

Opinio Juris in Comparatione

Op. J. Vol. 1/2012, Paper n. 6

Studies in Comparative and National Law
Études de droit comparé et national
Estudios de derecho comparado y nacional



MEDIATING COMMERCIAL CASES IN U.S. MUNICIPAL COURTS: A CASE FOR TRANSFORMATIVE MEDIATION

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Suggested citation: Jody B. Miller, *Mediating Commercial Cases in U.S. Municipal Courts: A Case For Transformative Mediation*, *Op. J.*, Vol. 1/2012, Paper n. 6, pp. 1 - 7, <http://lider-lab.sssup.it/opinio>, online publication August 2012.

**MEDIATING COMMERCIAL CASES
IN U.S. MUNICIPAL COURTS:
A CASE FOR TRANSFORMATIVE MEDIATION**

by

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Abstract:

Transformative mediation for commercial disputes provides courts, attorneys and parties a process that most closely follows self-determination, a core principle of mediation. It also provides unique benefits for stakeholders that include a process that is efficient and effective since it allows attorneys and parties to address the most salient issues of the conflict in the order that they choose to, while supporting their conversation. For courts, transformative mediation offers the chance for sustainable solutions and when no solution is found, the issues before the court are narrower because the parties are clearer and more focused, which increases efficiency in the court process. Lastly, transformative mediation does not get in the way of access to justice because parties may choose to go directly to court because they decide that they need the court to make a decision. Because transformative mediation's goals are to help people become clearer, more decisive and consider the other party's perspective, it does not divorce the interaction from the specific issues before the court. Rather it fosters a conversation that leads to benefits for all involved.

Keywords: Mediation, alternative dispute resolution, commercial dispute resolution, transformative mediation.

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Do all courts have this?

Commercial court mediation participant after a transformative mediation

Mediation, specifically transformative mediation, in court connected commercial cases offers enormous benefits for courts, attorneys and parties that remain consistent with the core principle of mediation – self-determination. At the same time it offers opportunities for sustainable solutions and reducing access to justice barriers. Despite the differing goals of courts, such as administrative efficiency and settlement, and those of transformative mediation, namely helping parties change the way they relate to each other, transformative mediation offers clear benefits over other models of mediation because it maintains the integrity and intention of self-determination, the core principle of mediation, while providing a true alternative dispute resolution process.

One criticism of mediation has been that models such as evaluative and facilitative mediation, common in the commercial context, are not much different than the adjudication process; therefore they do not provide a genuinely different process at all. Mediation can seem just like the court process when mediators focus on settlement; there isn't any difference in the experience of the parties at all. By contrast, transformative mediation is very likely to benefit and meet the various goals of all involved: courts, attorneys and parties. Recognizing that key stakeholders do have distinct goals, and identifying how mediation is likely to meet these different goals, strengthens the case for transformative mediation.

Lastly, transformative mediation reduces access to justice barriers in commercial cases by allowing parties, with their attorneys, to decide whether or not their goals have been reached and if not, to proceed directly to the judge. One of the criticisms of the growth of mediation in the court context is that it reduces the ability for parties to access court because cases are referred directly to mediation or other alternative dispute resolution processes. The inclusion of mediation in the court context reduces, if not altogether removes parties' choices about whether or not they want the court to hear the case, all for the purpose of efficiency and settlement. Today, the Mediation Center of Dutchess County, a community mediation center that solely provides mediation from the transformative framework, has grappled with and successfully addressed these very issues over the past 10 years as it offers commercial mediation in 13 town, village, and city courts.

What Commercial Parties Want

First, transformative mediation maintains the purpose of mediation, to be an altogether different process than that of the court, where self-determination is front and center. This is as important in commercial cases as any other. A common view most mediators adhere to when describing their mediation practice (regardless of model) is that mediation allows parties to come to their own self-determined solutions. However, research of mediators' actual practices has shown a

much different picture, one in which the foundational value of party self-determination was largely being ignored in favor of settlement ¹. One study found that in most mediation arenas mediators wanted to find a

“substantive outcome that would result in a deal. They orient their activities toward concrete problem solving and frequently make suggestions on matters of substance...using their expertise as the touchstone of their efforts at persuasion and influence. [They] are strongly inclined to believe that without their substantive and procedural know-how, the parties would flounder and settlement would be elusive.” ²

This very experience was born out in commercial mediation cases at the Mediation Center of Dutchess County and was a key factor in the Center’s change to transformative mediation. Mediators assessed the strengths and weaknesses of cases, shutting down communication between parties, focusing on settlements while saying they were allowing for self-determination and choice. Although mediators said they were impartial, their practices in the mediation room were heavily focused on making decisions for the parties about the topics for discussion, including what was relevant and what wasn’t. Discussions were shaped for a settlement outcome effectively taking choices away from parties.³ Choice is central to self-determination.

Why is self-determination important in commercial cases at all? A common view of commercial mediation is that the money or the dollar amount is the most important element of the case, privileging it over anything else. However, this assumption is incorrect, because the dollar amount of the case cannot be divorced from the social interaction of the conflict that brought it to court.⁴ Self-determination allows parties and their attorneys to decide not only the outcome, but the content and process that shapes the outcome. Because transformative mediation supports parties as they deliberate, make choices and consider other perspectives, they themselves determine what to prioritize and discuss. More often than not, they discuss the situation that brought them to court, the way in which they were affected and how that relates to the dollar amount of the claim. In essence they are completely in charge of the mediation session’s content and process. The Mediation Center’s experience consistently bears out that the conflict and negative interaction – even between parties who have no other existing relationship than a brief commercial one – is integral to the way that the case unfolds, including whether or not it settles.

¹ ROBERT A. BARUCH BUSH, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, in *North Dakota Law Review*, Vol. 20, 2009, 124-126.

² DEBORAH KOLB & KENNETH KRESSEL, *Conclusion: The Realities of Making Talk Work*, in *When Talk Works: Profiles Of Mediators* 459, 468-470.

³ JODY B. MILLER, *Choosing to Change: Transitioning to the Transformative Model in a Community Mediation Center* in *Transformative Mediation: A Sourcebook, Resources for Conflict Intervention Practitioners and Programs*, 189 (J. Folger, R. Bush, & D. Della Noce, eds., 2010).

⁴ ROBERT A. BARUCH BUSH, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, *North Dakota Law Review* Vol. 20, 2009, 143.

Litigated commercial cases begin as other types of cases do, with an unresolved conflict that escalates to one of the few resolution options available to parties: action in court. Although in the context of a business dispute that lands in a specific court due to the type and amount of the claim, the interaction between parties has likely become negative and destructive; despite one or both parties' attempts to address the issue by talking or writing to the other, each alone was not able to come to decisions that would fully address the situation. How the parties relate to each other is central to a commercial dispute; when anger, distrust, confusion, fear, and suspicion –typical conflict experiences – enter into the situation, it is likely that without one or both of the parties moving out of those states of being, they will be unable to reach a resolution. The venue of court does not erase the parties' experience of the conflict, which without interactional change can further entrench them. People cannot be forced to think more clearly, make decisions or communicate more effectively -- key behaviors in productive social interaction.⁵

Transformative mediation is well suited for commercial cases since it affords parties a forum to move out of the negative, deconstructive experience that led to the escalation of the conflict, providing them with the ability to articulate the experience and its relation to the claim before the court. The idea that commercial cases are best addressed with a focus on the dollar amount misunderstands why cases make their way to court in the first place: because conflict has become negative and destructive, affecting the way the parties relate to each other, and leaving them few if any other options to resolve it.

What Courts Want

The courts goals, along with those of attorneys, although different from transformative mediation's goals, are not mutually exclusive. Attorneys gain a more expansive understanding of their client's situation and can attend to the most salient issues that they believe need to be addressed.⁶

Two attorneys and their clients were in court disputing the final bill for plumbing services provided to a restaurant. Despite several attempts to fix the drainage lines at the restaurant, the owners ultimately had to hire another plumber to complete the job. The plumber explained his assessment of the problem and his good faith attempts to repair it. The respondent's attorney, speaking to the complainant and his attorney, explained the depth of the problem that the complainant was unable to fix. The system was fixed with no further problem when his client hired and paid another plumber. The attorney, clearly surprised by how the mediation unfolded, ended with, "This is the most information I've ever heard in a mediation." The complainant's attorney, after

⁵ BUSH AND FOLGER, *North Dakota Law Review*.

⁶ PETER MILLER & ROBERT A. BARUCH BUSH, *Transformative Mediation and Lawyers: Insights from Practice and Theory*, in *Transformative Mediation: A Sourcebook, Resources For Conflict Intervention Practitioners And Programs*, 211, (J. Folger, R. Bush, & D. Della Noce, eds., 2010).

listening to his own client and the respondent's client understood the case differently than before the conversation, and invited the other attorney to go outside, certain they could work something out.

For courts, transformative mediation provides unique benefits. First, because parties are able to articulate their experience for themselves and to each other, the result is often clearer decision-making that leads to more sustainable settlements.⁷ When mediators focus on communication, deliberation and decision making without the agenda for settlement, parties and their attorneys are free to set their own agenda -- which may in fact be settlement – and the mediator can help them achieve that goal. Because it is their goal and not the mediator's, solutions found belong to the parties alone, increasing the likelihood that they are authentic and therefore sustainable. Although courts seek settlements and may not have the same interest in sustainability per se, if a settlement breaks down or is breached, it is likely that parties will again need court intervention to enter and enforce a judgment, once again reiterating the importance of a true process of self-determination.

Additionally, courts often report that even when a settlement is not reached, the remaining issues before the court are narrower than in those cases where no mediation has been held. Parties themselves have sorted through and addressed not only the tangible issues before the court, but also the interaction between them as they discuss what has taken place. Mediation within this context provides another opportunity for the interaction to change to more positive and constructive, even when they continue to disagree. As a result of being clearer about the meaning of the conflict for themselves⁸ and understanding the other party's position, both parties know “where they stand” within the conflict, which translates into a more streamlined case for the court. Lastly, settlements are reached in almost as many cases as in other models of mediation, therefore still effectively meeting the court's primary goals that include processing of cases efficiently.

A complex commercial case pending in Federal court that had been in litigation for 8 years was referred to mediation. The plaintiff and his attorney were in New York as was the defendant's attorney, while the defendants were in California. All had agreed to mediate prior to the next step in the case, which was to file motions and appear in court in California. At the mediation, the attorneys discussed the status of the case at the time, including each of their strategies going forward...the plaintiff attended but did not speak. During the conversation, crucial new information was revealed, surprising the plaintiff's attorney, almost immediately making a difference in his strategy. The significance of this new information led to discussion with his client, a call to the defendant's client in California and within 2 hours they had a settlement.

⁷ JOSEPH P. FOLGER, *Transformative Mediation and the Courts: A Glimpse at Programs and Practice* in *Transformative Mediation: A Sourcebook, Resources for Conflict Intervention Practitioners and Programs*, 173, (J. Folger, R. Bush, & D. Della Noce, eds.,2010).

⁸ JOSEPH P. FOLGER, *Transformative Mediation and the Courts: A Glimpse at Programs and Practice* in *Transformative Mediation: A Sourcebook, Resources For Conflict Intervention Practitioners And Programs*, 173, (J. Folger, R. Bush, & D. Della Noce, eds.,2010).

Making the Choice of ADR More of a Choice

Lastly, transformative mediation in commercial cases increases choice for parties about whether or not to access the court process. With the increase of alternative dispute resolution in the court context and the patchwork of statutes that regulate it from state to state, the likelihood that a case will be referred to an ADR process is high. Because courts have a stake in efficiently settling cases, choice to participate in an ADR process is reduced if available at all. This may be the area where there is the most tension between the court's goals and transformative mediation's goals. Keeping choices in the parties' hands is paramount, including whether or not to participate as well as choices about how the conversation unfolds in the room. Although mediation is voluntary in New York community centers, the needs of the court weigh heavily on parties and on centers that provide mediation. Parties rarely feel as though they have a choice when a judge refers them to mediation; the voluntariness of the process is squarely on the mediators' shoulders to convey to parties. And there have been many times that parties want to go directly to court, without having any conversation with each other at all. It is not uncommon for parties to believe they have met their obligation to mediation by meeting with the mediators for a brief overview of the process, and decide not to move ahead – only to be sent back by the court to “try harder” to reach a resolution.

One way that the Mediation Center has balanced the requirements of the courts with party choice is to make very clear how the mediation process works with commercial mediation in court. Explaining that the judge refers all cases to mediation to encourage parties to try the process; that it is up to the parties to decide if and how they want to engage in mediation and that their case is still pending in court, helps to mitigate the tension between these two worlds. Ensuring parties can access the court, along with referral to mediation or other ADR process, removes the concern that ADR is encroaching on the ability of parties to access justice.

Conclusion

Transformative mediation for commercial cases ultimately provides the benefits that courts, attorneys and clients seek when they engage in a mediation process. It provides a context for parties to address the conflict that is tied to the dollar amount of the claim. It also reduces concerns about access to justice since it allows for parties to make choices, even when those choices are limited, within the court context. Transformative mediation provides attorneys an opportunity to represent their clients in the way that they both deem appropriate. This can allow for as much or as little information to be shared, with the potential to learn more about the situation and represent their clients more effectively. For courts, it can produce sustainable settlements that do not need further court intervention through enforcement because parties themselves have reached decisions without coercive tactics. Furthermore, when no settlement is reached, the issues before the court are narrower thereby reducing the scope and

time necessary to address the case. Preserving the core value of self-determination, as well as providing a multitude of advantages for all stakeholders involved, makes transformative mediation well suited for litigated commercial cases.