



## The Lawyer and The Mediation Process

By Michael L. Lapin, Esq.

To some, this title may seem to be an oxymoron. After all, wasn't mediation developed as an *alternative* to the adversary system? Legal combat induces stress. Mediation suggests something "softer" - like "meditation." As Justice Warren E. Burger put it:

*"The existing judicial system is too costly; too painful,  
too destructive, too inefficient for a truly civilized people. . ."*

Mediation is economical, encouraging, constructive and efficient. So, you ask, why undermine all these advantages by allowing the lawyers to be part of the mediation process?

### DISPUTES USUALLY COME WITH LAWYERS INVOLVED

First of all, an attorney may already be of record if the dispute has reached the litigation arena. In the court-ordered mediation, the mediator takes the party with the lawyer already attached at the hip. Also, if the mediation is triggered by a contractual clause mandating mediation as a precondition to the filing of a lawsuit, the lawyer is usually already part of the remedial process. In fact, the real world scenario is that many, if not most, mediations are initiated by lawyers. After an assessment of the client's case, and in particular the relationship of the parties, the lawyer may very well decide to embrace the advantages of mediation. The courtroom warriors are not necessarily always litigation-obsessed.

The court-ordered mediation can be tricky for the mediator. Usually mediation is a consensual procedure. Where the parties to a mediation are present voluntarily, the mediation has the best chance of success. The court-ordered mediation presents the opposite scenario. The parties and their attorneys are present only because the court has ordered them to be there. In addition, the court will frequently set a mediation deadline that forces a mediation to take place before the lawyers have taken enough discovery to know what their case (or defense) is really worth. While these are not always fatal impediments to a settlement, they tend to dampen the effectiveness of the mediation process.

⚡ The viewpoint that the lawyer profits on the conflicts of his client, and is really not motivated to see them go away before the processes of demand, argument, filing of complaint, answer, motions, discovery, trial, and perhaps even appeal have been entered into the time sheets is cynical and not reflective of the moral bearing of most lawyers. ⚡

So, does the lawyer's presence enhance the mediation process? Is the lawyer really useful in assisting the mediator and the parties to work toward a compromise? Is the lawyer so focused on advocacy and legal posturing that the mediation is hopelessly doomed? How might this fit into the mediation of a real estate dispute?

### AN UNFORTUNATE TALE

Some years ago, a developer friend had an option to acquire about 65 acres of raw land. The parcel was adjacent to a lake as well as to several established single-family detached home communities. The developer planned to build condominium units and supporting amenities on the site.



One of the homeowners in the area did not take kindly to this plan, and became very active in organizing opposition to the project. He was very successful in generating passionate opposition as well as garnering publicity and wide-spread support against the proposed project. An associate of the developer approached the leader of the opposition group and held a number of meetings with him to identify the areas of concern of the surrounding home owners. It was a slow and difficult process, but over a period of time the points of contention were identified. The associate and the homeowners' leader eventually were able to devise a comprehensive plan that met each of the homeowners' concerns yet left the contemplated project financially feasible.

The associate took the painstakingly fabricated agreement to the developer and explained its details, advantages and disadvantages. The developer was enraged that any group thought it could interfere with his right to build out this property as he wanted. He had been advised by his lawyers that the land was already zoned residential and that the density of the project was within allowable limits. Why should he make any changes in his development plans or extend himself to cooperate with those opposed to his plan? In effect he told his associate to tell the homeowners to take a hike.

Well, they hiked all right. They hiked right over to the meeting of the city's planning commission on the night it was to review the project for necessary permits. The administration hall was filled to overflowing with residents objecting to the plan. The opposition was organized, vocal and demonstrative. Given the publicity over this project and the political pressure applied by the homeowners in the weeks before the planning commission meeting, the developer's application was denied. The developer was never thereafter able to do anything with the property and eventually relinquished his option.

A sad story and an expensive lesson. Admittedly this episode took place many years ago, before organized community opposition to real estate development became a way of life. However, the potential and unnecessary loss of a project (or a lawsuit, or a relationship) due to the refusal to compromise is certainly still a recurring fact of life.

### **LAWYERS UNDERSTAND THE RISKS**

Now, who knows better than the lawyer what the impact of a failed effort to compromise might be? Who knows better than the lawyer what the costs and consequences associated with a stubborn denial of reality can be? The viewpoint that the lawyer profits on the conflicts of his client, and is really not motivated to see them go away before the processes of demand, argument, filing of complaint, answer, motions, discovery, trial, and perhaps even appeal have been entered into the time sheets is cynical and not reflective of the moral bearing of most lawyers.

The service of a lawyer arises to no higher level than the recommendation to a client that a conflict be mediated before resorting to the assertion of constitutional rights or to the institution of litigation. A client is entitled to the partisan advocacy of his lawyer. Yet the lawyer knows that in many instances the strength of the client's case and likelihood of prevailing is offset by the costs and uncertainties of a trial. By bringing in the experienced mediator, the lawyer is providing the client a valuable reality check by an impartial third person without appearing to be forgoing his duty to represent that client and be his advocate.



The advantages of having used mediation in the scenario described above are readily apparent. In fact, the developer's associate functioned as a kind of mediator when he met with the homeowners' representative and worked out an agreement that would have let the project proceed with little real cost to the developer.

Had that associate been trained as a mediator he might have been able to persuade the developer from the outset that the compromise in this situation was worth a little give in order to get a lot. Also, had the matter been in litigation, the lawyers for each side would likely have similarly worked on their clients to accept a compromise that really afforded both sides meaningful gains.

### **THE LAWYERS ROLE**

So the moral of the story is that the lawyer can and should be an important part of the mediation process. The conscientious lawyer can influence his client to consider mediation when a dispute arises, or ideally in advance by the policy of using a mediation clause in the controlling documents of each transaction. The lawyer can retain the posture of an advocate for his client, while letting the mediator deal with the development of issues of compromise. In addition, through the judicious selection of a mediator experienced in the area of the dispute (such as commercial real estate in the cited example) the lawyer will be saving much time and cost for his client because the parties will not have to take the time to educate a court on the issues and practices common to that particular industry. By incorporating mediation into the resolution process, the lawyer can reduce the stress endemic to dispute and increase the likelihood of the preservation of important relationships.

### **CLIENT SATISFACTION**

A successful mediation usually produces a satisfied client for the lawyer. Even the mediation that does not result in a compromise agreement is useful and satisfying in that it usually clarifies, eliminates or consolidates the issues, and enables the parties to meet in a temperate setting for what has probably been the first direct exchange of views between them since the dispute arose. My experience is that the satisfied client is the client that returns. Funny how that works.

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A twelve-year member of the Orange County Airport Commission (twice chairman) and three-year member of the Orange County Public Finance Advisory Committee (chairman), he was retained by the County of Orange during 1999-2000 in a consultant capacity of Program Manager of the Orange County MCAS El Toro Master Development Program, administering a \$10 million annual budget.

In the course of a professional career spanning the practice of law, real estate development and public service, Mr. Lapin has negotiated and resolved hundreds of disputes. More information about him may be found at [www.lapinmediation.com](http://www.lapinmediation.com) or by emailing him directly at: [mlapin@lapinmediation.com](mailto:mlapin@lapinmediation.com)