the parties whether her presence is helping. She encourages them to choose together the timing for her to leave the room in order to enable a more intimate business or

emotional chat.

Sometimes she chooses to leave the room at the beginning of the direct meeting, explaining to the parties that they can do the business alone and don’t need her to babysit them.

She explains that the direct meetings usually happen toward the end of the process, at a stage in which she had already mapped and addressed great parts of the legal-economic and emotional puzzles. That’s when the more-personal conversation between the parties can

make the difference and lead to a breakthrough.

Orit concludes that using direct meetings can be an effective tool to promote settlements and to empower the parties. In those cases, when significant progress occurs during a direct meeting, the parties feel as if they achieved the goal “themselves” as they “lead” the last steps of negotiation on their own.

The key takeaway: Often it is best for the lawyers or mediator to just get out of the way. ■

Mediator Skills

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yers and this type of aggregation as harmful to the rule of law and their profession? Don’t we see the same players all the time in these mass class aggregations and MDLs, with more often than not the same critics?

FRANCIS MCGOVERN: I’ll push it even higher. I think there’s a fundamental divide right now on aggregate as opposed to individual resolution for the bar and for the litigation system in Section 1.8.(g) of the Model Rules of Professional Responsibility, which pours a lot of cold water on aggregate settlements. [The rule states, “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” Available at <http://bit.ly/2LOsv3n>.]

... [It is the] same thing we saw in [*Amchem Products Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (available at <http://bit.ly/2JPEHOP>); the case was discussed in Part 1 last month]. The same thing we saw with the bench in [*Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 864–65 (1999) (in which the U.S. Supreme Court rejected an asbestos class settlement, holding that the settlement failed to satisfy Federal Rule of Civil Procedure 23(b)(1)(B) standards for certification of asbestos claims against a single corporate defendant)].

It seems to me that the issue that Ken has correctly raised is a really, really big one right now for our entire system of justice as to how we’re going to cope with the fact that we have large numbers of claims and how we should handle them.

ERIC GREEN: I think that you’re so right, Francis. It may be the biggest conceptual issue facing the legal system. As the economy has changed in the last 100 years and continues to evolve at an even faster rate, we have greatly increased the capacity to inflict massive injuries on huge numbers of people in a short amount of time, and environmental and terrorist disasters can kill or injure a large number of people in one event. The question is whether the legal system can adapt to deal with these situations on a mass basis or should it still be done on an individualized basis? There’s a huge tension there that is running through the system.

But back to what Ken said and Russ suggested, I do think you see a small number of repeat players in the bar involved in these kinds of cases, but that’s in part because you need to have resources and experience and skills to take the lead in these cases. There are some firms that seem to have it—a few firms that have it. ...

RUSS BLEEMER: Prof. McGovern, can you talk about this point about the plaintiffs’ views with regard to the opioids MDL? Because now, the scale of it alone is of interest. We are up over 1,500 cases filed, [with] ... so many of those plaintiffs ... not individual plaintiffs, but they’re municipalities, they’re hospital systems, they’re counties, they’re states, they’re attorney generals. ...?

[*Editor’s note:* Francis McGovern declined comment due to pending litigation.]

TOOLS OF THE TRADE

NOAH HANFT: Don’t you think it’s just like you guys have established that reputation as neutrals, these firms have established their reputation in terms of handling these claims?

GREEN: ... I think you’re right—when the courts are appointing lead counsel or co-lead counsel or liaison counsel, it does tend to be a lot of repeat players because they have the know-how.

HANFT: Ken, ... how difficult is it to get the judge to buy off on the process, and what are the tools that you use to actually effect that?

FEINBERG: That question should be directed at the expert, Francis McGovern, who has been trying at least for a decade, maybe longer, to act as a tutor in trying to educate the federal and state bench on the pros and cons of aggregation. And I think that’s a question for Francis.

MCGOVERN: You know, judges really want to do the right thing. And the issue that Ken raised at the beginning about the way they’re trained in law school [see Part 1], and the way they’re trained in the new judges’ conference for federal judges that I think both Ken and Eric have taught in, gives us an opportunity to sensitize them to different models, different roles.

And I just think it’s terribly, terribly important for us to try to make sure that they’re aware of alternatives that they have in trying to serve their public function in improving the administration of justice.

So from 100,000 feet, what Ken and Eric and I do really is to try to improve our justice system. And we do it through the litigation process, through the trial judges in resolving

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