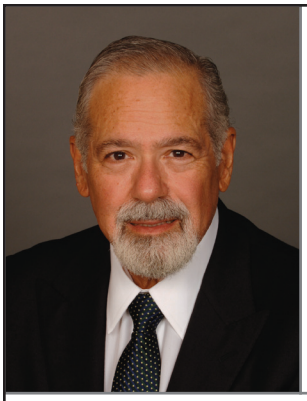

THE MEDIATOR AS PROCESS DESIGNER

By Richard Chernick, Esq.

A mediator is a facilitator who has the skill to work around or overcome obstacles to settlement created by parties or their counsel. In particular, when negotiations have gotten the parties close to a settlement, the skilled mediator is able to keep negotiations moving even when the parties are prepared to give up.

If the impasse concerns a disagreement about the likely outcome of a legal or factual issue, and all facilitative efforts at reconciling the parties on the disputed issue have failed, the mediator might suggest some evaluative device to assist the parties in compromising on that issue. Examples include an independent, third-party appraisal to establish the value of a disputed asset (on a binding or non-binding basis) or an opinion on a disputed legal issue by an expert in the field respected by both sides (this might even be the mediator herself), or a structured resolution of that limited issue by arbitration or reference, again on a binding or non-binding basis.

Disputed legal issues might also be addressed in the underlying litigation if there is a pending case by the filing of dispositive motions prior to continuing with the mediation process if such determination is crucial for one or both of the participants. The mediator thus helps the parties to agree on a process which will give them additional information about the point in dispute (or a binding resolution as the case may be) with the intent of moving the entire case toward resolution.

If the issue involves the range of possible damages, a baseball arbitration might be an acceptable resolution to the parties. The agreed arbitrator would hear evidence relevant to the disputed claim and must select the valuation proposed by one side or the other and no different number. (A high-low arbitration establishes an agreed floor and a ceiling, but permits any result in between those numbers.) Again, the mediator might suggest a structure for the process and might assist in the selection of the arbitrator. In some cases the parties would be willing to submit the matter to the mediator, as arbitrator. Appropriate waivers should be obtained in that event. This process choice assumes that the mediator has already explored integrative (win-win) solutions and has exhausted efforts to make the pie larger.

Finally, if the sticking point in the process is mistrust that a party will perform obligations which are the subject of the settlement agreement, the mediator might help the parties to structure the mediated agreement so that it protects against non-performance; the skilled mediator can give the parties some confidence that the agreement reached will be enforceable and might suggest provisions that will encourage performance as well as a dispute resolution provision in the settlement agreement itself that will assure swift resolution of such disputes if they arise. Such agreements may name the mediator as mediator and/or arbitrator of such disputes (again with appropriate waivers).

If a global settlement cannot be reached, the mediator might attempt to achieve settlement of one of several claims or of one of several parties. Even clarification of the claims, based on the parties' discussions during the course of the mediation, is of value to the later efficient resolution of the dispute.

The last service that the mediator can provide to the parties where no further agreement seems possible is to address the process by which the dispute will be resolved. The mediator is now armed with information about how the parties assess the issues in dispute and which elements are more important and which less important to the final outcome. Thus, the mediator might make suggestions about efficient resolution of the dispute. If the key issue is determination of the value of a disputed asset, perhaps that issue ought to be bifurcated and determined first, perhaps by arbitration or a binding appraisal process or a combination of the two. Once this value is established between the parties, perhaps a later mediation session would allow the parties to resolve remaining (less contested) issues between them. In the event resolution is not achieved, a final adjudicatory process might be agreed upon to bring the matter to a close. Arbitration or a general reference might be acceptable choices.

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Every dispute is susceptible to "deconstruction" in this manner. The mediator, who is a process expert, ought to be able to diagnose the dispute and make suggestions about appropriate process choices. The mediator also ought to assist the parties in fashioning an agreement which sequences each step of the resolution process so that there is an enforceable obligation to participate in each step to final resolution and so that the final resolution will be enforceable.

It is crucial that the mediator understands how each process works and how to make it enforceable. Many "creative" dispute resolution agreements flounder on account of process errors or misidentification of the agreed process. *See Old Republic Insurance Co. v. St. Paul Fire & Marine Insurance Co.,* (confusion between binding and non-binding arbitration and judicial reference); *Sy First Family Limited Partnership v. Cheung,* (confusion between arbitration and judicial reference); *Elliott & Ten Eyck Partnership v. City of Long Beach,* (designating trial judge as "arbitrator").

The mediator as process designer has the responsibility to help the parties achieve an effective process that addresses their unique needs and that will be enforced by a court in the event of a disagreement. ■

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