

Notes from the Editor**Issue No. 40, February 15, 2003**

The shock of the shuttle Columbia tragedy earlier this month over Texas, was felt worldwide and represents another water shed event that we will never forget. As a human being and an engineer I am torn between the emotional loss of life and the technological questions that have arisen. I applaud the NASA family for the public way they have responded to both these considerations.

As a mediator who specializes in the prevention and settlement of construction disputes, I promote a process that, like NASA, must balance the technical (and financial) aspects of the dispute with the human elements of the dispute. It is my observation that in the alternative dispute resolution (ADR) field, only mediation has the flexibility to provide this powerful combination as the means to a just settlement.

This issue presents a case study of a complex construction dispute where the use of expert analysis and an evaluative mediation process lead to settlement. **Gerald S. Clay**, is a partner in the Honolulu law firm of Stanton Clay Chapman

Crumpton & Iwamura. His firm focuses on construction and commercial matters and developing effective techniques for alternative dispute resolution. Since 1984 Mr. Clay has authored many articles for legal and industry publications and is co-author of "Before You Sue: How to Get Justice Without Going to Court", a lay introduction to mediation. You can reach him at gclay@paclawteam.com

I have always found **Barry Simon's** contributions to ADR internet postings to be forthright and interesting. He has kindly allowed me to reprint a condensed version of his viewpoint regarding the state of the mediator profession and his vision for its rich future. Barry has, since 1993, been active in resolving people, community workplace and business conflicts. He founded Mediated Solutions, a conflict management service in 1998. He can be contacted in California at sbarry@resolvenow.com.

Joe Grynbaum, P.E.

Mediation of Complex Disputes: The Effective Use of Expert Analysis**by Gerald Clay, Esq.**

Complex, multi-faceted cases can pose unique problems in mediation. Where there are a multiplicity of issues, each of which is the subject of a separate dispute, it can be difficult to get the parties close enough to achieve a settlement. One method that has proved successful is to provide each side with a separate analysis of the issues, using the services of an outside expert. Using the expert's opinion together with independent research as the foundation for the analysis, each party can then be advised as to how they should approach negotiations.

Case Study - One example where this approach proved successful was a recent dispute involving the construction of an apartment complex for the elderly. The parties were the Owner of the

building and the "Construction Parties": the General Contractor; the Architect; and the Electrical Engineer. There were allegations of a variety of defects in the construction, design, specification and co-ordination of the project. Many of the major issues involved alleged defects in the specification and construction of the electrical systems, including violations of various building codes and the Americans with Disabilities Act.

As is common in technical multi-party/multi-issue cases, the parties were far apart on both causation and damages. The Owner claimed significant damages to rectify the alleged defects. The Construction Parties denied most of the claims. They also asserted that, if any defects did exist, they were the responsibility of one of the other

Construction Parties, and would in any event cost less to remedy than the Owner claimed. As is also not uncommon, given the variety and complexity of the claims and the need for expert testimony, the combined cost to all four parties of arbitrating these claims would have been more than the probable recovery to the Owner.

Tailored Procedure - To narrow the gap between the parties and pave the way for a possible mediated settlement, the parties were persuaded to adopt the following procedure. First, they agreed that the mediator needed to evaluate their technical and legal positions. They agreed to share the cost of retaining an electrical engineer as a neutral consultant to advise on the merits of the various technical claims and defenses. They also agreed that the mediator would provide a confidential analysis to each party, based on the advice of the neutral expert.

Each of the parties was then directed to provide a detailed statement of their case. The Owner set forth the legal and factual basis for each of its claims, supported by the opinions of its experts and consultants, and the amount of damages sought. The Construction Parties provided responses from their own experts, which disputed the existence of certain defects, attempted to assign blame to others, and provided conflicting estimates on the cost to remedy the problems.

This material was provided to the neutral consultant. He provided a confidential, independent evaluation of every claim related to the electrical engineering, including the relevant standards of care, the options for remedying the defects, and the probable costs of those repairs. The non-expert legal and factual issues involved in each claim were researched and additional information obtained from the parties where certain issues needed to be fleshed out.

Confidential Evaluations - After further discussions with the expert, a sufficient understanding of the issues was gained for the preparation of individual, confidential evaluations

of the claims for each of the parties. The evaluations contained a discussion of the pros and cons of every claim, including an analysis of the legal issues and factual issues. For each claim, they gave an opinion as to whether the Owner was likely to prevail, and what the likely range of recovery would be. The evaluations provided to the Construction Parties separately advised each one how much of the damages were likely to be apportioned to it. The evaluations also discussed the likely fees and costs of litigating or arbitrating the claim.

For the Owner, the evaluation concluded with an overall amount, based on the analysis, of what would be the appropriate starting point in a settlement negotiation, from which the Owner could negotiate down. For the Construction Parties, the evaluation indicated a starting point from which each construction party could negotiate up.

Final Arguments - After receiving the reports, some of the parties made further arguments as to why their cases were more favorable than the evaluation had suggested. Because of the insights that had been obtained from the consultant and the independent examination of the claim, a persuasive response could be made in support of the initial report. In another case where this system was used, and which involved multiple mediators because the sums at stake were in the low eight figures, there were separate all day sessions with each side in which they were allowed to argue every issue in seeking to convince the mediators that the merits of the case favored them. The expert's report was not, however, shared with the parties, in order to avoid turning the case from a mediation into a cross-examination of an expert witness.

Settlement Mediation - The parties then went into a structured mediation process, designed to last no more than a half day. All of the parties began at figures equal or very close to the figures that had been suggested. Having narrowed their differences, the parties were able to negotiate a settlement in a fairly short time. Based on my

experience with complex construction claims, I believe this system can achieve a high rate of successful settlements, which could not be achieved

by a less searching, more "global" approach sometimes used.

MY VIEWPOINT – In Search of an Occupation**by Barry Simon**

The Problem - After four years of trying to enter the mediation profession, I came to the conclusion that there is no mediation profession. I posted this revelation on Cornell University's DisputeRes. Listserv and received nearly two dozen variations of this same theme. One called for a degree path not unlike that of attorneys while another advised hitting the streets and promote, promote, promote. I received several emails castigating trainers for not being up front with their students while court and community administrators wrote to defend their honesty and integrity when recruiting volunteers for mediation training.

Many complained how doing "free" mediations hurts the profession. Still others defended the practice as a way for new mediators to receive "on the job" training. There were emails calling for the establishment of a "national voice of mediation." Others expressed deep concern for what would happen to mediation if it became "professional," thereby taking away its openness for participation as mediators by all people and leaving, instead, just another fenced off career for people with appropriate degrees after paying thousands of dollars in tuition.

There are a lot of frustrated and cynical mediators out there, many wondering, as I am, why it is not possible to make a living being a peacemaker. In pondering how mediation can be so valuable that courts all across the country have developed mediator panels yet not provide enough business for a private mediator to buy a loaf of bread, I decided to dig around in its history for some understanding.

The Past -As we all know, mediation has been around for centuries. More recently, the Federal Mediation and Conciliation Service (FMCS) was founded in 1947 for the purpose of resolving labor

disputes. Over the years, FMCS has also helped other federal agencies develop their own mediation programs and the resulting growth of federal mediation programs has been astounding. Unmistakably, mediation has found a welcomed home within the federal government.

Unfortunately, it hasn't spilled over to the general public and, thereby, spawned a mediation profession. What's needed is legislation that encourages all disputants to start with mediation before progressing to arbitration or litigation. That would jump-start our profession over night while reducing clogged court calendars. But I'm not holding my breath because such legislation would remove power from the judiciary and judges and attorneys are not about to let that happen.

Perhaps even worse than the affect the swallowing whole of mediation by the courts [sometimes described as the anaconda effect] has had on the mediation profession is the chilling impact this has also had on our official mediation organizations. Whether or not mediation really is a branch of law (and I fall on the "not" side of this argument), these organizations act as if it is. For instance, the language and vision of the omni-present slogan "Mediate. Don't Litigate." associates mediation directly with the legal system.

Outside the Courthouse Box - In truth, this domination by the legal system is not going away. If anything, the legal profession will more than likely take over the court mediation programs. The question, however, is will it also take over the whole profession? I fear the answer is yes if we do not free ourselves and our profession's promise from the courts' domination over us, our imaginations, and, most importantly, how we perceive mediation.

I suggest we begin by thinking about disputes more broadly. There are 281 million Americans. Perhaps 30-40 million of them take their disputes to the courthouse. What about the other 220 million? Are we to assume they don't have any conflicts? We only need to look toward our own lives to know that disputes arise in our workplaces, schools, social organizations, houses of worship, families, and most intimate relationships. Surely, these need attention, too. Maybe if we thought of disputes in a much larger context than litigated cases, we mediators might realize that the opportunity for practicing our skills is enormous. And this isn't just wishful thinking.

The Future - What my brief research has revealed is that mediation is the public's dispute resolution process of choice. They just don't know it yet. Meanwhile, because it thinks of disputes as primarily being litigated cases, the mediation community walks in lock step with the court program. Therefore, it is clear to me that we must A) liberate ourselves from the perception that mediation is a branch of the law while B) developing the much larger market for mediation that awaits outside the courthouse.

We can begin by acknowledging that the real gatekeepers of disputes are the disputants. When in conflict, it is they who decide to hire an attorney or, more often, to sit on it or step outside and settle it. The statistics seem to indicate they would turn to mediators if they knew about us.

According to a 1992 Survey financed by the National Institute of Dispute Resolution (NIDR),

45% of respondents indicated that when confronted with a dispute they "leave it alone/avoid it" while another 24% indicated they "argue/(get into a) verbal argument." Meanwhile, only 1% associated "dispute resolution" with arbitration, while 2% associated it with mediation. The Wirthlin Group, who conducted this Survey, warned about the gap between what people say and do. Then their report went on to record that once respondents were made aware of how the different dispute resolution options work, 62% said they would go to a mediator. 62%! Not to an attorney. Not to a judge. Not to a courthouse. But to a mediator. To you. To me.

In order to accomplish this awakening, first I call upon all mediators and our official organizations to shake ourselves free from the legal lethargy into which we have fallen and begin focusing our energies on promoting mediation as its own discipline. We must embrace mediation as an equal of, not a servant to, litigation.

Next, we must create a clear and well-defined plan that takes solid and meaningful steps over the next several years toward building an awareness of mediation in the minds of the public. What I am suggesting is that we get to the public before they even come to the courthouse steps, before they even think of hiring an attorney. What I am envisioning is a public that automatically thinks of mediation whenever a dispute occurs, relying on the judiciary not as their first choice but their last. Once this has occurred, no mediator will have to search for the mediation occupation. It will be everywhere.

IN THE NEWS

The ICC International Court of Arbitration (based in Paris) announced last month that it had recorded a record number of more than 590 cases in 2002. In December (2002) alone the Court registered more than 80 new cases. Amounts at stake ranged from \$30,000 to \$40 million.

Also 2002 marked the first full year of operations for ICC ADR, bringing a range of ADR techniques for settlement of business disputes. Techniques include mediation, neutral evaluation and mini-trial.