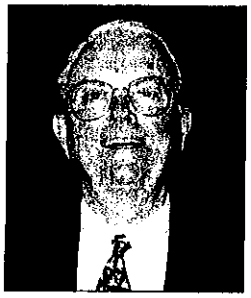
FOCUS ON LEGAL ISSUES

MEDIATION: ANOTHER STRING TO YOUR BOW

by Edwin "Brick" Howe, Jr., CRE



Edwin "Brick" Howe, Jr., CRE

My tendency is to set a certain store by titles and subtitles. For example, the subtitle of this piece might have been "Another Arrow for Your Quiver," or "Another Weapon for Your Arsenal," or "Another Layer to Your Armor." I like the one I have chosen, however, because it seems to exemplify the "creative, flexible neutrality" that is inherent in the mediation process.

Put simply, mediation is a process whereby the parties to a dispute seek to resolve the dispute via the facilitation of an independent and neutral third party, ideally someone professionally trained and experienced in the field of mediation. Having said the foregoing, I have to disclose that I personally cannot quite claim that degree of professionalism. I have taken a course in mediation sponsored by the National Association of Realtors. I have subscribed to the very nearly spiritual point of view that an adherent to mediation seems to develop. And I have participated, with a degree of success I believe, in several mediation simulations. For the moment, though, I am espousing something like pure theory. When I have had practical experience with real-world mediations, I may be back to you with variations on the theme stated below. The theory to which I refer, however, has opened new vistas to me in more than one respect. I hope you will agree that it is worth the expenditure of paper and ink to summarize it here.

When I say "Another String to Your Bow," I am referring to the bow of a party to a dispute and his legal advisor. If the parties are unable to resolve their dispute via negotiation and compromise, their classical resort is to litigation. In that setting, *(1)* unless all of the lawyers on both sides are men of good will and integrity, having their respective clients' respective best interests at heart, *and (2)* if none of the parties themselves are the sort that say, "My way, right or wrong, and I'll fight the matter to the death!", the parties are in for an unpleasant and normally expensive and disappointing experience in choosing to litigate. Contrariwise, the lawyers involved are handed the ticket to the gravy train that litigation all too often represents.

Litigation is a highly formal process, involving discovery—exchange of documents, onerous written interrogatories requiring very carefully phrased written answers, and seemingly endless depositions—before the matter even gets to court. Both depositions and testimony at trial are governed by rules of evidence that are rather archaic and difficult to understand and apply. The tests for admissibility of evidence will normally be subject to seat-of-the pants interpretations by the trial judge that often are unappealable as a practical matter. The entire litigation process will be carried out under the supervision of a judge, or even a succession of judges, whose mission in life is to "clear the cal-

endar," that is, to take advantage of their own pretrial decisions in an attempt to force the parties into a settlement. All too frequently, neither party subscribes to the settlement, but the parties accept it in order to avoid the further expense of a full trial in court. Often that acceptance also spares the parties the uncertainties arising from a jury trial, which is truly a roll-the-dice process.

One alternative to litigation for dispute resolution is arbitration. In many cases the parties' contract calls for arbitration as a mandatory alternative to litigation. In other cases, the parties may simply agree that both of them want to go to arbitration, rather than litigation. In arbitration, there normally are no depositions, except in relatively complex cases and certain special situations (such as impending death of a witness whose testimony needs to be preserved); documentary discovery tends to be less onerous on the producing party than is the case in litigation; interrogatories are normally forbidden; and the rules of evidence are looser than in litigation. The parties frequently have the benefit of adjudication by an arbitration panel having a degree of expertise in the field from which the factual issues emerge (seldom the case in litigation, even where there is no jury). But a common frustration in arbitration (other than international arbitration) is that the arbitration panel is normally required to make an award—i.e., who wins and for how much—without a supporting opinion. Of course, this frustration is the same when a litigation is tried before a jury or is resolved at a bench trial where the judge decides not to render a written opinion.

Another virtue of arbitration in my judgment is that the arbitrators are encouraged to impose a resolution that is just and equitable, not necessarily strictly in accordance with principles of law (though some states, including New York, unfortunately are tending more and more to limit such discretion on the arbitrators' part). My own view of law vs. justice can be summarized by an incident that has resonated in my mind and soul for fully 41 years. I was attending the first week of my freshman course in real property law, taught by Michigan's legendary Dean Allen Smith. We were using Dean Smith's casebook, of course, and he had carefully dropped a moral trap into its early pages. A case had been decided in a manner, while in accordance with binding legal precedent, that was manifestly unfair to one of the litigants. After discussion of the case, one of the students raised his hand timorously and said, "But, Dean Smith, that result isn't just!" Feigning great indignation, the Dean replied, "Justice? JUSTICE! You're not here to learn about justice! YOU'RE HERE TO LEARN ABOUT LAW!!" An unforgettable introduction to the real world by one of its sages.

An increasingly popular alternative is mediation. ("Aha!" you will no doubt say, "at last he gets to the point of the column!" That reaction is entirely in order, but please understand that the characteristics of mediation can be well appreciated only against the background of its alternatives.) Although both mediation and arbitration fall within the purview of "ADR"—alternative dispute resolution, which is to say resolution that is alternative to traditional litigation in court—and are treated that way by The Counselors among many others, the two processes could not be more different from each other.

Arbitration is a quasi-judicial process in which *(1)* both parties offer exhibits and other evidence, *(2)* the members of the arbitration panel are forbidden to have *ex parte* dealings with a party without an opportunity for the other party to attend and participate, and *(3)* the panel renders a decision that is binding on the parties and is normally not subject to appeal.

By way of contrast, mediation usually is a voluntary procedure to which both parties subscribe, which results in no binding determination unless the parties are brought to agreement by the good offices of the mediator. If such a binding determination results, the parties are well advised to reduce their agreement to writing, however informal. The mediator helps in crafting that agreement *both* in open sessions involving both parties *and* in private "caucuses" involving just one of the parties in which the mediator can help the party to the caucus to evaluate, for example, the strength of his case, the strength of the other side's case and the likely remedy that will resolve the controversy. Indeed, it is not uncommon that, a week or two after a mediation session at which the parties fail to reach a mutually satisfactory settlement, the mediator phones one of the parties in an effort, often successful, to restart the mediation and bring it to a successful conclusion.

Occasionally, mediation is not voluntary. For example a court may order the parties to try mediation. Of course, if one party is not committed to

the process, he will normally be able to torpedo it subtly, without exposing himself to charges of contempt of court. But it will be the exceptional case in which a judge— normally a lazy jurist—prods his litigants in the direction of mediation without a good reason for doing so.

Likewise, it is not abnormal for parties who have commenced, or are about to become involved in, arbitration, to turn to mediation as an interim measure. For one thing, arbitration is binding and arbitrators are strongly encouraged not to "split the difference" between the parties but to decide affirmatively in favor of one party or the other and thereupon craft the remedy to fit the interest of the winning party. In mediation, compromise, splitting the difference and almost any other outcome you—which is to say, either the mediator or the parties—can think of is possible *without its being binding on the parties* unless and until they sign a written agreement embodying the settlement. Mediation can be abandoned by the mediator or any of the parties *at any time* before the parties arrive at a final, binding agreement, but part of the mediator's job is to avoid this result unless *(1)* achieving a settlement is beyond reasonable possibility and *(2)* it is in the parties' best interest to abandon the mediation effort.

In litigation and arbitration, the judge and the arbitration panel must respectively maintain the stern demeanor of the agency that will *decide* the issue for the parties. In mediation, the role of the mediator is subtly different. Of course, the mediator must retain control of the process, but he (a term which here includes "she," and it is clear that some of the very best mediators are women) is also in a position to play a role that will expedite the settlement process. The role models that may be of use to the mediator, depending upon the circumstances, will include age (does a given party need a father/mother figure to whom he will listen?); sex (does one or more of the parties need to be edged by a member of the opposite sex into a resolution that will also satisfy the opposing party?); experience (does a party need to sense that the position he has taken is callow or immature?); you name it. While the foregoing observation would not appear in a politically correct context, you can always count on the present columnist to be politically incorrect when such incorrectness represents a potential key to success.

I mentioned above that the concept of mediation carries with it an almost spiritual dedication. While the parties may not look at it that way initially, the mediator is virtually bound—professionally, psychologically and simply as a human being—to do so. He is *helping the parties arrive at the position which both of the parties find acceptable in the circumstances.* It is utterly necessary that the mediator subsume himself completely in this goal. He *must enable both of the parties to buy in* to the settlement crafted at the negotiation. Of course, the mediator himself has a record to defend—successful settlement of X% of his cases. But this self-interest of the mediator fits as nearly perfectly as you could ask into the broader schema of the mediation process. Assuming that all three participants are focused on success in reaching a settlement that will satisfy both parties to the dispute, the mediator and thus the mediation process will have an enormous leg up in arriving at a successful conclusion.

Finally, after taking the NAR course, I have realized that the precepts of mediation apply, in something like parallel fashion, to the more successful negotiations in which I have been involved over the years. For instance, don't pound the table, try to put myself in the other side's shoes to get some perspective on the issue, and at the same time seek to get for my client the best possible reasonable deal—which is to say, the best deal for my client that the other side is likely to honor in terms of performance. In a currently pending negotiation, I have consciously tried to apply these same precepts to the tenor of my dealings. At least for the moment, the discussions seem to be going exceedingly well for my client. We'll see, of course, what the outcome of this will be. When (and if) I get back to you with further observations regarding mediation following some practical experience, perhaps I will also have some further news concerning that negotiation. If not, well, you'll know that my high ideals haven't worked out and that in that case I will most likely be turning for the future instead to the mailed fist without reference to the velvet glove.

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