

Dispute Resolution in Business and Technology

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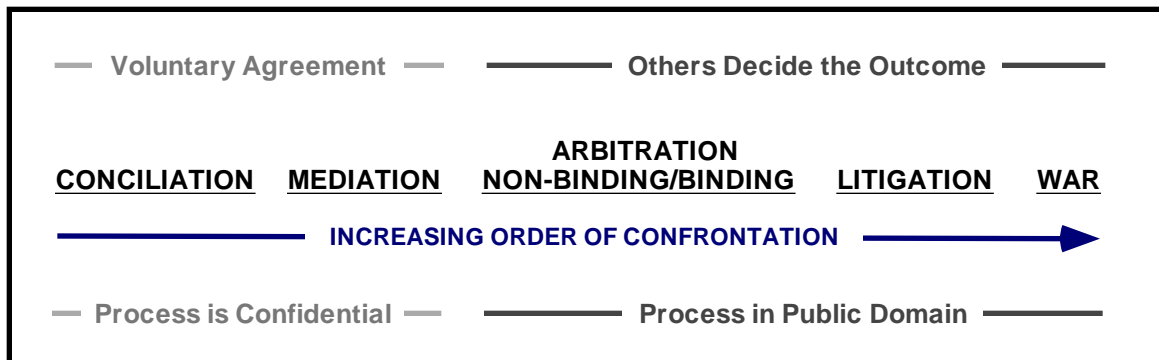
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Frank Rosten specializes in mediating medium to large disputes. He joined MediateTech, Inc., of Virginia, and subsequently became its West Coast Director and Vice President. American Intermediation Services, AIS, a Bay Area pioneer in Alternative Dispute Resolution, ADR, trained him as a mediator in 1987. He has handled some 500 multi-party tort cases since then. Prior to AIS, he was a program manager in the Long-Range Planning Service of SRI International. He was subsequently promoted to Director of the Business Intelligence Program, Europe-Middle East-Africa, and participated in negotiation and dispute avoidance activities. Frank has degrees in physics, chemistry and mathematics from London University and advanced degrees in psychology from Mac Master University in Ontario. He has been a long-standing member of NABE Silicon Valley Roundtable.

- Mediation is a dispute resolution process, facilitated by a third party neutral. Mediators make neither judgment, nor give advice or offer suggestions, other than by subtle implications through devil's advocacy questioning. Mediation fits along the spectrum of dispute processes, as per the box, below.



- Conciliation is a process used widely in collectivist (*as opposed to individualistic*) cultures where groups, such as the enlarged family, are common (*mainly third world countries*). Disputes are resolved by calling on a family authority figure, such as Big Daddy or Big Brother, to preside over the dispute process. The conciliator is therefore *not* truly a third party, nor is he entirely neutral, in that he influences the process in view of his authority. In the gap between mediation *and* arbitration all sorts of processes are practiced, such as med/arb, arb/med, rent-a-judge, etc. In med/arb, the third party mediates, and when a resolution can't be achieved voluntarily, the mediator dons the hat of arbitrator. This practice is not recommended in that the mediator may find reluctance on the part of future disputants to disclose

confidential information during the mediation process, for fear it may be used against them at the subsequent arbitration.

- Arb/Med is practiced when the degree of animosity is high and voluntary resolution is unlikely to occur. The Mediator arbitrates firsts, seals the award in an envelope and lays it on the table. Then the Mediation begins under the threat of the clearly visible award becoming binding in case a voluntary resolution can not be achieved. Rent-a-judge is a non-binding arbitration held in the privacy of the hearing room.
- Arbitration should never be the option of choice when mediation has not been attempted. Signing a binding arbitration agreement forfeits the right to due process. While mediators are professionals in their discipline, arbitrators are not. In view of the fact that arbitrators render a judgment, they must be proficient in the technology surrounding the dispute. This is the area of their expertise. Hence arbitration associations maintain large rosters of arbitrators any one of whom gets called on only rare occasions. When they do get to the table, it is likely they have not arbitrated a case for months or years.

The Mediation Process

After all the parties to a dispute have been persuaded to come to a table, a hearing date and venue is set. At the initial joint session, the mediator first solicits consensus on several procedural issues including bargaining in good faith, use of common rules of courtesy, only one person speaks at a time and everyone commits to remaining at the table until settlement is reached or it is agreed that a voluntary settlement can not be attained. Next, each party states how they see their position in the case, why they see it that way, their perception of the current status of negotiations, and what they hope to achieve through the mediation. Then follows a series of confidential caucuses during which time the mediator interacts with each party in turn. This enables disputants to disclose information exclusively to the mediator. It also enables the mediator to play devil's advocate and explore the arena within which a settlement might occur, without the disputants having to change their stated bargaining position in front of their adversaries. In about 85% of cases, a voluntary agreement emerges, usually after several rounds of causes. At that point, a final joint session is called to assure everyone understands and voluntarily agrees to the terms.

Complexities of Mediation

Mediation is a complex process and requires much expertise. There are at least ten factors the mediator must handle simultaneously. The mediator:

- is required to uphold the previously agreed procedural
- must establish who's who at the table, what role each party or person plays in the dispute and who speaks for the party.

- must develop a strategy leading to resolution.
- must control the speed of the proceedings so as leave no one behind nor having some people getting bored.
- must pay attention to body language.
- must assure that not just the issues are surfaced, but above all, the interests behind those issues.
- is required to have superior listening skills and be able to play back a synopsis of each party's opening statement.
- must know how to deal with highly emotional participants or threatening behavior in the hearing room.
- must be able to word questions so as to solicit the information required, as opposed to a "yes" or "no" response.

All of the above may occur in a variety of cultural settings which may necessitate major changes in how any of the items are handled.

Where is Mediation Used and Why It Has Become Popular

Mediation is mainly used in tort and **Public Policy Complex Multi-Party (PUPCoMP)** cases. Torts are civil wrongs as opposed to criminal wrongs. Torts, especially in business or professional disputes include Breach of Contract, Product Liability, Intellectual Property Law infringements, malpractice suits, and wrongful termination, among others. Public Policy cases from Not in My Back Yard (NIMBY) disputes, challenges to authority and special interest groups challenging anything and everything.

While the US culture tends to favor litigation over other dispute resolution techniques, mediation has nevertheless become popular again since the late eighties. Two reasons account for this turnabout:

- 1) the reintroduction of the death penalty, and
- 2) the increasing level of technology in disputes.

In addition, business people and other professionals finally have realized that voluntary agreements are preferable to court imposed settlements. Also, the confidential nature of mediation enables good relationships in the business world to be maintained or to be re-established.

Prior to the reintroduction of the death penalty, only criminal cases took priority over torts in the judicial system. The reintroduction of the death penalty causes appeals from death row to take priority over even criminal cases, causing unacceptable delays in getting a tort onto a judge's calendar. The increasing technicalities of many disputes is a further factor since it is often impossible to describe the underpinning technology to a jury who have no prior schooling in that area - See the example in the appendix below - Tropical Fruit v. Warehouse Refrigeration, Inc..

Appendix

Example of a Technology Mediation

Names have been changed to protect the guilty

Tropical Fruit v. Warehouse Refrigeration, Inc.

Tropical Fruit (plaintiff), owner of several refrigerated citrus fruit warehouses, complained against Warehouse Refrigeration, Inc. defendant and manufacturers/installers of refrigeration units in large commercial undertakings in the desert of Southern California. After just over one year of use, the refrigeration broke down, resulting in the loss of all stored fruit. The refrigeration units consist of aluminum coils transporting freon gas under pressure, running the length of the warehouses. To avoid ice build-up on the pipes, warm brackish water was continuously sprayed on the tubes.

The brackish water was piped from a nearby pond via copper pipes. The copper and aluminum, electrically connected via the conductive brackish water constituted a galvanic cell; a battery structure. This in turn caused aluminum to be progressively deposited onto the copper pipes until the walls became too thin to contain the pressurized freon gas. When these pipes burst, the refrigeration effect ceased.

Explaining the technology of galvanic cells to a jury would probably prove impossible. Hence, mediation became the preferred mode of resolution.

Copies of Slides

Mediators Don't

- **Make Judgments**
- **Give Advice**
- **Offer Suggestions**

**Mediators are neutral, 3rd Party
Facilitators**

Why Mediation is Difficult

Mediators must simultaneously handle the following 10 factors:

Memorizing Factors to Surface Later

Enforcement of Procedural Rules

Interpret Body Language

Practice Active Listening

Ensure Correct Image Formation

Practice Process Speed Control

Word Questioning Appropriately

Practice Information Analysis

Strategizing

Identify Who's Who at the Table

Major Points

- **Ask questions**
- **You have power but not authority**
- **Keep out of the case**
- **If you knock 'em down, pick 'em up again**

Other Points

Always acknowledge

Avoid surprises

Be patient, diplomatic, and firm

Take the blame and shun the glory

Mediator Attributes

Quick mind

Low ego; keep out of the case

Power of Command, be *unflappable*

Confidence and persistence

Good active listener

Good command of language

High level of more integrity

Diplomatic and patient

Culturally sensitive

Non bigoted

Good memory