

## **OVERVIEW**

### **MY MEDIATION-FACILITATION FOCUS**

My mediation focus is finding real alternatives to litigation, rather than processes that merely 'soften' litigation. My interest is to facilitate the movement from mediator-centered settlement conferences where bargaining is positional, to party-centered mediations aimed at better understanding and mutual gains bargaining. Consequently, my approach to mediation differs substantially from the current and dominant paradigm of commercial mediation.

### **MEDIATION CAN BE IMPROVED**

To get the real benefits of mediation, we must move beyond the typical "settlement culture" and work to achieve "interest based" bargaining in settlements where the parties themselves make the settlement decisions. To be interest based, the control over both the process and the decision-making must be placed in the parties, not the mediator or the legal counsel for the parties.

### **MEDIATION CAN BE DIFFERENT**

Mediation can be more than a "haggling" approach to exchanging offers & counters. It takes effort, but in a phased approach to resolving the conflict, we can look for solutions as a group. Many cases are settled through a traditional haggling approach that begins with extreme offers/counter offers and ends in the "midzone." Yet, many times there were options for settlement that were better for all parties than the settlement signed by them. My goal is to help find those better resolutions.

### **ENVIRONMENTAL MEDIATION & FACILITATION**

I have worked in environmental and public policy mediations, including assignment from the US Institute for Environmental Dispute Resolution to mediate NEPA, Clean Water and Public Lands access conflicts among governmental parties (USDOJ, USFS, FWS, State and County) and citizens in Elko, Nevada. In such matters, my task was to design (with the parties) and carry out mediation and facilitation processes that provide the parties with the information that is needed to make key decisions about the options of negotiation or adjudication. In public lands and environmental disputes such as in Elko, Nevada, the neutral's challenge is finding ways to mediate high conflict disputes, where emotions can run high. Similarly, I have served as a mediator in water rights, land access and land contamination disputes. My goal in such efforts is to assist the parties in finding processes that will assist the party, rather than being mediator-centered or lawyer-centered. The processes involved in mediation and facilitation overlap in many circumstances where principal distinctions depend upon whether the parties will proceed to an adjudicative process if the negotiations are unsuccessful.

## **PARTY-CENTERED MEDIATION**

### **MEDIATION GOAL IN PARTY-CENTERED MEDIATION**

My personal mediation goal is to have us agree on and use a process that permits the fullest possible exchange of ideas and views to bring clarity to your individual decisions about whether to (i) resolve this case by finding a negotiated solution or (ii) proceed to trial and possible appeal. If you have increased understanding and clarity about that decision, and we have worked to find creative negotiated resolutions – then the mediation has been a success in my view.

The process goal of this mediation is to give the parties the best possible look at your options for resolving the dispute. Can we find an agreement that is better for all parties than going to trial?

I suggest that mediation generally be conducted in the following phases: Contracting, Table 1, Table 2 and then the Integration of the information learned. These phases are shown on the attached schematic, and described below.

### **"CONTRACTING"**

Mediation is best begun with a brief discussion of mediation basics to ensure some common understanding of the process. What are the roles of the participants and mediator? What additional safeguards are needed? Do we have a collective goal for this process? How can we work to get the best communication and avoid any past communication problems? How can we deal with impasses?

### **"TABLE 1" TESTING THE LEGAL REALITIES : WHAT ARE THE PARTIES' TRIAL RISKS AND OPPORTUNITIES .**

After discussing roles, we move to "Table 1." The goal of this phase of mediation: A clear look at the legal realities of the dispute. What will be presented at trial (and potentially at appeal)? If we cannot find an agreement in this mediation, what does each of us face by going to trial and possible appeal?

Some mediators approach this task by privately giving each party the mediator's view of strengths and weaknesses of each party's case. Although this is common, I think the approach is often abused – with parties thinking that the mediator is taking sides or manipulating one or more parties. In fact, that can and does occur. Some mediators do not like to discuss the lawsuit for fear of alienation or highlighting the conflict. Yet, if we are thoughtful, we can and should discuss the litigation because it is the result if you do not settle.

I prefer that we have a discussion of the lawsuit among all parties so that each party has a solid understanding about their own and the other parties' views of the case. In this case, you know your judge and we benefit by discussing what the judge (or jury if applicable) will need to decide. The goal is the education of the entire group (parties and mediator) --- for the purpose of full understanding rather than a non-binding evaluation/decision by the mediator. I don't expect one party to persuade another of their cause --- rather, the key issue is understanding.

Without disclosing trial secrets or tactics, can we discuss the following:

- What are the key legal and factual disputes?
- What is our agreement and disagreement on the legal issues and authorities?
- What are the relationships among these issues?
- What are the "swing" issues? On what issues will the case turn?
- What causes one party to win or lose (some or all of the case)?
- What do we think the judge will have to do with these legal issues? What judicial resolutions are reasonably available within the scope of the authorities?
- What judgments or verdicts are possible? What are the ranges of resolution for the court?

### **"TABLE 2" - LOOKING FOR OPTIONS FOR RESOLUTION.**

The goal of this phase of the mediation is set aside our litigation "frame of mind," and work together to see if we can find options that serve our interests better than proceeding to trial and appeal

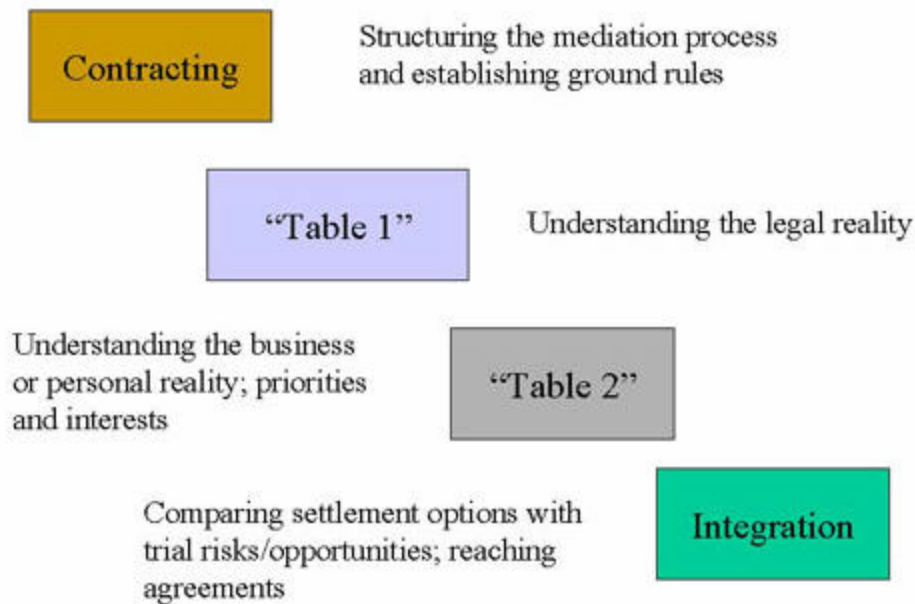
- What are the parties' needs for a solution? What issues are important to each party, and why? (As regards the lawsuit and the parties past and future relationship).
- For a comprehensive settlement, what issues do we need to resolve by negotiation?
- Brainstorming: Can we search for creative options for resolution (adding issues for resolution, perhaps combining or separating issues)?
- Can we create a "settlement template" that shows the various ways of resolving this dispute?

- Exchanging options and making proposals for resolution. Can we look for "productive compromises" and "improvements" to the best options found. We should then compare options presented with our "Interests" – Which options best satisfy our Interests?

### INTEGRATION OF TABLE 1 AND TABLE 2

At this point, the parties make their settlement decisions. Is there an agreement that is better for the party's interests than the risks and benefits of trial?

## Phases of Mediation



### HOW TO PREPARE FOR MEDIATION

The experts in this field say that inadequate preparation is the reason that negotiations or mediations go poorly. As a checklist, consider the following in your preparation:

**Interests.** What are your (your client's) real interests in this negotiation/mediation? What are your real goals? What do you want to resolve this lawsuit and change the relationship? Why is this important to you? How do you measure success? What are your success criteria? Do we know which issues are most important to us? Least important? Have we reconsidered our goals recently? Are they current or out of date?

**The other parties.** What are the other parties' interests? How do they see this negotiation? What is important to them? Why? How do they see us? How can we change their misperceptions about us? Do they stereotype us? How can we avoid that? What are our shared interests with them?

**Relationships.** What is our present relationship with the other parties? Why? What are the present conflicts between us? What caused them? What future conflicts between us are likely? How will these conflicts be resolved? Is more litigation likely? Are we in danger of a cycle of repeat litigation? How would we prefer to see our relationships change? How could it change?

**Information.** What facts do we know? How certain are we of our facts? What information are we missing? How can we get the information we need? What assumptions are we making? Are these good assumptions? What future events could change this situation?

**Decision-making.** What is our trial risk? Are we over-confident in our chances at trial? If we lose at trial, what happens? If we win at trial, what happens? Are we reacting to the other party or making thoughtful decisions? Are we pre-occupied with past events or positions? Are we merely justifying past decisions, positions or statements?

**What do I need to know from or about the other party?** What could they tell me to clear up ambiguity? What would I like to know from them? How can I ask that to get the clearest response? Who are their negotiators? What drives them? What could cause them to leave the negotiating table? How can I encourage them to keep negotiating?

**Likely negotiation topics.** What issues will we need to discuss in this negotiation/mediation? How important are these issues to me? To them?

**Analysis of issues needed for resolution.** In a comprehensive resolution, define a list of all topics that will need to be addressed? What are the reasonable options for resolution of each topic?

**Value: BATNA, aspirations.** What "value" do I need from the negotiations? What is my BATNA ("best alternative to a negotiated agreement")? What is a reasonable value to which I can aspire? At what point will I decide to leave the negotiations because of low prospective value?

**What are some options that could resolve these issues and conflicts?** Can we create some new options for resolution? How? What can I offer to the other party to encourage settlement? What do I value more highly than they? What do they value more highly than I? What tradeoffs are in my best interests? Are there some creative approaches to solving this dispute?

**Secondary effects.** How does the resolution of this dispute affect other matters and issues? Positive or negative?

**Negotiating roles.** If on a team, have we assigned roles? Who will handle what issue? Who is the best spokesperson on an issue? As between lawyers and clients, who will be responsible for what parts of the mediation?

## FACILITATION

**Facilitation Experience.** I have served as a facilitator on a variety of projects including matters for government agencies, corporations or other business entities, and non-governmental organizations. Such assignments have varied from facilitating short meetings to multi-day retreats and multi-session facilitated negotiations. Served as Visiting Professor and role-play facilitator in the mock negotiation of the *San Francisco Airport Runway Expansion Negotiations*, Advanced Negotiations Course, Stanford Law School, Program on Mediation and Negotiation, April 2001.

**Facilitation Approach.** I work with the participants (prior to and during the event) to develop a process that balances full and thoughtful participation with time demands and efficiency. My role is moderately directive as to "process" while ensuring that "substance and content" remain in the hands of the participants.

**Challenges in facilitated negotiations.** As with mediations, multi-party facilitated sessions must balance the need to promptly move toward successful resolutions with the reality that consensus building takes time. Processes must consider how these tensions can be balanced to ensure the greatest chance of finding consensus.

**Considering multiple options.** When problems are best solved by thoughtful comparisons, a facilitated process can permit the simultaneous consideration and improvement of multiple (and potentially inconsistent) options. If the participants can avoid premature commitment to an outcome, all feasible outcomes can be improved in a process that makes the best solutions and best thinking of the assembled group available for final consideration and decision-making.

**Facilitation Subjects.** I have worked with organizations in the following type of matters:

- Building the elements of a long term strategy
- Providing an approach for airing intra-organizational disputes
- Building an action plan for a multi-year international program
- Assessing opportunities for organizational growth
- Identifying how to assess scientific data in environmental conflict
- Assessing the use of Process Design Committees or Joint Fact Finding initiatives
- Improving working relationships among a board of directors
- Assessing options for dealing with a specific conflict or dispute
- Identifying goals and setting "success criteria"
- An assessment of challenges and opportunities facing an organization and development of an action plan

**Internet/Web based options.** I am experienced in using web-based options for either "electronic whiteboards" or as Negotiation Support Systems.

**Web resources.** Although face-to-face communication remains the foundation of mediated and facilitated negotiations, the Internet offers some interesting and efficient options for enhancing communications. Web-based applications can be used to communicate ideas or even exchange and evaluate offers and counter-offers.

**Electronic whiteboards.** In some situations, not all persons can be present at discussions, or helpful ideas occur at times other than during the public or private meetings. Software that serves as "electronic whiteboards" can be used to accept comments -- and those comments can then be further refined by a trained facilitator. I am trained in the use of these systems and can assist private parties in their use, or set up the use of such systems to collect public comment on matters such as environmental or land use issues.

**Negotiation Support Systems.** Additionally, software is now available to assist parties in negotiations (Negotiation Support Systems) and in some circumstances, to use software to exchange offers. I am trained in these systems and can assist a party in using Negotiation Support Systems to enhance their negotiation decision-making.

**Facilitation References:** The Consensus Building Handbook, Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer, Sage Publications, 1999

## **ENVIRONMENTAL DISPUTE RESOLUTION**

Environmental Dispute Resolution offers and presents both unique opportunities and challenges. The fact that such disputes are usually multi-issue and multi-party makes the negotiations or mediations complex. However, the presence of multiple issues makes the prospect for use of interest based bargaining much richer.

Special issues of interest in Environmental Dispute Resolution include:

- Coordinating multiple participants.

- Working with governmental agencies in ADR.
- Often there may be high levels of conflict, political implications and public interest.
- Need for special [facilitative](#) or decision-making processes such as Process Design Committees or Joint Fact Finding.
- Some participants, including some environmental organizations, now feel that mediation and other forms of ADR are manipulative and do not serve their interests.
- Complex technical, scientific and factual issues.
- Higher than customary chances of factual overload.
- High need in mediation to coordinate group activities to keep settlement momentum preserved and coordinated.

In light of the foregoing, special considerations may be needed, such as:

- Special efforts to ensure that the contracting phase of mediation provides the needed safeguards to the participants.
- Need for high levels of organization and focus.
- Use of an [analytical approach to negotiations](#) to improve effectiveness and efficiency.
- Coordination and motivation of efforts to be undertaken between mediation sessions.
- Use of multiple ADR methods to deal with factual, scientific and legal conflicts.