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PERSPECTIVE

## From attorney-warrior to mediator-peacemaker

By Arnold Levinson

**G**oing from warrior to peacemaker is not an easy task. Certainly, the transition has not been as easy as I had anticipated. I began my legal career working for an insurance defense firm, but after three years I shifted gears and began doing plaintiffs' work. I spent the next 34 years representing plaintiffs in insurance bad faith cases. I loved (almost) every bit of it. However, I never wanted to do the same thing my whole professional life.

When funding for the courts became scarce, San Francisco County Superior Court put out a call to attorneys to volunteer their time handling mandatory settlement conferences. Feeling a duty to help, I began handling settlement conferences. I was putting in as much energy trying to settle those cases as I was working on my own. In one case, I found myself reading all of the summary judgment papers and each party's principal deposition.

Like many lawyers, I had contemplated mediation — but not seriously. However, I was getting hooked. I was also finding that it was not nearly as easy as the good ones make it appear.

So I started mediating and found that not only I enjoyed

it, but it provided a particularly amazing benefit. My family loves it. The reason is pretty simple: I don't carry my cases home night after night, week after week, month after month. At least not the same cases.

However, there was one huge barrier blocking the path from trial lawyer to mediator. How do you climb off your high horse as the powerful attorney fighting the "good fight" against the great forces arrayed against you and take on the role of a "lowly" mediator? I mean, really, who wants to be a "neutral" when you can be the guy who rides into battle and slays your legal opponent — or goes down in a blaze of glory trying? What are your fellow warriors going to say when you tell them that you have decided to dismount your stallion? Mostly, it's "What??!! What are you doing that for?"

Well, it's a pretty darn good question. More importantly, how are you going to feel standing on the sidelines watching your compatriots as they continue to go into battle?

I can only speak from the point of view of a plaintiffs' attorney. I can tell you that there is a whole lot to recommend it. First of all, it allows you to feel very important. You have the privilege of being the sole connection between people who don't have a lot and have become sick or injured on the one hand and a decent life

on the other hand. In some instances, I literally saved people's lives by helping them obtain needed medical care. There is a real feeling of doing something important with your life when one successfully resolves a case on behalf of an individual like that. You are the only person those people have in what they (and you) feel is

"document roller coaster." All those documents and cases which read so well — until the very end when the author says, "nonetheless, the conclusion is [180 degrees the opposite]."

In short, your entire identity and pretty much your life, is wrapped up in being a trial lawyer. You feel — and you are — important. Just as a doctor is

leave it. In fact, for me the time has come to start something different — something that provides a different relationship with other people.

Being a trial lawyer — plaintiff or defense — means you're all in. There is no way to be a really good trial lawyer without a 100 percent commitment to your cases. That means you can't turn it off at 6 p.m. Families understand. They know that we wouldn't be doing it unless we were closely attached to it. But they sure do appreciate it when you can sort of turn it off when you come home. And that, of course, opens up other parts of our lives. For me, that was the essential piece of evidence in my decision.

There are, of course, other benefits as well. The relationship with your former opposition is now cooperative, rather than oppositional. Actually, your relationship with all of the parties is collaborative. However, there is still plenty of arguing. In fact, many parties would almost be disappointed if they were not appropriately "beaten up." Overall though there are many more handshakes.

Of course, we all have complaints about practicing law. Many of them are very darn valid, particularly after a few decades in the law. Still, it takes some contemplation to jump off a cliff when you are

riding high. But isn't that what life is all about? Constantly deciding which road to take?

I find mediation just as challenging as trying cases. Also, just as interesting. Cases come and go more quickly and frequently. Most importantly, as a friend of mine told me recently, "No matter how thin the pancake, it always has two sides." Now I am enjoying the people on both sides of the pancake, instead of just one.

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**How do you climb off your high horse as the powerful attorney fighting the "good fight" against the great forces arrayed against you and take on the role of a 'lowly' mediator?**

the pursuit of true justice. You face the intellectual and financial challenges of defendants who usually have far more resources than you. Most of us wouldn't be doing it unless, somewhere deep inside, we feel like what we are doing is important and making a difference. And, let's face it, there is the unparalleled excitement of the "big case" adrenaline rush, the great highs at winning and great lows of losing. And let's not forget about what I call the

important when you need her. You might even feel powerful. You leave that and, in a sense, you leave yourself behind.

Anyone who has practiced as long as I have has to ask the question at some point: Am I going to do this until I fall over? Some love it so much that they want to do it until they fall over. And I could do that without too much trouble. However, I don't believe there is only one thing I want to do forever and I don't like it so much that I just can't



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## How I learned to love the other side's pick for mediator

By Arnold Levinson

A number of years ago I was handling a major insurance bad faith matter on behalf of a plaintiff who was alleging damages in an amount well into 10 figures. When it came time to consider mediation, I proposed a fantastic mediator who was previously a plaintiff's bad faith attorney. It had been approximately 10 years since the mediator had practiced. Still, the defense attorney said, "Are you kidding? Why in the world would I ever agree to a former plaintiff's bad faith attorney?!" Long story short, we went to the mediator and the case settled at the mediation.

However, the question was a good one and it took some persuasive efforts to get defense counsel there. Unless you choose a former judge or long time neutral, it is a natural reaction to want a mediator of a party's same past bent or persuasion. It's worth a moment to consider whether that is the best strategy. A plaintiff, for example, might want a former plaintiff's counsel as a mediator because they think in higher numbers and the defense might have the opposite idea — a

former defense counsel will think in smaller numbers. The fact is, if a mediator thinks bigger rather than smaller or vice versa, they won't be mediating for long. A good mediator can't afford to do either.

Most of us have changed jobs at least once or twice in our lives. Lawyers become judges, salesmen become teachers, football players become talk show hosts, singers become actors, etc. What is more likely true than not is that someone who was diligent, worked hard, paid attention to detail and was good at one job has an excellent opportunity to excel at a new and different career, particularly if it is related to the previous one. If a lawyer, either defense or plaintiff, was a darn good one, there is a good chance that the lawyer will succeed in the next job, either as a judge, mediator, teacher, etc. It's by no means universal, but the odds are in their favor. So, if you

find a former opponent who you respected (albeit grudgingly), chances are they are going to be good at their new job of mediation. A friend of mine recently opined that certain people are always going to rise to the top, no matter what they do.

To be a good mediator, a person has to listen, consider and care about both sides. Being a shill

for one side or the other is a dead end street. If we then get past the understandable reaction to prefer a mediator of one's own persuasion, let's consider the opposite. What advantages are there in selecting an attorney with formerly opposing views?

The most obvious and important consideration is credibility for your opponent. One of the strongest tools a party has in settling a case at mediation is a mediator who has credibility with the opposing party. A former attorney who is well respected by your opposing counsel will have this valuable advantage.

Second, it is always a bold and encouraging move when one party agrees to use a mediator of the opposing party's choice. It signals both a good faith intention to try to settle as well as the confidence that the party understands this is mediation, not a trial.

Thirdly, mediators who were formerly with the opposition have valuable assets. If you had respect for this attorney when they were practicing, it presumably was because they were tough, intelligent, thoughtful, thorough and talented. When those attributes were put to use, they were effective. Why not put those attributes to use for you

now to attempt settlement? It's a new job but they still have those traits.

As a mediator, the former attorney has new duties, loyalties and responsibilities. To be good at the new job, they need to use those skills from when practicing and apply them to mediating. If, for example, a former counsel effectively used common sense, why not make use of that to settle your case? Again, the underlying assumption has to be that, if they are going to do well in their new profession, they are going to have to master mediation skills, which means neutrality.

Fourth, a former lawyer of the opposing persuasion has particular advantages that you can employ. Take, for example, a former plaintiff's counsel. What were their duties besides strongly advocating for clients? Their duties also included screening and evaluating cases, and explaining the risks, rewards and dangers of litigation to people. I can't tell you how many times a client told me, "I need X dollars for this case." My response was always, "It doesn't matter what you 'need' for this case. That is not relevant. If you had a car you wanted me to sell that was worth \$10,000, you can tell me all day that you 'need' \$100,000.

But I won't ever be able to get you \$100,000. No one is going to pay me more than \$10,000 for that car. Similarly, a case has a value. I am happy to seek the highest value your case has, but the value is what the value is. The other side is not going to pay more than the value of the case." Believe me, that simple explanation helped settle a lot of cases. Clients understand the car example.

A former plaintiff's counsel has two significant advantages to a defendant. They are skilled at talking to plaintiffs. They are also skilled at presenting to the defense the case that the plaintiff will eventually present at trial. Those are two skills essential to a good plaintiff's counsel. Why not make use of them?

Similarly, a former defense counsel has particular skills helpful to plaintiffs. They are skilled at presenting the case to the plaintiff as the defendant intends to do at trial. They also have first-hand experience with the way insurers and other defendants who are frequently sued work in terms of budgets, authorities, status letters, and information and reports necessary to permit the carrier to effectuate a settlement. They have dealt with innumerable people responsible for evaluating and settling claims,

know what is important to them and how to tell them. If a plaintiff, why not consider using those attributes to help you effectuate a settlement?

It's worth chewing on.

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