Mediation Means Less Talk, More Listening

By Ann Farmer

Dubbed "the queen of torts," lawyer Sheila L. Birnbaum of the New York office of Skadden, Arps, Slate, Meagher & Flom LLP has successfully defended corporate clients in some of the most consequential class-action lawsuits of recent decades.

When she was appointed the neutral in a recent mediation settlement, however, that posed family members of victims of the 9/11 terrorist attacks against airlines, security companies, and insurers, she had to put her fighter instincts aside and focus on how she could shepherd all the parties to a mutually satisfactory agreement.

"I saw it as incredibly challenging," says Birnbaum, who was appointed by Judge Alvin K. Hellerstein of the U.S. District Court of the Southern District of New York to moderate this alternative dispute resolution (ADR) process, which came about after 95 families chose not to participate in the multibillion-dollar victim compensation fund set up by Congress to distribute money to survivors.

ADR—the private process in which a neutral third person serves as a facilitator to help resolve a dispute—has become an increasingly important tool in the U.S. justice system. The American Arbitration Association (AAA), which provides arbitration and mediation services around the world, reports that more than 85 percent of all mediations result in a settlement, including the most impassioned and legally complex of cases.

"I was pleased that Judge Hellerstein thought I could do it," says Birnbaum, whose responsibility was to maximize the legitimate interests of all the parties. Along with her Skadden associate, Thomas Fox, she explored the intricacies of the choice-of-law issues in the three states where the plane crashes occurred—New York, Pennsylvania, and Virginia—to determine how the law might be applied in these cases so they could appropriately advise the parties.

There was some uncertainty as to the liability of the airlines in the first place—whether they even had a duty

to compensate the families. But, early on, the defendants were determined liable for the purposes of the mediation. Had the cases gone to trial, the liability issues might very well have been fought all the way to the U.S. Supreme Court, with the results uncertain.

Birnbaum also had to pay close heed to the various reasons presented by the plaintiffs for opting out of the victim compensation fund. Some families of the deceased, for instance, believed they were entitled to much greater recoveries than amounts available from the fund because of a victim's substantial life insurance policy. Others couldn't move forward until they'd been given the opportunity to publicly express their grief over losing a loved one that fated day.

"For some, [their objective] was to tell the airlines how angry they were," says Birnbaum, describing the emotional roller coaster of this highly charged negotiation process, which took three years—from 2006 until last year—to resolve. "There were times when there was not a dry eye in the room," she says.

Ultimately, all but three of the cases settled for a cost of close to $500 million. "The process worked very well," Birnbaum says.

ADR Case Candidates

Until the 1970s, ADR was used primarily to mediate labor contract negotiations. Today it's widely implemented in all types of disputes, thanks in part to the Administrative Dispute Resolution Act of 1996, which was passed by Congress to encourage greater use of ADR methods.

It remains a purely voluntary process. Likewise, no one is required by law to reach a settlement. But retired judge Diane M. Welsh says, "I have come to believe that any type of case can be mediated, with the exception of an election dispute." Judge Welsh spent 12 years as a U.S. magistrate judge, handling more than 2,000 cases for settlement. Now affiliated with the JAMS Foundation, one of the largest private ADR providers in the world, she spends 90 percent of her time serving as a neutral.

Judge Welsh specializes in both (1) arbitration, when a neutral reviews evidence, hears arguments, and makes a decision, and (2) mediation, when a neutral assists the parties in reaching their own resolution by way of facilitative or evaluative mediations, mini-trials, nonbinding arbitrations, and other approaches.

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Judge Welsh has mediated all types of cases, including a settlement case involving claims by the federal government and state against defendants in a major environmental superfund case. She presided over a complex discovery dispute in the fen-phen diet drug litigation. She mediated a claim against a school district on behalf of a special education student who was raped by other students while the class was being supervised by a substitute teacher. She has served as the neutral in settlement cases involving just about every area of civil litigation and believes that businesses, in particular, "are more than ever desirous of mediated settlements."

According to Judge Welsh, people primarily turn to ADR to save time and money and avoid the risks of trial. "In this day of pretrial discovery, with electronic data readily available, the costs of going to trial can be in the millions of dollars. People cannot or do not want to pay such extraordinary costs," she says. She believes television also has played a part in people's reluctance to put a legal outcome in the hands of jurors who "don't always get it right."

Some people prefer mediation for the privacy and confidentiality it offers. A person who wants to challenge an employment termination,

Six Steps to Formal Mediation

1) **Introductory remarks:** The mediator outlines the role of the participants and demonstrates the mediator's neutrality, defines protocol, reviews guidelines, recaps the issues, and sets a time frame for the process.
2) **Statement of the problem by the parties:** This allows the parties to frame the issues in their minds and allows the mediator to ascertain their emotional states with regard to the problem. If the lawyers give the statements, the neutral may also ask the parties to speak.
3) **Information-gathering time:** The mediator will ask the parties open-ended questions.
4) **Identification of the problems:** The mediator tries to find common goals between the parties and tries to ascertain which problems are more likely to settle and settle first.
5) **Bargaining and generating options:** The mediator uses different methods to generate options, including putting a proposal on the table for modification and developing plausible scenarios. The mediator may also meet separately with each party.
6) **Reaching an agreement.**

Source: These steps were synthesized from an article written by Jessica A. Stepp, a DRS Certified Mediator for the LA County Bar Association, that was published on www.mediate.com.

for example, might think twice about going to trial because the ease with which any future employer could learn about the lawsuit on the Internet could prove a detriment to ever being hired in that field again.

Parties also may turn to mediation in cases where multiple disputes exist in different jurisdictions, such as class actions involving people located throughout the country. A situation like this might require any number of trials. But by using a private mediator, the issues to be resolved can be consolidated into one session.

There is a broad consensus that mediation is not appropriate for domestic violence cases, according to Carol Liebman, a clinical professor who teaches mediation and negotiation at Columbia Law School in New York. "Because those cases are about power and the exercise of power and the abuse of power," she says, "the mediator's job is to make sure there isn't an imbalance of power."

How the Process Works

Some parties will independently seek alternatives to settling an issue in court. Often a judge sets the stage for arbitrations or mediations. While working through a court docket, a judge will routinely inquire during initial hearings about whether the parties have made any efforts to settle using alternative methods. If not, the judge might encourage them to do so, or may go so far as to direct the parties to engage in settlement conferences.

If the parties choose to take the adjudicative path, a neutral—who might be a lawyer, a private judge, or other individual (mediators come from all walks of life and career paths)—is brought in to listen to the facts and render a decision.

When the parties want more autonomy and control over the situation, they will employ a mediative process, which enables them to find their own resolution with the aid of a neutral. "You use whatever intervention is appropriate," says Margaret Shaw, a former civil litigator who's been at the forefront of the modern ADR movement. In the 1980s, she was asked to set up a mediation program for PINS (Persons in Need of Supervision) children on behalf of the New York City Children's Aid Society. In 1998, she cofounded the boutique law firm Wittenberg, Mackenzie & Shaw and, later, ADR Associates, which merged with JAMS in 2004.

> Aided by a neutral, the greater autonomy and control in a mediative process enables parties to find their own resolution.

Shaw has taught ADR to thousands of people at NYU Law School and elsewhere. She says some graduates are coming right out of law schools and choosing to practice mediation. Some take to it naturally. Others struggle with the role. Although the field is largely unregulated, the AAA and the Association for Conflict Resolution adopted a Model Standards of Conduct for Mediators that was approved by the American Bar Association (ABA) in 2005. Most people, she says, abide by these standards.

This year Shaw was asked by the New York State Bar Association to come up with ADR credentialing. However, she says, "I don't think credentialing necessarily enhances quality," describing some of the attributes that she believes neutrals should strive for. "Trust building is the biggest thing," she emphasizes, adding that persistence, competence, and the ability to stay neutral help build that confidence among clients. "What's important," she says, "is connecting."

On its website, the ABA Section of Dispute Resolution lists the following among the characteristics of successful mediators: (1) an empathetic listener, (2) skilled at drawing out people's opinions and feelings without adopting them as their own, and (3) adept at helping the parties use language that is clear and descriptive but not inflammatory.

"Exhausting, but Fascinating"

Shaw prefers to jumpstart a mediation process with calls to the lawyers the night before to ascertain who will be appearing at the initial joint session and what she can expect to see and hear then. This way she can tailor the meeting accordingly. "Each case is different," she says.

The joint session involves all the parties and their representatives to whom the mediator explains the process and roles and establishes ground rules and an agenda. The parties are given an opportunity to make opening statements regarding their positions and to voice their major areas of agreement and disagreement. Some like to give presentations.

At times, the entire process is conducted jointly. More often, though, and depending on what the facilitator believes will best move the process

A. Leon Higginbotham Jr. Fellows Program

For more information on the A. Leon Higginbotham Jr. Fellows Program, go to the American Arbitration Association Web site at www.adr.org.

forward, the two sides splinter into separate rooms with the neutral shuttling between them, listening, gathering information, and discussing possible solutions.

"Don't offer strong opinions, but ask questions," says Judge Welsh, describing how the job of the neutral is to stimulate communication and negotiation and get the parties to make their own voluntary decision. It's vitally important, she says, that both parties feel like they're being heard and that the mediator is committed to finding a workable solution for both sides. "They must feel like they got their day in court," she says.

The operation can be highly sensitive. During the negotiations of the 9/11 survivors, for example, Birnbaum determined it was necessary to deal with each case separately. "You've got to listen very hard," says Birnbaum, who found the cases involving children who went down with the planes to be the most troubling and moving. Three inner-city children, for instance, were flying with their teachers to accept a scholarship. For some it was their first time on an airplane. Part of the process involved hearing the parents express guilt at letting their child go on the trip. "It was very emotional," she recalls.

Depending on the complexity of the dispute, several mediation sessions may be necessary before the parties are able to reach a settlement. In the case of the 9/11 settlement, it took years, with negotiations taking place in three cities to accommodate the parties. Other mediations can be resolved in a day or less.

"It's exhausting but fascinating," says Shaw, who appreciates the way ADR allows the parties to think and act creatively. For example, what might grease the wheels in an employment dispute could be the defendant's offer to provide a positive work reference. Or, if a party offers to pay a lower-than-requested settlement amount, but to disburse it right away, this might be sufficient incentive to move things along. In an age discrimination suit that Shaw mediated years ago, the parties agreed to a solution that allowed the employee to retain his employment status without pay for two years to vest some benefits afforded to retirees. "I love the problem solving," Shaw says. "I love the people orientation."

Until now, the field of mediation has been male dominated. Judge Welsh attributes the imbalance to more of a pipeline issue. For instance, as more women come off the bench and go into mediation, women in this field are gaining in numbers. "I believe we are just as suited [as men]," she says. "In terms of success using mediation, it's not relevant to gender."

"The female voice is certainly a compatible, natural fit for mediation," Liebman says. "It's for smart women who are interested in problem solving," she adds.

Meanwhile, the AAA has shown a commitment to generating more diversity in the field of ADR. The association's A. Leon Higginbotham Jr. Fellows Program, named in honor of a prominent African American federal appeals court judge, provides training, mentorship, and networking opportunities to up-and-coming diverse professionals. Now in its second year, the program "is filling a need," AAA Associate General Counsel Sasha Carbone says.

Forms of Alternative Dispute Resolution

Mediative Processes

- **Facilitative mediation:** A neutral assists the parties in reaching a resolution.
- **Evaluative mediation:** A more structured mediation in which the neutral injects his or her view and/or prediction of a trial outcome.
- **Neutral evaluation:** A nonbinding process in which parties retain a neutral to provide an evaluation based on the merits of the case.
- **Mini-trial:** A formal, structured process in which parties cede procedural control to reframe the dispute from the context of litigation to the context of a business problem.
- **Nonbinding arbitration:** A hearing process that looks and feels like arbitration but is advisory, not binding.
- **Neutral expert fact-finding:** A stand-alone, nonbinding process or part of a larger nonbinding process used to resolve a disputed technical issue.
- **Special masters/discovery masters:** Court-appointed special masters assist with complex disputes. Discovery masters are selected by the parties.

Adjudicative Processes

- **Arbitration:** A less formal and abbreviated alternative to litigation in commercial and labor disputes presided over by a neutral.
- **Bracketed arbitration:** Parties agree to limit the possible outcomes.
- **Final offer arbitration:** Plaintiff and defendant each submit a "final" to the arbitrator.
- **Private judging:** A private trial conducted by a former judge, similar to a conventional trial. Judgment may be appealed.
- **Med-arb:** When parties participate in mediation with an agreement that if unable to reach a settlement, the process will shift to arbitration.

Source: JAMS Foundation, www.jamsadr.com.

Ann Farmer is a Brooklyn–based freelance journalist who covers breaking news for the New York Times *and contributes stories on culture, law, crime, and other topics to publications including* Emmy, DGA Quarterly, Budget Travel, *and others.*