**Mediation: One Lawyer's Decision, By Philip Mulford, J.D.**

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Mediation. I graduated from UVA law school in 1982. Not once during my legal education do I recall hearing the word “Mediation.”

From 1982-1989 I practiced law in Dallas, Texas; first with a big, corporate firm, next with a small, spin-off of the corporate firm and finally as general counsel to an international airfreight forwarding company. Not once do I recall hearing the word “Mediation.” Now, “Mediation” is all I do. In 1989, I stopped practicing law and started a mediation business. I called my mediation business “Legal Alternatives, Inc.” because the word “mediation” was not then a marketplace term.

           The change from an adversarial to a mediative mentality evolved over a period of time. From 1982-1984, the focus of my law practice was commercial real estate lending. My firm represented financial institutions, primarily savings and loans. No longer limited to residential lending due to deregulation, savings and loans had recently entered into the commercial real estate lending field. At the same time, real estate speculation was driving prices skyward. Loans were being made and paid off at a rapid, but, as it turned out, short-lived, pace.

In 1984, the bottom fell out of the commercial real estate market in Texas and throughout the Southwest. Land prices came tumbling down. Suddenly, offices and apartments were overbuilt. Savings and loans found themselves holding the proverbial “hot potato.” Nobody was in line to buy the raw land they had financed. Nobody was occupying the buildings they had financed. Overextended borrowers couldn’t repay their loans.

Initially, for me, that meant a change from negotiating lender’s loan documents to proceeding with traditional loan default remedies, including foreclosure. From my lawyer’s view, I knew my client either had to be paid or it had the contractual right to foreclose. Why talk? It soon became clear, however, that foreclosing on all that land was not a viable long-term solution. Upon foreclosure, the lender had to reduce its net worth by the difference between the original loan amount and the much lower foreclosure sale price. Due to the magnitude of the problem, that meant potential regulatory insolvency.

Facing that outcome, lenders tried a different approach. If a borrower could somehow bring the loan payments current and seemed potentially able to repay the loan given some adjustment to the loan terms, then our clients engaged us to “workout” a loan modification acceptable to both borrower and lender.

Typically during loan modification negotiations, borrower’s attorney would explain and justify his client’s position and make accusations against my client. I would then defend against borrower’s accusations and make plenty of my own against borrower. I would continue to pursue other formal legal actions- Demand Letters; Notices of Default; Notices of Foreclosure, etc.- that only served to further sour the relationship between my client and its borrower. We lawyers controlled the process. Our clients would sit quietly. Negotiations would proceed in this very adversarial, argumentative manner.

After several such negotiations, a loan officer with whom I often worked asked a simple question, “Why do we do it this way?” He wasn’t an attorney, so, of course, he didn’t understand. In practice for only a couple of years and not long graduated from law school, his question gave me the perfect opportunity to show off my legal knowledge. I “explained” to him how “things worked.” Surprisingly, my explanation didn’t seem to resolve his question. Soon he expressed his dissatisfaction with our approach again. It just didn’t make any sense to him. Eventually, he persuaded me to try a different approach to our negotiations.

One day, weary of the constant adversarial head banging, the loan officer and I decided to implement our new approach. I interrupted opposing counsel from his accusations and said something to the effect of, “We aren’t here to posture for litigation. My client is here in good faith to create a solution, not to place the blame. We’re here to work something out. To do so will require us to work together. If you want to, fine. If not, we’re done.” Borrower’s attorney rose to leave. His client sat quietly for a moment. Then he said to his attorney, “Sit down. I want to work something out.”

That was a turning point, not only for the particular negotiation, but also for me.

The negotiations took on a whole new feel. Instead of us attorneys arguing about seemingly irreconcilable positions, our clients began to discuss the underlying reasons for their positions. They began to talk about their needs, their areas of flexibility and their limitations. My role changed. I wasn’t talking. I was no longer in control of the process. I hadn’t really considered the impact of this new approach on me. There didn’t seem to be much for me, or my colleague, to do.

I began to wonder how to justify my presence. I listened intently to my client ready to redirect the conversation or to pull him aside to talk confidentially. My colleague was doing the same thing. We’d both jump in at various times to “caution” our clients and, in doing so, effectively turn the discussion over to us attorneys. Our clients began to show irritation with our interruptions.

Rebuffed from our efforts to “protect our clients from themselves,” we both likely entertained thoughts of asking to be excused, formally withdrawing representation or terminating the discussion one way or another. In the midst of these thoughts, I found myself drawn into thinking about solutions to the problems being discussed. As I listened to the loan officer and borrower talk, I realized I had an idea that might, at least in one area, serve their mutual purposes.

I hesitated. Should I offer a suggestion that might benefit the other side at some cost to my client? Would that be consistent with my ethical responsibility to zealously represent my client? Was my desire to participate going to outweigh my ethical duty? Would my suggestions compromise my client’s position in some way? Should I take the loan officer aside and first discuss the idea with him? After giving some thought to these questions, I interrupted. Client exasperation on both sides was evident. But when I offered my idea, it was if the whole room went, in a positive fashion, “Hmmm?” The reaction was most likely not due to the merit of my idea, but because I, an attorney, in the spirit of the clients’ discussions, had offered a constructive comment.

I had just taken another step in my transformation from lawyer to mediator.

I could tell that my client was pleased that I was trying to solve the problems he faced. The borrower was also receptive. Having found a way to participate, I started to listen to both sides in a new way. What were they trying to accomplish and how could we make that happen? I had to adjust my “pay or we’ll foreclose” mentality to one of how to create a mutually agreeable solution to this seemingly impossible situation. Not only did I, as lender’s lawyer, need to readjust my thinking-so did borrower’s counsel.

We successfully negotiated that loan modification. My client was happy. The borrower was also happy. Too happy. He thanked me approvingly at the conclusion of our discussions with the words, “Thanks. You didn’t act like an attorney.” As much as I appreciated his “compliment,” I worried what my client’s reaction would be. I expressed my concerns to the loan officer. He already was having a great time kidding me about the “compliment” and my related concerns only increased his pleasure. Our new approach made much more sense to him in theory and was successful in fact. Why worry? It made more sense to me, too, but those words stuck in my mind. The more I thought about them, the more questions they raised.

If the other side were thanking me for “not acting like an attorney,” what would my client think? The loan officer and management were pleased with the outcome. Management had approved the loan modification terms, but only the loan officer had sat in on the negotiations. Would management also find humor in the fact that its attorney had “not acted like an attorney,” or wonder if it had left something on the table? Even if those most directly involved were happy with my legal representation at the time, would others be second-guessing them and, thus, me down the road? As successful as our 4-way negotiations were, I felt there was a missing element. I felt like I was playing multiple, conflicting roles – the role of attorney and the role of someone who “didn’t act like an attorney.” I remained uncomfortable.

I wondered if there existed an effective, non-litigious way to resolve disputes without having to question my role? I wondered if there were an out-of-court process that included a person who’s role was “not acting like an attorney.” I looked into arbitration, but found arbitration to be simply informal litigation, the arbiter an informal judge. My exploration of arbitration did, however, introduce me to an entirely new and different concept – “Mediation.” In 1989, I came across this definition in the 1987 Texas Alternative Dispute Resolution Act: “Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement or understanding among them. A mediator may not impose his or her own judgment on the issues for that of the parties.” I knew I’d found what I was looking for.

Although often lumped together with arbitration as an “alternative dispute resolution” (“ADR”) process, mediation actually has little in common with arbitration. Mediation does not include a third party decision maker, but a third party facilitator. Mediation encourages the positive application of the very concepts the savings and loan officer and I had been using in our negotiations, but with one significant addition, the mediator - the person who “doesn’t act like an attorney.” As a mediator, my job is to listen to both sides and help them communicate in a clear and understandable fashion. I help parties explain to each other, and often discover for themselves, what’s behind their stated positions. I help them focus on solutions for the future, rather than belabor the past. I sometimes act as a referee, but never as a judge or arbiter; and never as an attorney.

A common misunderstanding about mediation, besides the fact that’s it’s not arbitration, is that it eliminates the need for attorneys. It does not. More often than not, attorneys refer clients to me and seem to think that their role is then over. Not true. Mediation is not a substitute for legal advice. In no way does the mediator replace the attorney. The mediator does not give legal advice. Mediation is an alternative process to the adversarial, court-oriented one. Mediation is a substitute for litigation, not a substitute for legal advice. (I probably should have first called my mediation business “Litigation Alternatives, Inc.”)

Granted, most lawyers practicing today weren’t trained to represent clients in mediation. Mediation does not require lawyers to argue the law and persuade a third party decision maker as we were trained to do. Mediation requires lawyers to play a different role. Mediation asks attorneys to help clients create forward-looking, customized solutions to their problems in a non-adversarial environment; support clients’ decision making ability by explaining the legal consequences of various alternatives; help clients explore their needs and assure that those needs are satisfied in any agreement; and assure that agreements comply with the law.

I never know what solution parties might create when we first sit down to mediate. I do know that mediation works. Whether in commercial or domestic relations disputes; disputes between amicable or disagreeable parties; disputes that one or more parties initially believe to be irreconcilable; disputes that have found their way into court or never crossed the courthouse steps: Mediation helps parties create customized solutions in a timely and cost effective manner, through direct communication, with fair accountability, privacy and confidentiality- all while giving the parties control of the outcome and eliminating risk. And it works.

Public awareness and demand for mediation is growing rapidly. The federal government, state legislatures, private businesses and bar associations have incorporated mediation into their laws, contracts and routines in a variety of ways. Ten years ago, most people looking for an alternative to litigation weren’t familiar with the word “Mediation.” This year, in recognition of a more educated and informed public that specifically demands “mediation,” I have changed the name of my mediation business to “Mulford Mediation.”

Philip M. Mulford ’82 left the practice of law in 1989 to open a private mediation business. Virginia Supreme Court certified at the highest level, he mediates family, business and government disputes. He is also NASD approved to mediate disputes within the securities industry. Through his VSB approved CLE programs, he teaches lawyers how to effectively represent clients in mediation. In addition, he speaks to business, trade and community organizations about the benefits of mediation. Mulford Mediation has offices in Fairfax and Warrenton, VA.