On Feb. 11, 2005, in Philadelphia, the Pennsylvania Bar Institute will hold a first-of-its-kind, intensive, seven-credit CLE program: “Mastering Med Mal Mediation: Preparation, Strategy, and Ethics.” Insurance adjusters, risk managers, in-house counsel, mediators, judges doctors and lawyers are all being encouraged to attend; and the Philadelphia Court of Common Pleas will cancel jury selection in med mal cases that day so that attorneys can attend. The program will be taught by faculty who have participated in the new, “Rush-style” mediation program developed by Drexel University College of Medicine. This article will report on the first year of the Drexel Med program.

In the spring of 2003, a special task force convened by Gov. Rendell made many recommendations for resolving the health care crisis facing Pennsylvania and it called on the Supreme Court of Pennsylvania to examine the mediation of health care disputes as one possible element in that campaign. In early November 2003, Chief Justice Ralph Cappy and Justice William Lamb invited the CEOs and general counsels of all Pennsylvania hospitals to Hershey to learn about the mediation program created by the Rush-St. Luke’s-Presbyterian Medical Center in Chicago. Impressed by their successes, Drexel University College of Medicine (Drexel Med) decided to see if mediation would work in Philadelphia as well.

There was no reason to think that the program would succeed. Unlike Rush, which is both the hospital and the medical staff, Drexel Med is only a clinical practice group: its 360 physicians and nurse midwives provide most of their medical services in hospitals owned, operated and staffed by Tenet HealthSystems, a for-profit hospital company based in Texas. Since plaintiffs sue the doctors and their hospitals, Drexel Med would always have to get Tenet’s consent to mediate. While interested in the notion of mediation, Tenet would not agree to co-sponsor a program with Drexel Med; it would only agree to review requests by Drexel Med on a case-by-case basis. Unlike most other academic medical centers in Pennsylvania, Drexel Med still had commercial med mal insurance. This means that Drexel Med’s insurers also had to agree to take a case to mediation. Then again, Drexel Med’s own physicians had “consenting rights” under their policies, and they had to agree.

That was just the beginning. In most lawsuits, Drexel Med’s physicians were not the only defendants: all providers (physicians and hospitals) who had provided care to the plaintiff were typically joined as defendants, and each one of them (and their insurers) would also have to agree to mediation. The plaintiffs and their counsel obviously had to agree — and since most of the cases selected by Drexel Med were very close to trial, plaintiffs’ counsel were frequently adverse to spending time working on mediation that was better spent preparing for trial. In cases of catastrophic loss, the MCare Fund had to agree to participate. And finally, there was the court itself: the Philadelphia Court of Common Pleas. Administrative Judge James J. Fitzgerald III and Supervising Judge, Civil Division, William J. Manfredi, were both very supportive of the program, but both made it quite clear that the trial schedules for these cases would not be postponed, even for a week, to allow the mediations to occur.

In short, Drexel Med had no ability by itself to implement its mediation program. All it had was the opportunity to ask the different players if they would participate.

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Why Mediate Health Care Disputes?
Unlike auto cases or contract disputes, doctors and their patients do not come together either accidentally or for commercial purposes. Patients and their doctors typically have a relationship that is intimate and intensely personal. While patients know doctors cannot guarantee success, they will put their hopes in their doctors for a good result. When that does not happen, patients want to know what went wrong — and it is precisely at that moment that their doctors stop talking to them. Doctors do this on the best of advice — their insurers tell them that if they admit fault, they could lose their insurance, and their lawyers tell them that they should not say anything more, since what they say can and will be held against them in a court of law. But this time-honored instruction drives a wedge between patient and doctor at the most critical time, and leaves the patient (and his/her family) feeling totally abandoned at the moment of greatest need.

An informal survey of expert plaintiffs’ med mal lawyers revealed that, more than half the time, their clients came to them because they could not get any information from their doctors and were angry. Now magnify this by four years — the typical amount of time that passes between incident and trial (and this is conservative: getting to trial takes well more than two years from commencement in counties other than Philadelphia). It does not take much to imagine what the patient/family feels when, after four years, the doctor has never spoken to them, and instead has refused to answer interrogatories, refused to produce documents, covered up at his deposition and forced the patient/family to undergo days of depositions and invasive “day-in-the-life” videos. And now, you are a juror: you see the devastation that has been wreaked on this family as a result of unsuccessful medical care, and you hear that the doctor has never to that day ever spoken with the family nor said how sorry he was. Any good trial lawyer — and Philadelphia has the best — could turn this fact pattern into a multi-million dollar verdict.

If you start with the premise that doctors should do what is right for their patients, you quickly reject litigation as the right method for resolving health care disputes. Lawsuits will always be necessary when there cannot be agreement; but the intimacy of health care merits a faster, more intimate approach and agreement whenever possible.

The Drexel Med Mediation Program
In the Drexel Med program, all parties and their counsel must sign a Mediation Agreement that lays out all the essential terms. As with Rush Medical Center’s program, there are two co-mediators, both expert med mal lawyers. These lawyers have been trained as mediators by Health Care Resolutions, L.L.C. (HCR), a mediation services provider in Conshohocken that specializes in health law alternative dispute resolution. Once “certified” by HCR and accepted by Drexel Med (which only agrees to use premier malpractice attorneys), both co-mediators are selected by the plaintiff’s counsel, and can only be disqualified by a defendant for cause. The mediators are paid top dollar for their services, and the amount of time they can spend on a case is not limited. The defendants agree to pay all costs of the mediation in equal shares, and they pay their estimated share in advance.

The attorneys submit pre-mediation materials to the mediators in advance, and the parties themselves agree to attend the mediation session. Defense counsel can speak among themselves, but cannot communicate directly with plaintiff’s counsel until the mediation is over, so there can be no attempt at unilateral negotiations or joint-torting. Everything given to the mediators and said in the course of the mediation is completely confidential — no one may speak of it once the mediation ends, regardless of how it ends. If it fails, the attorneys cannot even tell the judge what the last proposals were, because that is confidential; and at trial, the attorneys obviously cannot refer to what was said or done at the mediation. If it succeeds, it ends in a confidential settlement agreement and complete releases.

Results from the First Year
Since February 2004, Drexel Med has instructed its outside counsel to seek mediation in 23 pending lawsuits. Here is how those matters stood at the end of December 2004:

| Number of cases settled in mediation | . . . . . . . . . . . . . . . .4 |
| Number of cases settled after mediation, but before trial | . . . . . . . . . . . . . . . .4 |
| Number of cases settled after mediation requested, but before it was held | . . . . . . . . . . . . . . . .3 |
| Number of cases where mediation was rejected/could not be scheduled, and claims went to trial | . . . . . . . . . . . . . . . .3 |
| Number of cases where mediation did not succeed; case awaiting trial | . . . . . . . . . . . . . . . .1 |
| Number of cases where it is “too early” for mediation, because discovery is needed | . . . . . . . . . . . . . . . .4 |
| Number of cases still awaiting consent from other parties to mediate | . . . . . . . . . . . . . . . .4 |

Because the program is based on Drexel Med’s expressed preference to resolve health care disputes by mediation when it can, the instruction to take a case to mediation cannot be interpreted as a sign of weakness or admission of liability. Indeed, three of the 23 cases

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could not be resolved before they were called to trial, and in all three of those cases, the juries rendered defense verdicts for the Drexel Med doctors.

In the 11 cases that did get resolved, more than 20 doctors employed by Drexel Med were named as defendants, but only 13 were actually involved in the mediations. This is because, when it comes time for the mediation, plaintiffs’ counsel focused on which physicians really were targets of their clients’ claims. “Target” does not necessarily mean “liable” however: of the 13 physicians who did attend the mediations, 10 ended up contributing to settlements and three came through the process without having to pay anything.

And it was a process. While we began the program expecting that the mediations would take a day or less, most have taken several days to conclude. One case took two weeks to resolve, and it was only because the plaintiff’s attorney helped keep her client from terminating the mediation that the mediators were able to bring home a resolution. In another, a very long day ended with the defendants agreeing to settle with the plaintiff but not agreeing on how to divide the payment obligation; so they chose an expert plaintiff’s med mal attorney to serve as the judge, and held a binding arbitration to determine the shares. But some cases were resolved very quickly, with just a few telephone calls being needed to break the ice and get the parties to “yes” even before an in-person mediation session could be held.

Having expert litigators from both sides serve as co-mediators has been indispensable to the process. Each can talk openly, honestly and with great experience to his/her own “side” and cut through the negotiating “positions” that the sides typically take. That much was expected. But what was not predicted is the now-proven ability of the mediators to separate themselves from their daily roles as advocates for one side, and to demonstrate to “the other side” that they are both trustworthy and creative as neutral problem-solvers. Counsel for both sides began this process last February with great suspicion about picking “foxes” to guard their henhouses; today, the credibility of the process has been established and we are even receiving requests that we put cases into our program. By the excellence of their service, the mediators themselves have proven the value of this approach.

The most frequently asked question is whether mediation saves money. The answer is, we don’t know. In the 11 cases that have resolved, we decided that the settlement amount was “reasonable.” In some of those cases, we were delighted to get the case resolved for the agreed-upon amount; in others, we contributed more than we felt was “right.” It is possible we paid on cases that could have ended in defense verdicts (as could have happened with the three that did not settle); it is also possible that a jury could have awarded lots more than we agreed to pay. Mediation did take less time than preparing for and conducting a trial, so those costs of defense would surely be saved in future cases – but the cases we initially referred to the program were all on the verge of trial, and the result was that all counsel had to both mediate the cases and prepare them for trial at the same time.

Lessons Learned

That mediation is different from trial or arbitration is immediately obvious to anyone who has been through one. Several of ours started with the patient/family speaking (even yelling) with incredible emotion directly to their doctors, who were across the table, telling them just how much they hated them. It’s not rare for everyone in the room to have watering eyes, if not running tears. Doctors have apologize; patients have forgiven. It’s not what litigators are used to, or what happens in courtrooms. It provides both victims of medical error — the patient and the physician — the opportunity to reach closure more quickly than having to suffer through depositions, motions and trial; it allows the doctors to answer the patient’s/family’s questions about how this could possibly have happened; and it allows everyone to focus on the relief that the family really needs. As we expand our program and reach back in time, closer to the event, we are hoping that health care disputes will go to mediation even before lawsuits are filed; that way, the courthouse can be saved for those cases where settlements are not possible.

In short, it is a whole new ball-game — one in which attorneys continue to be key players, but have to analyze cases differently and use new skills to represent their clients well.

On Feb. 11 in Philadelphia, those who have gone through the process will be sharing the lessons they have learned in an all-day, seven-credit CLE program hosted by the Pennsylvania Bar Institute. If you are involved in health care disputes, hold that date, and benefit from the lessons we have learned.

Carl (Tobey) Oxholm III became general counsel of Drexel University in May 2001, after 22 years as a trial attorney in Philadelphia. He is also general counsel of Philadelphia Health & Education Corporation db/a Drexel University College of Medicine, which, since August 2002, has been a not-for-profit affiliate of Drexel University. A longtime member of the Philadelphia Trial Lawyers Association, his own views on capping damages differ from those of many medical professionals, and for that reason he has a personal interest in trying to find new ways of solving the healthcare insurance crisis.

See additional program information on Page 4.
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**THE PENNSYLVANIA BAR INSTITUTE PRESENTS:**
A special program devoted solely to Mastering Med Mal Mediations

**Anticipated Outline of Program:**

1. Welcome, Overview and Intro: **Tobey Oxholm, General Counsel, Drexel University College of Medicine**
2. The Governor’s Support for Med Mal Mediation – **Susan Anderson, Deputy Director, Governor’s Office of Health Care Reform**
3. Judicial Support for Mediation – **Honorable William J. Manfredi, Supervising Judge, Trial Division, Philadelphia Court of Common Pleas**
   a. Confidentiality Statute
   b. Discovery Rule 4011
   c. Exemption from JPT conferences
   d. Settlement conferences after unsuccessful mediations
   e. Evidence at trial (Apology Rule)
   f. Verdict Sheet
   g. Appeals
   h. Scheduling issues
4. Mediation Options – **Ann Begler, Principal, Begler Group**
   a. Single mediator
   b. Rush and Drexel Models
   c. Defendants Only
   d. Discrete (e.g., preliminary) issues
   e. Split (mediation + arbitration)
   f. Differences with Settlement Conferences, Negotiations, Ombuds Programs and Arbitration
5. The mediators – their training, their role, their goals: more than just money – **Jane Ruddell, President, Health Care Resolutions, Inc.**
6. Setting the stage – choosing the right time, picking the right model, and establishing the right rules – **Tobey Oxholm**
7. MCARE – its rights, its procedures, and how to make sure it is ready to participate – **Beth Persun, Director, Bureau of Claims Administration, MCARE Fund**
8. Luncheon presentation: The Ethical Dimension (1 hour ethics) - **Tom Wilkinson, Partner, Cozen O’Connor; Hon. Abraham Gafni, Professor, Villanova University School of Law**
   a. ABA and ACR Ethical Standards of Practice
   b. New Rules of Professional Conduct
   c. A different kind of advocacy: what is “winning?”
   d. Money vs. other kinds of compensation: setting your fee
   e. Doctors and their insurance companies: competing interests
   f. Defense lawyers serving as mediators
9. **MOCK MEDIATION** – Moderated/directed by **Ann Begler; Deborah Lorber**, Risk Manager, Drexel College of Medicine; **Alita Das**, Hospital Liability Representative, Medical Inter-Insurance Exchange (MIIX); **Pete Ricchiuti**, Mediator; **Carol Nelson Shepherd**, Lawyer for Patient; **Peter Hoffman**, Lawyer for Doctor #1; **Heather Hansen**, Lawyer for Doctor #2
10. Preparing for it; critiquing it (panel; above)
    a. Preparing the plaintiff patient/family
    b. Preparing the defendant doctor/hospital
    c. Preparing the insurer
    d. Preparing the lawyers
11. How it works/why it works: Lessons learned – **Peter Hoffman**
12. Closing – **Tobey Oxholm**

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Developments in Utah’s Arbitration of Medical Malpractice Statute

By Thomas B. Salzer

The Utah statute dealing with mandatory arbitration of medical malpractice disputes has had a lot of press over the recent months — and years. In essence, Utah has a statute that allows a physician to refuse to provide medical services, except in emergency settings, if a patient does not sign an agreement before being treated that the patient will only arbitrate and not bring suit in court concerning any malpractice allegations.

Utah has a statute that allows a physician to refuse to provide medical services, except in emergency settings, if a patient does not sign an agreement before being treated that the patient will only arbitrate and not bring suit in court concerning any malpractice allegations.

The press releases, summaries and other short-handed verbiage may seem, on their face, contradictory or confusing or lead to the assumption that the concept of arbitration for medical malpractice disputes is not working in Utah, but these written and verbal bytes of information are the result of a lobbying battle which includes prominent names such as former Gov. Norm Bangerter. While this statute has been in existence for half a dozen years, after its first year, the trial attorneys asked for some “modifications” which may be classified by observers as improvements. In 2004, we found new battle lines had formed around this statute.

From three Deseret News articles published in 2004, all authored by Lois Collins and Elaine Jarik, the following points and opinions may be distilled: (a) Whether or not there is a state statute addressing a physician’s right to demand an arbitration process before services are provided, many medical professionals are asking patients to sign such agreements. (b) A Utah pro-arbitration group, appropriately titled the Arbitration Alliance, found that asking a sample of 600 people revealed that, if faced with signing arbitration agreements at their doctor’s office, 66 percent would do so, and these same people perceive arbitration as faster and less expensive than a court proceeding, and ultimately fair. (c) A Salt Lake City public survey firm found 39 percent of respondents favoring arbitration agreements, with an unstated percentage having no opinion; and in another survey, five percent of patients refused to sign such agreements when faced with the question in their physician’s office. (d) There is some antidotal evidence that medical insurance groups are offering a five percent discount to practices that have their patients sign such arbitration agreements without demanding long historical periods to see how these arbitration agreements affect costs. (e) Pro-arbitration forces say the costs of dispute resolutions will go down, sometimes using the statistic “70 percent less expensive.” (f) The Arbitration Alliance, citing research from the National Arbitration Forum, concludes that arbitration costs can be “nearly 20 times lower than going to court.” The Deseret News journalists caution, “the [Forum] report’s numbers, though, are a little murky.” Expenses in an employment arbitration, the report also says, can run from $3,000 to $14,000, compared with at least $50,000 when litigated. Patients Against Mandatory Medical Arbitration (PAMMA) counters these dollar estimates with the response that you can’t compare employment arbitration data with medical malpractice arbitration.

Returning to some basic arguments for and against the malpractice arbitration statute, “When both parties are forced into arbitration,” plaintiff’s trial attorney James McConkie and PAMMA founder says, “Arbitration looks more and more like litigation because both sides won’t agree on legal shortcuts such as,” McConkie suggests, “not hiring experts or taking depositions” [Editor’s note: McConkie seems to favor depositions in arbitration, which the editor finds are an unnecessary crutch for trial and expensive and high-profit vehicles]. When McConkie compared two similar Utah birth-injury cases — one arbitrated and one litigated — to see which was more expensive, he found to no one’s surprise that defense costs were five times higher for the court process. Then again, to create cost divergence, PAMMA and the Arbitration Alliance compare costs on what an average arbitrator charges in Utah; PAMMA says $300 to $400 an hour; the Alliance says the average is $180. PAMMA says arbitration can take as long as 10 eight-hour days; the Arbitration Alliance says most are finished in a day. To further polarize the issue of whether arbitration is desired, McConkie states that fewer lawyers will take malpractice cases if they have to “front” the cost of arbitrators, and plaintiff’s attorneys will not take on faith that the “neutral” arbitrator will be neutral because an arbitrator who goes against the medical establishment too often will be out of work. In a 2004 Deseret article, another trial attorney, Clark Newhall, doubts doctors will settle as often under arbitration than when faced with a court proceeding, but doesn’t

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offer any support for the conclusion, while an unnamed health insurance professional says arbitration tends to favor the awarding of “something.”

A medical malpractice expert at Case Western Reserve University, professor of law and bioethics Karin Hobbs, states that there is a paucity of data nationwide to back up either side’s claims. She continues, “The future for arbitration in the medical malpractice arena just hasn’t been tried enough to assemble a statistically significant body of outcomes to justify continuing or rejecting its use. It is still an open-ended question of ‘Will more or fewer patients file cases, and who will win?’ “ This seems to be an uncontested conclusion by Hobbs.

It should be noted as background data that in Utah, an individual may be placed on an arbitrator roster if he or she is a member of the Utah Bar in good standing for 10 years and has 30 hours of training and 10 hours of experience and has passed an ethics exam.

Thomas B. Salzer is an attorney with 11 years experience as a hospital board member and is the general counsel for APG-America, Inc., a curtain wall manufacturer and installer.

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Seven Common Myths of ADR

By Judith P. Meyer

I frequently encounter seven common myths associated with alternative dispute resolution. Primarily assailing arbitration and mediation, the most commonly used ADR tools, these myths are dangerous because they may prevent counsel from using the best and most efficient form of dispute resolution for their clients. A signature benefit of using ADR is that the resolution process may be crafted to meet the specific and unique needs of each dispute. However, the ability to tailor the ADR process depends on the ability of the attorneys and the neutral to understand the true possibilities of mediation and arbitration without being deterred by common myths.

These myths are dangerous because they may prevent counsel from using the best and most efficient form of dispute resolution for their clients.

Myth #1: Arbitrators Split the Baby.

I sat in on an arbitration between defaulting purchasers of a $2 million home and the builder. The defaulting purchasers argued that a 10 percent liquidated damages provision was both an unenforceable penalty and severed from the contract by the builder’s breach. The builder argued that the default costs measured by interim-financing interest costs and lost opportunity was close to $420,000. After two years of architectural revision, the buyers had walked away when they disliked the location of a public utilities’ junction box and, incidentally, found a property they liked better. The panel unanimously awarded liquidated damages to the builder. Upon receiving news of the award, an outraged buyer telephoned the panel chair and roared, “I thought we went to arbitration so everyone could win!” Popular myth has it that the buyer is right. In an article on “Why Arbitration Agreements Are No Panacea for Employers,” its lawyer-author summarizes, “Finally, and worst of all, there is a tendency among arbitrators to ‘split-the-baby’ — and their decisions can be virtually non-appealable.” If this myth has any truth, it may derive from the perception that arbitration awards are lower than those generally rendered on the same facts in court. If true, it also may arise from both the acute awareness of the arbitrator that, if even slightly wrong, s/he cannot be appealed and an unconscious unwillingness to offend any party too much for fear his/her services will never be sought after again. Of course the biblical tale from which this arbitration practice derives in fact resulted in no such diluted award [Kings, 3:24-25]. King Solomon offered an equal award to each side only to force out an admission of the true mother who acted promptly to save the life of her child.

The attitude of professional arbitrators is that one is not rewarded for wimpiness. An award that gives half-a-loaf so as not to offend anyone, offends everyone. The half-a-loaf award is generally given without reasons because any reasoning would be weasel-worded and transparent. With the tendency of better provider organizations to require reasoned awards, arbitrators must now justify any award they give. And it makes more sense to explain a winner than half-a-winner. If anyone is in doubt, the law firm of Liddle & Robinson is not shy about advertising its big wins in arbitration. [See http://adr.com/smu/client.htm.] Also, in June 2002, the New York State Supreme Court entered a judgment of almost $29 million ($25 million punitives) against Waddell & Reed, Inc., and its former CEO. The court noted, “the panel’s finding finds support in the record.” And that is only one example.

Myth #2: You Can’t Mediate Until Discovery is Done.

One of the main points favoring mediation is it saves time and money. Discovery, on the other hand, is probably the single largest budget item for a client in any lawsuit. Economists talk about the 80/20 rule which, when applied to litigation, fairly means that 20 percent of the effort produces 80 percent of everything important you need to know about the case. The additional 80 percent effort to fill in an additional 20 percent of information is the litigator’s bane (or delight if you look at billable hours) and what is often referred to as leaving no stone unturned. You never know what you might find under a last rock. But rarely is it a smoking gun. Best practices in mediation dictate that you come to the table knowing the essentials of your case and the other side’s case, but equally importantly, the knowledge of what your client hopes to gain in a resolution of the dispute. The reasoning that limits discovery in arbitration, time and cost savings, is even more compelling in mediation.

Best practices in mediation dictate that you come to the table knowing the essentials of your case and the other side’s case, but equally importantly, the knowledge of what your client hopes to gain in a resolution of the dispute.

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And the beauty of mediation is that, if a fact is critical, you take the time to discover it.

And the beauty of mediation is that, if a fact is critical, you take the time to discover it. And even more elegant is the possibility of bringing in people, by phone or in person, whose testimony is critical and posing agreed questions to them—not under oath and not for use in impeachment at later deposition or trial. The answers are highly instructive and assist the parties in assessing risk and crafting settlement.

Bottom line, if you do need more discovery to engage in meaningful settlement discussions, mediation will direct you to the discovery you do need and away from the wasteful “leave no stone unturned” type. What don’t you know that is critical to understanding your interests? Mediation should answer that question. And then you can adjourn the mediation and seek that discovery and only that discovery. Mediation can be adjourned and reconvened with the new information. Mediation is not only a way of problem solving, but of defining the problem to be solved.

Myth #3: Asking to Mediate is a Sign of Weakness.

Real men don’t eat quiche. Real men don’t cry. War is the metaphor of litigation: “take no prisoners,” “go for the jugular,” “scorched earth.” The litigation prep room is frequently called the “war room.” Litigation is the ultimate competition. That makes sense since it is the stand-in replacement for medieval trial by battle or purgation. It is institutional warfare governed by institutionalized rules of battle and court-sponsored protocol. In a courtroom, it is unseemly and forbidden for counsel to address each other except through the medium of the judge. They are not trusted to be civil since there is nothing civil about a civil action. So how can you ask to mediate? Isn’t that a signal that you have a truly weak case? Maybe. But if you do have a weak case, why mediate at all? You can always fold your cards early or sit the game through bluffing to the end. Mediation can be approached from strength—the strength of knowing what you want out of this dispute and the assurance that you can get it, or at least most of it. And as Fisher and Ury have repeatedly reminded us, if you don’t like the deal offered, your “Best Alternative to Negotiated Agreement” (BATNA) is—fill in the blanks—walking away, trying the case, engaging in more discovery, moving for summary judgment, et cetera.

You could look at it another way: only weak litigants avoid mediation. They are the ones who are afraid to engage in a meaningful dialogue in which they look not just at their strengths, but also at their weaknesses. And it is a grateful client who gets this opportunity in the second hour rather than in the 11th hour when the judge in a pre-trial conference strikes the fear of possible loss into each side. Think of Peter Jovanovich, who, in sitting down to negotiate the survival of his family-founded publishing house, Harcourt Brace Jovanovich, signaled his desire for sincere discussion by presenting his opposing presence, Dick Smith, CEO of General Cinema, who was bidding to buy HBJ, with an engraved HBJ watch and the words: “My father always gave a watch like this to his partners at the beginning of a new business relationship. This is meant to signify my sincere belief that General Cinema is the right buyer for HBJ.” [Richard Shell in Bargaining for Advantage, Page 4.] Remember, agreement is consensual. One does not have to settle a case or make a deal if the terms of settlement make no sense and serve no need. It is the strong who are unafraid to engage in talk; the weak who first resort to battle.

And if you are really shy about asking the other side to attend a mediation, ask the mediator to serve as your foil. S/he can contact each side and suggest that s/he thinks this is an excellent case for mediation and not suffer the reactive devaluation response that is almost knee-jerk were you to suggest the same thing to your opponent(s). And in a multi-party case, it need not even be disclosed where the interest in mediation is coming from.

Myth #4: Mediation is Simply Free Discovery.

Why should mediation be free discovery? Because your client is there? Isn’t it his case? Isn’t he the one who will be most affected by the outcome? Are you afraid your client will show weakness? Display a personality side previously unrevealed? Is there anything really that you can hide that won’t be discovered at trial or in settlement discussions with the judge the day before trial? Remember, mediation is voluntary. Its rules are consensual. If the defendant does not bring a representative, insurance claims specialist or CFO of the company, you do not need to bring your client. If the defendant barrages your client with questions, your client does not need to respond. Might you get a sense of the demeanor of the people present and how they may appear at trial? But doesn’t that work equally to the advantage of both sides?

Are you afraid your client will spill his guts? Sit down and talk to your client before the mediation. Decide what role he will play and what he will contribute. Make him an active participant in a comfortable negotiation; you will get all his new business and many referrals.

People talk in mediation. True it is far from the “talk” of interrogatories where questions are “asked” in

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writing and “answered” in writing under oath. Most of the time the questions are tortured and the answers ungrammatical and evasive. Clients sign the interrogatories as an act of faith in their lawyer. The questions and answers have nothing in common with a dialogue and they are designed to conceal not only interests but also as much information as possible. Courts hate them and in the law practice they are delegated to the people furthest from the client – the youngest associates in the law firm.

Are you afraid of revealing a settlement position that makes you look soft? Don’t reveal it. You don’t have to reveal bottom lines. You really just want to know if you can get into the same ballpark. Lots of good things happen after that.

One place where you really may worry about free discovery is if a third-party to the dispute shows up at the mediation who, while averring that he has no liability in the case, just wants to sit in. You might strongly suspect that in this situation that party is simply looking to gather evidence that he can assert if he is sued. But that kind of free discovery is easy to deal with; if he is unprepared to tell you his take on the story and factually why he should not be a party, ask him to leave. Mediation is consensual. Only the people who want to be there are there with others of the same mind.

Myth #5: Arbitrators Don’t Apply the Law.

That is correct. They don’t have to apply the law. However, it is a rare or untrained arbitrator who is not grateful to counsel for supplying a cogent legal analysis and application of statutory and case law to the facts of a case before him.

Remember, arbitration has a proud historical foundation in the efforts of merchants and business people to retain control over their disagreements by submitting them for determination to an arbiter in their particular trade who had no stake in the outcome and whose wisdom, experience and impartiality everyone respected. Commerce required quick resolution; the legal system was the long arm of the state, which knew nothing about the ins and outs of daily commerce in a particular trade. [See Justice Without Law?, Jerald S. Auerbach (1983).] The problem was less in determining who was right and who was wrong, but in achieving a solution that let everyone get on with their business. Rough justice was quick justice, which, if not academically analytical, served America’s capitalist future.

Today, lawyers view arbitration as an alternative to court, but one that still applies legal precedent and procedure. It is particularly attractive in international disputes where at least one party is not the hometown team and fears submission of its dispute to a legal system that is, by definition, foreign. But what guides arbitrators today? Outside of the agreement of the parties, on which not enough emphasis can ever be placed, arbitrators are ruled by fear of vacatur. Under the FAA §10, courts can vacate an award where it was procured by corruption, fraud or undue means; where there was evident partiality or corruption in one or more arbitrators; where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence; or where the arbitrators exceeded their powers. And there are “non-statutory” standards for vacatur that courts recognize with no predictable reliability: where the award was rendered in manifest disregard of the law; where it was arbitrary and capricious; where it was completely irrational; where it violates public policy. [See §7, Commercial Arbitration at Its Best, Thomas J. Stipanowich, editor (2001).]

But most importantly, remember, if you want an arbitrator to apply the law, say so in your agreement to arbitrate. Your agreement to arbitrate defines the scope of your arbitrator’s authority. If you want the case law of New York applied say so. But be sure then that you supply all the case law, with copies of the cases that you want your arbitrator to rely upon. Your arbitrator generally does not come with a research clerk, which is just as well, because the research clerk would have to disclose any conflicts he may have. And you want to make sure that it is the arbitrator who is doing the reading and thinking. Just give him the law, ask him to apply it, and he will.

Myth #6: Mediation is Just a Waste of Time and Money if the Case Doesn’t Settle.

Mediators like to say there is no such thing as a failed mediation. But lawyers tend to think in binary fashion. A case settles or it is tried. Mediation is meant to settle cases; therefore, if the case does not settle in mediation, the mediation is a failure. Mediators think along a spectrum and ask the following kinds of questions: What are the issues in the case? Are the parties able to dialogue about the issues? Are the lawyers and/or the clients too adversarial to communicate effectively? Can the lawyers talk to each other? Can the clients talk to each other? Does the client trust his lawyer? Does the lawyer believe his client?

Lawyers view settlement as an apocalyptic and sudden event, usually induced by a heavy-handed judge and a trial the next day. Mediators view settlement as a process, and a gradual one at that. Adversaries settle in court because the risk of loss is too great to contemplate. Adversaries settle in mediation because they begin to understand each other’s perspective. The same set of facts can bear totally differing interpretations. Much like
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the picture shown in introductory psychology classes of the woman who appears as either a beautiful young woman or a witchy old hag, the untrained eye can only discern one image. But identical pictures do yield different stories. A trained mediator can look at the picture and see both women simultaneously.

So if a case does not settle at the mediation, is that a failure? What if the parties came in a million dollars apart and leave $45,000 apart? Is there an increased likelihood that the case will settle? What if three smaller issues resolve, but a larger one remains? Is the goodwill generated by the solution of some, but not all, issues enough to allow the parties to continue to dialogue? What if, if nothing else, the parties leave understanding exactly what stands in the way of settlement and can focus more narrowly on overcoming a better-defined, and therefore more manageable, obstacle? What if, two weeks later, the lawyers renew the conversation through the mediator and two weeks after that, the case settles? What if the mediation teaches the parties how to communicate about a shared problem?

Mediations don’t fail. A good mediation smooths the way to settlement by creating ways in which parties can understand each other, the mediator serving as a conduit to explain each party’s sense of the case to the other. A good mediation enables parties to focus on the issues that truly impede settlement and to talk to each other about removing that impediment. Mediation generates options and opportunities. Mediation enhances the likelihood that the case will settle before trial in ways that are more satisfying than apocalyptic settlement on the eve of trial. And that is what mediation in great measure is all about.

Myth #7: Mediation Just Delays Ultimate Trial of the Case. It is Just Another Delaying Tactic.

“Sometimes parties may try to use the mediation process to stall or buy time, not only dragging out mediation with no intent to settle, but by agreeing to a settlement they have no intention of carrying out [or maybe stalling for time before filing for bankruptcy]. By the time the other party can take them to court, to get an outcome no different than the settlement, they will have gained weeks or months.” See, Dwight Golann Mediating Legal Disputes, Aspen Publishers 1996, §14.3.8(d).

But ask yourself why should mediation delay any legal remedy? Just because you agree to go to mediation does not mean that the clock should stop on court-sponsored remedies. One reason that cases settle is because they face trial tomorrow, hence the adage that “all cases settle on the eve of trial.” Keeping a trial date set offers every encouragement for people to pay attention in mediation and use it for purposeful ends. And even if an agreement is reached, a trial date need not be dismissed until performance of the agreement’s terms is completed. Some ADR clauses are drafted to require direct negotiation and then mediation before a lawsuit may be filed; while this may be conducive to early resolution, the time frames for negotiation and mediation should be kept relatively short. There is no better way to focus people’s attentions than by creating a trial date that may be everyone’s “WATNA” or Worst Alternative to a Negotiated Agreement.

Judith P. Meyer, Esq., is one of the founders of JAMS Philadelphia Resolution Center. She can be reached at jmeyer@jamsadr.com.

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