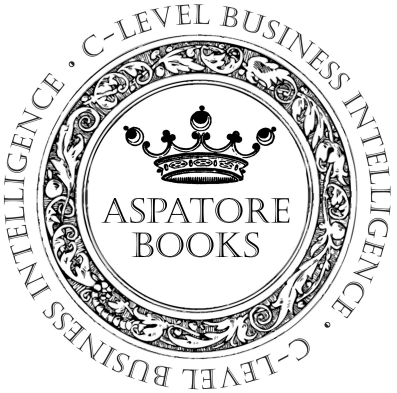
INSIDE THE MINDS

Inside the Minds: Alternative Dispute Resolution

Leading Lawyers on the Art & Science of Arbitration, Mediation, & More



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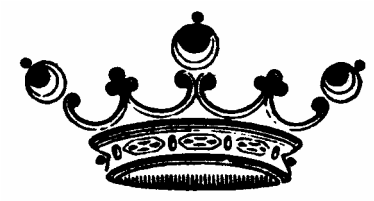

The Mediation Revolution

Daniel Ben-Zvi

Mediator

DB Mediation & Arbitration Services

Background

I began as a trial lawyer in 1981 in the late Senator Abe Ribicoff's law firm in Connecticut. I left that firm to develop a broad multistate litigation practice, based in California, representing both plaintiffs and defendants. I enjoyed being a trial lawyer, however, even when I won trials, I was struck by the thought that the dispute could have been resolved years earlier, without going through the court proceeding. My client had incurred fees and costs of litigation, lost time from work and his everyday life, and been put through the extreme stresses and anxiety that go with any trial – and he was the so-called winner. When I did the analysis, I realized that my client would have been better off had his dispute been resolved by a good mediator.

I took a slight detour when I became a writer on the television show LA Law. That experience of tapping my creative side made me think that there might also be a more creative way to approach my legal practice. The answer I arrived at was mediation.

In 1995, I started DB Mediation & Arbitration Services in Los Angeles, where I have been serving primarily as a mediator in areas including entertainment, business, intellectual property, real estate, malpractice, estates, product liability, and personal injury. In mediation, I have found my own personal calling in a dispute-resolving process that I can advocate wholeheartedly to nearly every potential party to litigation. I also serve as arbitrator and judge pro tem (temporary assignments) for the Superior Court of Los Angeles County, but my primary focus is mediation. One newspaper has called me a "warrior-turned peacemaker."

I'm convinced that almost every dispute should be mediated before being arbitrated or tried in court. I talk about this in my seminars and on talk shows. By way of illustration I cite two common cases, both involving

breach-of-contract claims. In one case the parties were bound by a contractual clause to employ mediation before filing suit. In the other, the parties simply went directly to litigation.

In the first case, the parties came to my office as called for in their contract. By the end of the day, the parties shook hands. Their dispute was settled. No lawsuit was ever filed. The parties in the other dispute came to my office as well – after a judge at the final pretrial status conference ordered them to try mediation before proceeding with the trial (an order which judges now commonly give). We settled their dispute in one day as well, and the trial was no longer necessary. The difference was that in the latter case, by the time the case came to mediation the two parties had already spent over $100,000 apiece on attorneys' fees and costs, and a great deal of time on the litigation – attending numerous depositions, hearings, and attorney-client conferences, and searching for and preparing documents, evidence, and witnesses.

That, in a nutshell, is why I believe mediation should be the first alternative in any attempt to resolve a dispute.

The Basics of Mediation

Mediation is booming. And for good reason: it works. It is an effective means of settling disputes without the expense, time, uncertainty, and personal stress of trial or arbitration. However, most people are unclear as to what it is and how it works.

Mediation takes place in a confidential session in which all parties to a dispute convene with an unbiased, objective professional called a mediator, whose goal it is to guide the parties to voluntarily reach

agreement. The mediator helps the parties realistically evaluate issues, risks, compromises, and creative solutions. A mediator is a "doctor of negotiation" who facilitates effective communication in order to end the dispute. A key word is "voluntarily." Unlike a judge or an arbitrator, a mediator has no authority to impose a resolution. The parties themselves must all agree to a settlement before it can become binding. And, unlike in arbitration or a court proceeding, they are not bound to mediate until a settlement is reached. Either or both parties can stop the process at any time and proceed with conventional litigation or arbitration.

The parties are not required to come with an attorney, but they may if they choose to do so. Since any agreement reached will have legal consequences, it is often advisable to consult with an attorney. And in cases involving complex issues, it is usually to the parties' great advantage to have counsel. A mediator will meet with each side to a dispute separately to discuss the strengths and weaknesses of their respective positions and to uncover relevant underlying issues. The mediator, while remaining neutral, exercises quite a bit of discretion in guiding all parties to a mutually agreeable settlement.

Mediation is often confused with arbitration. While there are similarities, there are also critical differences.

Mediation vs. Arbitration

Mediation and arbitration are the two forms of alternative dispute resolution (ADR). The term ADR was coined in 1976 at the Pound Conference in Ohio organized by Chief Justice Burger to offer a frustrated public an alternative to a backlogged civil court system. An agreement was reached to promote ADR and its two distinct alternative dispute resolution mechanisms. Parties could save many years of litigation, great

costs and attorneys' fees. They would no longer have to endure the obstacles and delays in getting finality from the court system -- from the complaint to numerous motions, verdict, judgment, appeals, possible retrial, and final appellate ruling.

Through the years, arbitration and mediation have become increasingly more popular. After an impressive increase in the use of ADR during the 1980's, an explosive growth in the 1990's of domestic and international use of ADR took place. As ADR emerges from its infancy, the similarities and differences between its two dispute resolution approaches have become more widely known.

Like arbitration, a mediation session occurs outside the courthouse in the comfortable office setting of the "neutral," as both arbitrators and mediators are called. In both arbitration and mediation, the parties generally select from a list of neutrals one mutually agreeable neutral. The schedule of the session is based on the mutual convenience of all parties, not the strict courtroom calendar of a judge. While all communications in mediation are confidential, the parties can also agree to keep arbitration proceedings confidential. In certain sensitive cases, this can be seen as very important. Unlike court rulings, resolutions in ADR processes do not carry precedential value or binding effect with respect to setting law in future cases.

Both arbitration and mediation are flexible processes and, unlike formal judicial proceedings, can be tailored to meet the particular needs of the parties and the circumstances of the case. I once mediated a dispute in which a party claimed the other had sold him an irreparably defective donut-making machine. He claimed the machine put too much oil on the donuts and no adjustment would correct the problem. All the parties agreed to meet at the claimant's place of business, where everybody watched the donuts being made and tasted them. The party who had sold

the machine had an opportunity to watch how the machine was used and attempt the process himself. Then we adjourned to the meeting room where we ultimately came to and finalized an agreement.

In alternative proceedings there are generally no hard and fast rules. A good neutral will work with and be open to suggestions from the parties and their attorneys to find the best procedures to use in approaching the particular dispute.

The flexibility of the ADR process is often a key to its success. I mediated a dispute in which one party claimed that renovations being made by his neighbor were undermining the structural support of his home. We held the proceeding at the property, along with engineers and experts for both parties. The result was that we could see demonstrably the extent of the damage. Then everyone joined, over coffee and donuts, in brainstorming ideas and remedies. We eventually came upon a shared, practical solution.

Sometimes having a neutral with expertise in a certain area, such as intellectual property or a specific type of engineering, is desired by the parties. While at times this is quite useful, experience has shown me that expertise in a particular field is not as essential to a successful mediation as are the skills of the mediator in resolving conflicts. Keep in mind that in a courtroom neither the judge nor the jury will be experts in the subject of the dispute. That is why a parade of expert witnesses, which lawyers often refer to as "the battle of the experts," is often necessary at trial. When faced with the quandary of which expert to believe, a judge or jury cannot always be counted upon to make the right decision. A neutral who can successfully get both parties to agree on a solution has crafted a better resolution than the opinions any number of experts can hope to produce.

Mediation and arbitration incorporate flexible procedures before a neutral party, with sessions held outside the confines and rules of the courtroom. Both procedures ensure equal opportunity for all sides to be heard and present their arguments. So what are the differences?

The greatest distinction between mediation and arbitration is who makes the decision. In mediation, the parties control if and how the problem is resolved. A mediation that ends with a settlement typically ends the dispute at issue. In arbitration, the parties are bound to submit to the decision of an arbitrator or a panel of arbitrators. In that respect, arbitration is no different than the court system. The decision is imposed on the disputants by a third party.

The wisest course is for parties to try to exhaust the mediation opportunity first and then resort to the more drastic measure of an imposed solution through court or arbitration. Consider this analogy. Your doctor informs you that you have a medical problem which unless addressed could become critical. He offers you two choices. You can try taking medication and change your diet and lifestyle, or you can simply skip that and go right to the final option – surgery. For most of us, that's a no-brainer. We would choose surgery only after the less drastic alternatives have been exhausted.

Resolving a dispute should not be any different. Just as medication should be tried before resorting to surgery, mediation should precede arbitration or court. Only if mediation is unsuccessful should the parties proceed to ultimately give up their control to a third-party authority to decide their case – be it arbitrator, judge, or jury.

Parties sometimes perceive that there could be a risk in going to mediation and presenting their case to the opposition if it ultimately does not settle. They think they will have lost a strategic advantage by

disclosing too much of their evidence or argument. This risk is unfounded. Evidence not provided to the other side before a trial will generally not be admissible under the standard rules of discovery and evidence. In any event, evidence will have to be shared with the opposition at some point before trial. Moreover, each party determines what to disclose at mediation. Each party can convey to the mediator information and argument in confidence and request that the mediator not disclose that information or specifics to the opposition. The mediator respects such requests.

A double-edged sword of arbitration is that although it is usually faster and less expensive than court proceedings, the power of the arbitrator is frequently greater than that of a judge of a trial court. A judge's decision can be appealed. Most arbitrations can be appealed only on very limited grounds. Any errors made in a court can be, and often are, reversed on appeal. But awards from arbitration are so difficult to appeal that some attorneys say simply that an appellant must prove that the arbitrator was either corrupt or crazy ("the two Cs") to have any chance of success. The power given an arbitrator is frequently so great that even certain blatant errors may not be the basis for the loser to succeed on appeal.

An arbitration is typically a much longer process than a mediation. While arbitrations are still more expeditious than court trials, many arbitrations can last weeks or months. This frequently far exceeds the initial expectations of the parties that arbitration would offer a far speedier solution. Many arbitrations are becoming "judicialized," increasingly resembling a time-consuming court system, which arbitration had originally been promoted to replace. In many arbitrations now, discovery and various motions are battled out with briefs and preliminary hearings, just like in court. This is, in part, a reaction to the 1970's when use of arbitration began to grow exponentially. Arbitration clauses were being inserted into contracts like never before. Due to this upswing, courts and

legislatures saw fit to add protections and procedural safeguards for disputants who find that arbitration is their only choice. Some say another cause for more complexity and longer arbitrations are aggressive lawyers and arbitrators, more of whom these days are retired judges accustomed to lengthy court proceedings and more open to legal motions. Some bemoan these changes while others applaud it as placing on the scales of arbitration more weight on fairness and less on swiftness.

Mediation, in contrast, is relatively fast. I have mediated approximately one thousand disputes. The great majority of these disputes have concluded with a signed settlement agreement – within one day! And there is a growing crop of fine mediators now having similar success. I therefore wonder why so many people still elect to resolve their disputes through lengthy, expensive, and often bitter litigation without even attempting mediation. It seems that many people believe that mediation of their case is a waste of time because they don't believe the other party to the dispute would enter into a reasonable agreement. Or, they believe that a mediator is simply someone who is going to listen to each of them, elicit their demands, and then simply suggest that they "split the baby." Indeed, mediators worth their salt would not survive professionally if that is how they approached their task.

Most appreciate mediation and its dramatic benefits only after they have experienced a proper mediation for themselves. Before my mediations, I usually ask each of the parties, in private, what they feel is the prospect of resolving the case. Typically, they think it's low. Often the answer is a 10 percent chance. Sometimes they estimate 1 percent. But, much more often than not, by the end of the day they're shaking hands and the dispute is settled.

Practically every dispute – before being tried before a judge, jury, or arbitrator – should first be mediated. When precisely is the best time for

the mediation? Some disputes beg for early mediation, particularly when there is a relationship between the disputants, either personal or business, that needs to be maintained on some level. The more difficult conflicts and challenging cases involve family members, business partners, employer-employee relationships, co-workers in a small industry and so forth. Mediation can help to preserve rather than destroy these relationships, which makes these cases, for me, some of the most satisfying to help resolve. In child custody battles between divorcing couples, mediation has been demonstrated to be so beneficial that it is has been mandated in many states, including California.

In arbitration and in court, there ultimately is a winner and a loser (though in some protracted litigations and arbitrations often no one truly wins). Typically that means any relationship is destroyed at the end of an arbitration. In mediation, by contrast, severed relationships can be remedied and transformed. A football player told me following a mediation in which he settled with a business partner that it was like a broken rib that had grown together even stronger than it was originally. The two of them went on to have a healthy and profitable relationship.

The need to not sever relationships is particularly true in the entertainment industry, which is where I do a considerable amount of work. The entertainment business is a small community. People often need to maintain relationships so they can work together again. Arbitration and litigation can adversely impact and often end these relationships. Careers are affected, and the lasting impact of pursuing the dispute far exceeds the original issue. For this reason, many people in the entertainment business are afraid to pursue a remedy, even when they are deserving of it, for fear that the ripple effects will be too great. Mediation is a way of pursuing these matters confidentially while still keeping important relationships alive. Careers are not affected, and parties can continue working together.

Mediation can take place before, during, or after litigation. I try to get the parties into mediation sooner rather than later. It is particularly fulfilling for me and gratifying to the parties when I settle a case before an arbitration claim or lawsuit has been filed. Once litigation progresses, battles often turn into war, much more time and money is spent, and the parties become more entrenched in their positions – often to their own detriment.

I once mediated a case involving an older, popular pro basketball coach who had been terminated by the team's owner. The case had already been in litigation before it came to me and it had become ugly. In an effort to justify terminating the contract, the owner's attorneys took the position that the coach's job performance did not meet minimum professional standards. They drummed at this constantly, during depositions and in court filings. The coach was aware of the realities of professional sports, but now something more than his job was on the line – his personal pride. He had been humiliated in depositions as a stenographer took down word for word the litany of accusations and criticisms hurled at him by the opposing counsel. By the time the owner realized that the best thing to do would be to settle, the coach felt so victimized and embittered that he was no longer thinking in practical terms. He wanted revenge. After a difficult mediation, a settlement was ultimately reached. A settlement could have been more assured had the parties mediated before so much unnecessary damage had been done.

Benefits and Risks of Mediation

The stress of the litigation process, the financial expense and the uncertainty of the result are immense. Arbitration and, more so, litigation often takes productive people away from their work for long stretches. When the resolution of the dispute lies in the hands of a jury, judge,

appellate panel, or arbitrator, it is often hard to predict with high confidence what will be finally decided. Unresolved conflicts explode so frequently into violent acts and health problems that the Centers for Disease Control and Prevention (CDC) have called this a "public health issue." Cardiovascular problems, skin diseases, psychological disorders, workplace injuries, and other serious health problems can be traced to litigation stress. As a trial attorney, I witnessed a proud executive lose control of his bowels on the witness stand. It was certainly a moment he wishes he could have avoided. Also, attorneys, even experienced ones, find it difficult to cope with the stresses and uncertainties of a courtroom trial.

While courts and arbitrators primarily grant or deny relief in the form of monetary compensation, in mediation the remedies available are wide-ranging and creative. As Albert Einstein said, "Imagination is more important than knowledge." In my mediations, ultimate settlement agreements have contained unique and creative deal points, such as home repairs, flight tickets, time shares at resorts, box seats, free products, tickets to various events, screen credits, press releases, favorable loans, trademarks, shared royalties, vehicles, free services and visitation rights with a pet, to name just a few. More than once, I've broken a negotiation impasse when both sides agreed to contribute equal amounts to their favorite charities.

The greatest benefit of mediation over any other means of resolving a dispute is that the parties retain absolute control over if and how to resolve their dispute. Let's say you and your spouse have an important issue that you can't resolve. You may seek the help of a counselor to help you work through the problem together, but you don't give the counselor the power to make the decision for you. You want to play a role in determining your destiny, rather than being forced to submit to the will of an authority figure. But when you take a dispute to a jury, judge,

appellate court, or arbitrator, that is exactly what you are doing – you're giving up your right to reach a decision on your own and giving it to a third party.

Certainly there are disputes in which the parties involved will not be able to agree on a resolution. In those instances, handing the decision over to a court or arbitrator is the logical next step. But that step should be taken only after attempts at resolution through mediation have failed.

The Role of the Mediator

A mediator brings people in conflict together. A good mediator must be skilled in many different areas, curious, a good communicator, able to employ the right mediation technique at the right time and adjust flexibly to the changes of mood and approach. When appropriate, a mediator must at times be evaluative – evaluating the law and the facts of the case– and at other times must be facilitative – facilitating effective communication among the parties and guiding them to explore creative solutions. For some time, there was a belief in the mediation community that mediators are either evaluative or facilitative. But, recently it has become recognized that an effective mediator must be able to do both. It is in the shadow of the court that the mediator evaluates with the parties how law and justice would likely apply to the facts and circumstances of the case. A mediator ensures that both sides are represented equally and that no one party dominates in the negotiation process. Most importantly, the mediator leads all parties to understand that it is in their self-interest to absolutely exhaust the mediation opportunity.

There is a popular expression that a good settlement means everyone walks out equally unhappy. There's an element of truth there. Compromise often occurs in mediation. That means for a greater goal, a

party is prepared to give up a part of what they believe they are entitled. Beyond that, successful resolution in a mediation can often witness parties transformed, relieved, and revived. Parties can be refocused to what has been achieved in a settlement than to dwell on a part that may have been given up. Oftentimes I witness all parties leave after signing a settlement agreement with a feeling of control, empowerment, and success.

However, as the saying goes, you can lead a horse to water but you cannot force him to drink. Not every case can settle. In cases that do not end with a settlement agreement and instead continue down the road of litigation or arbitration, a mediator will have been of valuable service if he or she did everything in his or her power to exhaust the opportunity. The parties and counsel benefit in straining to resolve the dispute amicably before marching on to the next adversarial proceeding. What happens in a mediation can pave the way for an eventual settlement at some later point in time. And even when the case does not ever settle, mediation can very well streamline and focus issues in dispute. In a mediation recently, the parties came in with a list of twenty-three depositions that all thought needed to be taken before a trial. By the end of the mediation, all agreed that only five depositions were needed and the parties set a mutually convenient time and place in conjunction with a limited production of documents. That saved much time and expense in the litigation. Both counsel, who before mediation had a bitter relationship with each other, left mediation with a spirit of cooperativeness in the scheduling of depositions and the exchanges of documents. Thus, even though the mediation did not end the dispute with a final agreement, it was extremely beneficial to all parties and counsel.

The more I mediate, the more I believe in the benefits of mediation. One of my favorite quotes comes from Abraham Lincoln: "Discourage

litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

The Mediation Process

Individual mediators have their own unique styles and approaches in dealing with parties and the mediation process. But within this informal, flexible process, there are some constants. A mediator meets with the disputing parties separately (sometimes called "caucus") and in most cases will convene the parties together, typically early in the process, for a joint session. I often meet separately with the parties and their counsel before any joint session in order to brainstorm with them about their presentation and to coach them on how to vent their feelings effectively and constructively during the joint session. Often, anger or frustration needs to be vented, like a balloon that needs to be deflated, before the real issues can be dealt with effectively. The parties are then better able to listen objectively to each other and to the "reality check" that the mediator may present in the private sessions that follow.

All communications in the mediation session and all kinds of exhibits prepared for mediation are confidential. This law of confidentiality encourages the parties to honestly communicate and confront the opposition with their defenses or claims and underlying issues without being concerned that it may one day be used against them in court or arbitration.

In mediation, two certainties about the future become clarified. First, should the case go to arbitration or trial, there will be a winner and a loser. And second, once the parties walk out of mediation without a final

settlement agreement, the attorneys will represent their client zealously, continuing to argue the best legal and factual points. In order to help the parties focus objectively on the issues, I sometimes remind them that their attorneys are advocates who are not employed to focus on the weaknesses of their case. I sometimes show parties that if their attorneys, as professional advocates, would switch roles they could and would make certain strong arguments for the opposition. In other words, I convey to the clients not to be too hasty in believing that their counsel will be infallible in court; there are rarely slam dunks in trial.

At the outset of the mediation, the mediator will generally advise as to the best procedure depending on the case. The mediator will deal with the strengths and weaknesses of legal and factual positions, analyze the likelihood of outcomes in litigation or arbitration, and seek to bridge the gap in the manner called for by the dynamics of the case.

In mediations, parties can, but are not required to, submit prior to the mediation session written briefs. Generally, exchanging briefs with opposing counsel is at each counsel's discretion. Witnesses or experts are typically not brought to mediation. Counsel summarizes anticipated witness and expert testimony. Often, discovery of evidence or depositions need not be undertaken before a mediation. Before striking an agreement in mediation, a party may demand discovery of information in the form of document exchanges, inspections, and/or deposition of the opposition or of certain witnesses. In some cases, this is necessary in order to be able to realistically appraise the value of the case. It is certainly logical that in a serious personal injury case, the defense would first want to have a medical examination of the plaintiff. Without it, the defense could be working in the dark. A discovery schedule can be agreed to in an efficient manner as part of the process of mediation. After the limited discovery, the parties come back as agreed to the mediation to make a more informed offer or demand.

In preparing a typical case for court trial, an attorney will assemble as many witnesses and as much evidence as possible. Non-party witnesses, like experts, do not need to appear at mediation. In a preliminary session of a mediation, the parties can agree in advance to such things as to limit presentation to what is necessary and what the opposition deems important, thus saving both sides a great deal of time and expense. Think of it this way. You are summoned to an IRS audit. You spend weeks gathering all your receipts, cancelled checks, and supporting documents. You show up at the appointed time, portfolio bursting with paperwork, and the auditor asks you for one or two receipts which support one of your deductions. Think of all the time and stress that would have been saved had you just known in advance exactly what they wished to see.

Mediation advocacy is different than trial advocacy because a mediator will not be imposing any decision. It is the opposition that needs to be persuaded. The question for any advocate in mediation is only what kind of pleading, presentation, or advocacy will move the opposition in the negotiation. So much depends on who is the opposition. As any trial attorney knows well, you must have a sense of your audience. Whether the defendant is an insurance adjuster or a widow makes a world of a difference.

Possibly the single most important factor to the success of a mediation is the presence of all decision makers. Sometimes I get a request before the mediation from a party, usually through their counsel, for permission that they not attend the mediation. Periodically, I get a call from an insurance adjuster asking for my approval that he not attend. He assures me that he will be available by phone while his counsel appears in person. I generally persuade the adjuster to appear. I explain why I believe it is critical for the decision-maker to appear in person. If the adjuster is present in the room when the plaintiff presents his or her case, the adjuster can get a sense of what kind of witness this plaintiff will make. Would the witness

likely be believed by a judge or jury? The plaintiff also is more prepared to negotiate knowing the decision-maker has given him an opportunity to be heard and is in attendance prepared to sign a settlement agreement.

I try to get the parties to bring to the mediation not just anyone who has the authority to settle the dispute, but also anyone who has the ability to influence the outcome. That may mean finding out who is really in charge in a company hierarchy, or determining what family member – a spouse or a sibling – has great influence. A mediator does not want a family member or partner to call on the phone at the very end of the mediation and talk the party out of any compromise. That's why, before the mediation, I try to understand a party's relationship with his or her spouse and to discover others who would have major influence.

Even where plaintiff's deposition has already taken, a plaintiff in a mediation can persuade an adjuster through a good honest presentation that his injuries and damages are greater than the value the adjuster placed on the case initially.

Oftentimes I request each side to summarize in a joint session what their claims or defenses will be in court and through which witnesses and what evidence it will be proven. This allows the other side to likewise put most of their cards on the table. I find that this method does not alienate the parties but clarifies positions so that the mediation can proceed with clearer understanding.

Selecting a Mediator

It is becoming more and more common for parties drafting contracts to insert mediation clauses – often with an arbitration clause that applies in the event that mediation does not succeed in ending the dispute. In

California, the standard residential real estate contract form contains such a mediation clause. It provides for mediation as the first step. If there is no settlement of the dispute and both parties have initialed the arbitration paragraph, the case will then proceed to arbitration. If both parties have not initialed the arbitration option, the case would then proceed, after mediation, to court.

The teeth to such a mediation clause is that if a party disregards the clause and commences litigation or arbitration without first having requested the other side to mediate, then that party forfeits the right to recover reasonable attorney fees which he would otherwise be entitled to if he wins the case. I most often recommend a variant of this type of mediation clause. It is simple and effective. Other mediators and I provide mediation clauses for free to those who contact our offices.

Sometimes parties to a contract agree in advance to a particular neutral, or a panel of neutrals from which the parties select. When there is just a generic agreement to mediate, if the parties cannot agree on a mediator, a simple court petition can be filed with the court, which would make the selection.

A party may prefer a mediator with a certain background or one who is a retired judge or a non-lawyer mediator. Different considerations should be weighed in the selection of a mediator as opposed to an arbitrator. Unlike an arbitrator, a mediator needs to be very skilled in communication, psychology, and persuasion as well as having a judgmental and evaluative side to tap when appropriate. The criteria for selecting a mediator is quite unlike the criteria for selecting an arbitrator – even though both are called "neutrals." While some retired judges make excellent mediators, many retired judges are too prone to being judgmental and evaluative which does not always work well to end the dispute and get "closure."

A professional mediator aims to get the parties to strain to reach a resolution. I tell participants in my mediation that the description of "neutral" as a mediator is not particularly fitting for me in that I am a strong advocate of resolution. In a certain way, once an advocate, always an advocate. As a mediator, I am an advocate of the great benefits of exhausting the mediation opportunity. And the participants understand that even if the dispute does not resolve they will at least have tried their best to resolve it before heading to an adversary proceeding. So, when they are sitting in on the fifth or tenth day of an arbitration or trial, the outcome of which is uncertain, continuing to spend substantial money, energy, and time away from work, they will feel better knowing the trial and uncertainty was unavoidable because the mediation opportunity was fully exhausted.

I am a mediator who taps when necessary not only evaluative and facilitative skills but also transformative mediation methods. I shoot high. I don't just want a settlement agreement. I would like to see people grow from their conflict and from its resolution. I have seen it work, even in pure business disputes. I sometimes do some serious Monday morning quarterbacking to analyze why I was able to get parties to sign a settlement agreement but not able to get to them to the next, transformative step. Some parties in certain cases very much want to select a mediator that could and would try to bring about not just a settlement but also a true reconciliation.

It is against the law for any neutral to have a "bias" in favor of one side. Disclosure rules require neutrals to disclose certain prior relationships and cases that the mediator had with the opposition. For some parties and counsel if the opposition selects a mediator, that's reason enough to reject that mediator on the concern that the mediator would be biased in favor of the opposition. Savvy attorneys however act contrarily and often will agree to the mediator requested by the opposition. The thinking is

that they know where they themselves are likely to go in any compromising or negotiating. They want the mediator to have the maximum influence on the opposition to convince the opposition to see their point of view. They want the mediator to have the best credibility in getting the other side to move in the negotiation.

Using that approach when I was litigating, I once agreed to a mediator who was a roommate of the opposing counsel in law school. The case settled. Such openness to the opposition's selection of a mediator would not apply to the selection of an arbitrator who makes a final binding decision. So, while one side may be quite content that a mediator has seen the opposition or his counsel in many prior mediations, the same fact would be a cause for further examination with respect to the selection of an arbitrator.

Active listening and an innate sense of curiosity are critical skills of a mediator in resolving conflict. Although listening skills seem like something that we all have, mediators need to be especially attentive when listening. A good mediator also appreciates that communication is both verbal and nonverbal. Most experts estimate that communication is really made up of only 7 percent speech, and the balance is 38 percent tone and 55 percent body language.

It is appropriate for attorneys and parties to call and interview the neutral about his or her way of conducting the process as well as experience in the type of case at issue. Many neutrals I speak to are surprised at how few calls they get making such inquiries before a selection. There are different styles of mediation, just as there are differences between parties and types of disputes. Some mediators are more adept at dealing with cross-cultural issues. A mediator, in order to be successful, must be prepared to size up a situation and decide upon an approach that addresses the specific circumstances and personalities in the dispute. A

telephone call with a prospective mediator – whether he or she is a retired judge, an attorney, a psychologist or a layperson, -- can reveal what approach this mediator prefers.

I grew up hearing that the three golden rules of real estate are location, location, location. In mediation, I would go with persistence, persistence, persistence. I see myself as an advocate of resolution who wages peace. Ultimately, parties embrace my argument that it is in their self-interest to follow my lead and do whatever works to exhaust the opportunity of mediation. Every party in a mediation benefits when no stone is left unturned.

Greatest Challenges

People still occasionally have the impression that agreeing to mediation would project a sign of weakness. As mediation is becoming more commonplace in the landscape of dispute resolution, fewer close off the mediation option based on this perception. But some still retain what I call the "John Wayne syndrome." John Wayne never negotiated or compromised. John Wayne would just blast his way to court. Some big corporations with the John Wayne syndrome use the battle cry "millions for defense, zero for settlement." This is somewhat of a backlash by big corporate – prime targets of frivolous litigation. However, even good faith meritorious claims get the same cold treatment.

I succeeded recently in persuading a movie executive (he loved John Wayne) to come to a mediation after we analyzed what being tough means. We concluded that it would be him sitting across a table and looking the plaintiff in the eye and explaining why he believes not a penny more is owed and why he is convinced he will win at trial. The executive presented a compelling case. A mediation was convened. The

executive did just what we talked about and then, near the end, apologized to the plaintiff over a certain misunderstanding. He won over the plaintiff who agreed to drop the case against the executive. And the executive happily agreed to read a new script written by the plaintiff writer.

Baseball great Yogi Berra once said, "Half this game is 90 percent mental." I often find that, even with disputants locked in entrenched positions, once the door to the mediation room shuts, a dynamic kicks in which can begin a momentum toward resolution. Sometimes the parties need to vent first and clear the air.

A challenging aspect of mediations is breaking an impasse. I have various techniques that I am constantly expanding. Some I find fascinating; for example, the more I empower parties and the more I remind them that as a mediator I have no authority to impose a solution, the more receptive they are to following my lead in the mediation.

Getting to the source of the conflict is often a key to resolving a dispute in a mediation. A mediator must frequently get beneath the surface of the conflict. This means digging until the conflict's source is reached. I once mediated a family dispute in which one sister was suing another over a piece of real estate that she believed had been promised to her by their father. It became clear to me that her real issue was not the piece of property, but that she felt unloved by her father. At the opportune moment, I requested of the other sister and the attorneys that they step out of the room, leaving just her, her father, and me. I articulated my impressions. After a few moments father and daughter were hugging. She told him, "You haven't hugged me since I was 15." This, not the property, was what all the years of bitter litigation and family divisiveness had been about. One hug and the case was over.

I can't even begin to count how many business and financial disputes I've seen where it's bruised ego and hurt emotions that drive the litigation. In many entertainment cases, one must mediate not just issues but also egos. There is often on one side of a dispute many parties including agent, manager, lawyer, and client. I sometimes must mediate internally on one side. And that, not the money in question, is what so many times creates obstacles to a solution.

When the real source of the conflict is faced and dealt with by a party, then their sense of self, communication, and the resolution itself can be transformative. The Chinese emblem for crisis is made up of a symbol that means opportunity. There is a great deal of opportunity for a disputant to make his or her life better and to grow if the source of the conflict is viewed honestly.

I am amazed and encouraged by the power of a simple apology to move what otherwise seems like a hopelessly deadlocked dispute to settlement. It worked in the case of the movie executive. Sometimes a party to a dispute just needs to hear an admission of fault or responsibility. And all parties are made aware that everything said in a mediation is cloaked in confidentiality, so any apology or admission cannot be used against them later in court. Remedies and terms of a settlement agreement reached in a mediation can be made confidential as well, so none of the parties should feel constrained from making a settlement for fear it will affect their standing or credibility outside the mediation.

It is uniquely challenging when the disputants have had a long history together, such as lovers, family members, partners, or in an employer-employee relationship. In such cases, the source of the conflict is often a long-term frustration. Invariably, by the conclusion of an arbitration – unlike in a mediation – when a winner and loser are determined, the relationship between the disputants is destroyed. Mediation brings people

together rather than creating a greater rift between them. Blowing at the smoke of a fire does not put the fire out. But that is exactly what much litigation is about; in order to end the dispute, the fire must be extinguished.

Changes in Mediation

ADR – arbitration and mediation – have now become so widespread in the United States that Janet Reno, as the U.S. Attorney General, said that ADR should now stand for "appropriate dispute resolution" rather than its original "alternative dispute resolution." It is exciting to witness the growth of this uniquely empowering, beneficial dispute-resolution system known as mediation.

After the 1976 Pound Conference, court-connected mediation programs began developing in earnest within the courthouse. This brought "voice" and "choice" within a judicial system that historically assumed that people are relatively incapable of resolving their own disputes. Lawyers speak for the parties in all but small-claims courts and third parties decide the parties' fate. Suddenly, mediation moved in with its empowerment dimension. Many therefore see the mediation and the judicial systems built on incompatible assumptions about human nature.

Transformative mediation highlights the added uniqueness of what is obtainable in a mediation and yet unobtainable in litigation or arbitration. The transformative mediation approach focuses on allowing mediation to bring in a new clarity and a whole new way of communicating between the conflicting parties. This is epitomized by the moment the father and daughter hugged after so many years of estrangement. The transformative model focuses on how people can change the quality of their interactions through self-confidence (the

empowerment shift) and can become more open or responsive to the other (the recognition shift).

Many parties understand that the adversarial process can bring out their worst side and their willingness to demonize the opposition. It is the transformative parts of mediation that can bring people back to talking to each other about disagreements in a constructive way.

Mediation will increasingly become a more common form of dispute resolution. One clear indicator of this is that in 2001, a Uniform Mediation Act was passed by The National Conference of Commissioners of Uniform State Laws and recommended for all states. More and more states have since been adopting it. Lagging somewhat behind the United States, countries and parties to international disputes are now beginning to fully appreciate mediation over arbitration. I anticipate that we are about to witness a major increase in the use of mediation throughout the world. One indicator of the promising future of mediation on the international scene is that in 2002, the United Nations approved the first Model Law on International Commercial Conciliation ["conciliation" is an expression used internationally for mediation]. This novel resolution promotes mediation to resolve international commercial disputes.

Mediation training programs are now being offered by dispute resolution companies and by many prestigious universities. Recently, ADR has become an important course in the curriculum of law schools. Although there is still no mandatory uniform system of certification, efforts to certify or license mediators are taking place in many states. Mediator quality assurance will, in all likelihood, continue to be a very hotly debated topic.

Mediation is still an evolving profession and the movement for professional autonomy is at an early stage of development. The questions are: Who should regulate? How should regulation be accomplished? What qualifications are required? While the Uniform Mediation Act promotes uniformity in mediation practices, it does not establish mediator qualifications. Mediators do not need to be attorneys; they can be psychologists, businessmen, or anyone who has been properly trained.

I foresee that lay people, attorneys, businessmen, and industry leaders will grow to appreciate mediation more as time passes. We are witnessing the success of the "Mediation Revolution." I see a trend where industries will further develop internal management dispute resolution programs and will educate management as to the benefits of mediation. There is a trend in the law, enacted already in several states, to impose a legal duty on attorneys to adequately inform their clients before litigation about ADR options. It's like the doctor who should inform his patient at the earliest time about any viable alternatives to surgery, to allow the patient to provide fully informed consent before heading to surgery.

I predict that the day is not far off when ADR centers and neutrals will be commonly utilized by the average citizen, who will clearly understand the distinction between arbitration and mediation. Today, neighbors may be feuding over a boundary line but they agree on one thing – going to an attorney to litigate the dispute would be too costly. So they live day by day shooting evil glances at each other. In the future, most people with such disputes will agree to go to a mediator and split a deposit covering a mere few hours of the mediator's time. They could have counsel join them, at their choice. The odds would be high that their dispute would be resolved quickly, inexpensively, and by agreement.

A unique mediation tool is known as the Summary Jury Trial (SJT). It is a non-binding, advisory jury trial that offers a "reality check." Typically, a

SJT takes only one day; complex cases can take a bit longer. Under strict time limits, the parties select a jury from the available jury pool. Only the key witnesses briefly testify and are briefly cross-examined. Attorneys present summaries of their cases to the jury, which deliberates, renders a verdict, and then discusses the decision with the parties. A mediation on the heels of such a discussion can very well lead the parties to a settlement where the parties would otherwise be too far apart. Judges in certain parts of the country order parties to participate in a Summary Jury Trial.

Summary Jury Trials have proven to be quite successful to help bring parties to an agreement, particularly in cases which the parties have very different or unrealistic expectations about the outcome. I believe the use of Summary Jury Trials will significantly expand.

Mediators in the future will focus their professional skills on methods to resolve disputes earlier – nipping disputes in the bud. One working paradigm that I expect will be expanded is the Dispute Review Board (DRB) concept. They have been used with great success in avoiding or resolving disputes arising on projects that have inherent unknowns. The decision to establish a DRB is usually a topic of discussion during project negotiations and written into a project contract. Since its first implementation in 1975 for the Colorado Department of Transportation's Eisenhower Tunnel project, DRBs have been used for numerous private and public construction projects as well as a number of other types of multi-party business projects. The DRB familiarizes itself with the nature of the project and periodically visits the site of the project. During those visits, the DRB will not only review the progress of the project but will also sit down with the parties to explore any potential conflicts and mediate when appropriate. Typically, a DRB is made up of three mediators but can also be one mediator.

There is an emerging trend to suggest DRBs would work just as well in other industries in a large multi-party project where time is of the essence and an ongoing relationship among the parties is necessary or desirable. I believe this form of dispute resolution can be adapted to any substantial joint venture and in particular, here in Hollywood where I am based, to movie or television production. A DRB, or a process like it, can prevent disputes from escalating, thereby reducing the risk of protracted arbitration, litigation and, worst of all, a failed project.

As Victor Hugo said, "Nothing is more powerful than an idea whose time has come." Mediation's time has come, in the United States and globally. It will surely continue to grow and expand in various, creative form.

Daniel Ben-Zvi (pronounced "BenzVee") is a respected and passionate Mediator who appears on national radio and television as an expert on Alternative Dispute Resolution. Founder of DB Mediation & Arbitration Services [dbmediation.com], DanielBen-Zvi serves actively as a Mediator as well as an Arbitrator. He is highly successful in mediating disputes and with creativity and persistence, ending even the most bitterly fought lawsuits.

Mediator and Judge Pro Tem of the Los Angeles Superior Court and author of articles on ADR, Daniel Ben-Zvi began in 1981 a multistate career as a trial lawyer representing both plaintiffs and defendants. He is admitted to the bars of California, New York, Connecticut, New Jersey, Washington D.C. and the United States Supreme Court.

Daniel Ben-Zvi lectures on various topics in Alternative Dispute Resolution at mediation conferences, Bar Associations, law schools, and various civic and real estate associations. In 2003, Daniel Ben-Zvi led the "Entertainment

Mediation" panel at the Southern California Mediation Association's annual conference.

Dedication - *I dedicate this to my children and the upcoming generation who will wisely mediate before they litigate.*