

Notes from the Editor**Issue No. 41, March 15, 2003**

Here we are in the middle of March and spring has not yet shown up. Even the birds are surprised. I've seen woodpeckers, robins and cardinals scrounging around for food with snow still thick on the ground. One escape from the tensions of world politics, high energy prices and the extended economic downturn is to complain about the weather. Wasn't it Julius Caesar who was forewarned to "Beware the Ides of March!" Just as we are all at the mercy of the weather it seems that we are all being held hostage in a spiral of descent into a war in Iraq. During mediation, when the parties revert back to the emotions of confrontation, it is essential that both parties are coaxed back from the edge, each to reconsider their resolute perspective. If the United Nations cannot provide this coaxing then the prophetic "Ides of March" warning will once again prove to be true.

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At least one bright light has come back on, on Broadway. This week the musicians union and the producers of Broadway musicals reached a settlement to their dispute regarding the minimum number of musicians required in the orchestra pits of the 13 largest theaters on Broadway. Spurred by

the intervention of New York Mayor Michael Bloomberg, and successfully mediated by Frank Macchiarola, the settlement was described by the union negotiator as a difficult concession but one that will protect live music on Broadway for the next 10 years. Bloomberg made a strong impression on both sides with his greeting words, which pointed out that 'At the end of the day, we're all buried in the same ground, and we have to find a way to live together.' Amen.

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Robert Harris is a Connecticut lawyer and mediator with the firm Zeldes, Needle and Cooper. He last appeared in this newsletter two years ago. His latest piece, featured this month, comes from an article that comments on the advantages of utilizing mediation for multi-party dispute settlement. It was originally published in the March 3, 2003 issue of the Connecticut Law Tribune newspaper. Attorney Harris can be contacted at Rharris@ZNCLAW.com.

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Joe Grynbaum, P.E.

The More. The Mediator.**by Robert A. Harris, Esq.**

Two's company, three's a crowd, four is a morass. Every litigator knows that, as the number of parties increases, the complexity, expense and delay of litigation increases, often exponentially.

Attorneys involved in multi-party matters often shy away from mediation, deterred by their belief that a global resolution is unlikely given the number of participants. In fact, multi-party disputes should be priority candidates for mediation. A mediation that results in even a partial resolution can substantially reduce the complexity and expense of the remaining litigation.

I recently participated in mediation involving a home that had been constructed on

another party's land. Oops! After the homeowner defaulted on his mortgage, the foreclosing lender learned the hard way that its ostensible collateral was imperiled. The lender brought suit against the adjacent landowner and the mortgage originator. The originator brought a separate action against the Title Company, the appraisers, and the closing attorney.

You can posit how full-blown litigation would have proceeded. Each party would have a right to counterclaim, to cross claim, to challenge the specificity and legal sufficiency of the claims against it, to seek consolidation of the two cases, to conduct discovery, and to retain experts on a multitude of issues requiring opinions regarding

standards of care. Coordinating lawyers' schedules for depositions would create a logistical headache with a life of its own. A higher percentage of lawyer time would be spent performing tasks that would not advance the case in any material respect. And, God forbid, if the cases went to trial(s), it (or they) undoubtedly would be long and expensive.

The mediation did not result in a global settlement. However, I believe most, if not all, of the participants viewed it as successful, as all claims except those between the foreclosing lender and the adjacent landowner were resolved.

Moreover, by resolving the other claims, the mediation also benefited the lender and landowner by dramatically simplifying their remaining dispute. Both were extricated from the circus of multi-party litigation, with its inefficiencies and expense, enabling the remaining litigation to proceed as a substantially less complicated two party dispute. Moreover, the mediation served to commence a dialogue that may, as yet, foster a settlement.

Attorneys also should not lose sight of other benefits provided by the mediation of multi-party disputes:

1. **It's cheaper.** Mediation under most circumstances is one of the best bargains around. However, when the mediator's fees are divided by three, four, five or six, instead of two, it's an even better deal.
2. **More settlement possibilities exist.** Mediation strives for "win-win" resolutions that take advantage of ongoing relationships between the parties. When more parties are added to the mix, there usually is a more than commensurate increase in the inter-relationship dynamics, which serves to provide increased possibilities for structuring a settlement.

3. **More checkbooks means settling parties contribute less.** The plaintiff wants the claim paid, and money is fungible. By collaborating, defendants can take advantage of their collective bargaining power to resolve claims at less cost.

4. **A greater likelihood exists of finding a knowledgeable, pro-mediation attorney from a pool of five than a pool of two.** Mediations often have a greater chance of success when at least one of the attorneys is an experienced, proactive believer in the process. He or she can help keep skeptical disputants involved in the process. In a two party dispute, there is a substantial likelihood that neither attorney will be experienced or knowledgeable about mediation. In a multi-party dispute, with more lawyers involved, there is an increased chance that at least one of the parties will be represented by a mediation advocate, who will help facilitate the overall process.

5. **Mediation can minimize unproductive and costly motion practice and discovery disputes.** The communication channels opened by mediation provide parties with an opportunity, even when the underlying dispute is not resolved, to avoid a scorched earth march through the Practice Book. The dynamics of mediation often result in agreements to dispense with extraneous motions, and to agree upon discovery scope and timetables.

Conclusion. So, when you find yourself reading a long list of names on a pleading's caption, think "mediation."

An open letter to litigators and counsel contemplating mediation

Dear Sir/Madam,

This letter is directed to those lawyers who think of mediation as just another tool to test their arguments and positions and give their clients a taste of how a lawsuit may turnout. To all others keep up the good work.

My best advice would be, don't underestimate the ability of mediation to resolve intractable disputes that have festered and dragged on for years with no resolution seemingly in sight. I am always excited when I hear counsel from one side or the other side tell me that coming into the mediation they were convinced that this would be an exercise in futility. They are convinced that the two sides are too far apart and too invested in their opposing positions.

A counsel for one of two respondents to a complex construction claim explained that he had witnessed a settlement forged in a previous mediation and was so impressed that he had counseled his client to make himself available for this mediation, and use the opportunity to its best advantage. This (now retired) lawyer has continued to stay in touch and has referred others to me.

I have also been confronted by a defendant counsel who has accused me of not working hard enough to convince the claimant that their case was ill founded and would not win in the upcoming trial in a federal courthouse. This, mind you, after the case had already been in litigation for almost 7 years. In that time it had cost each party over one million dollars in legal fees, summary judgement briefs and extensive discovery to argue numerous court appeals.

In this particular mediation the defendant litigator was basing his case in support of winning at trial on two sequential arguments that the trial judge would be asked to rule upon. In private caucus he argued strongly, in the presence of his client, that he was convinced that he had an 80 percent chance

of winning the first argument, and then a 90 percent chance of winning the second and major argument of the case. The overall claim involved almost \$3 million in damages. Interestingly enough his opponent, the claimant litigator, was just as convinced that his case would win with almost the same probability of success.

This seemingly incongruous situation is not unusual as other mediators will attest. The dilemma for the mediator is what best to do with this confidential information. Sometimes pointing out some of the weaknesses in the underpinnings of the logic that has been assembled to bolster each argument can evoke some movement. The manner in which these counter arguments are presented can be crucial to their being heard.

In the presence of his/her client each counsel will often feel constrained to speak as freely as they might in a private conversation with the mediator. And of course it may not be possible for the attorney to back off from a position he has argued for in building the best case for his client. I have sometimes informed each party that despite what has been presented so far the other party cannot understand how they can believe that their case has a chance of succeeding. My objective is to coax each party into re evaluating their previously hard held positions.

In the previous mediation we worked with each party in private caucus to convince them that if either side did not succeed with the first step of their case, then their overall case would be irreversibly compromised. They both initially quickly dismissed this possibility as improbable and therefore not worthy of further consideration. However, as the conversations continued in separate rooms, it became apparent that the owners and principals were listening and beginning to ponder the possibility of a judgement that was not as secure as promised by their counsel. They each wanted to explore this possibility in more depth

and began to participate directly. They even began to consider the benefits to their organization of a business-based solution rather than the unknown decision that the court might deliver.

With a new morning start and a fresh beginning the mediation proceeded and ended with a monetary settlement offer that was discussed thoroughly by both sides in a climate of working together to end the dispute. It should be noted here, that in all the time that had passed there had never been an actual money offer presented. Although it took several more weeks for this offer to be ratified and accepted by the claimant party,

the matter never did revert to the court and a 7 year ordeal was finally over.

The facts support the possibilities. Even though a dispute appears intractable and has gone on for years, do not underestimate the possibility of success of a mediated dispute resolution opportunity. Try it for your client's sake.

Respectfully,

*Joe Grynbaum, PE
Mediator*

A TUNE-UP EXERCISE

Every mediator has crafted their initial presentation at the mediation table for preparing the participants to begin the mediation process. The mediator's introduction is very important. It should not only inform them of how the process works but also alert everyone as to what they can expect from the mediator. That is, the mediator's style and expectations.

I have found the following exercise to be useful, particularly to begin the second day of mediation, as an ice-breaker and to gently shake the foundation upon which we all prefer to operate. That is our comfort zone. I call it a tune-up or alignment exercise because it illustrates how much we take for granted in what we see and read. And how two or more people often cannot agree upon the same set of facts, even when they are presented for all to see.

In this exercise the question is, how many letter "F's" can you find in the following sentence. You may take several minutes to arrive at your answer.

FINISHED FILES ARE THE RESULT OF YEARS OF SCIENTIFIC STUDY COMBINED WITH THE EXPERIENCE OF MANY YEARS.

I am tempted to publish the answer next month, but have decided to provide it on Page 1 at the end of my editor's notes. The mixed results from this exercise provide a common base for everyone to proceed with the mediation.

[My thanks to Steve Knisely, (JM) Associates, Management Consultants in Austin, Texas) who first introduced me to this exercise.]