RESOURCES

Training

Mediation Course for Lawyers Stresses Empowerment Of Parties

Gary J. Friedman, a practicing mediator, has been teaching mediation to lawyers and law professors since 1977. He has conducted an American Bar Association mediation training program, and for the past three years he has been teaching mediation at Stanford University Law School. An ADRR editor attended an introductory course Friedman taught in New Mexico in February, and this article is based on that experience. For more information, contact The Center for Mediation in Law, 34 Forrest Street, Mill Valley, Calif. 94941, 415-383-1300.

Santa Fe, N.M.—(By a BNA Staff Editor)—Gary J. Friedman's 40-hour training course in mediation for practicing lawyers combined a practical orientation with an opportunity to discuss controversial issues arising in mediation practice. The lawyers who participated in the February 18-22 session in Santa Fe chose to debate at some length three areas covered by the course: the role of law in mediation; dealing with interpersonal conflict in mediation; and relating mediation to an individual's law practice.

Course Overview

The four-day session started with an overview of mediation. A few exercises, such as a three-minute sample conflict resolution by the use of arbitration and an equally brief mock mediation, broke up the lecture format. Subsequent sessions interspersed lectures with demonstrations, exercises, and brief roleplays in which the participants alternated between playing mediators and parties.

Two hypothetical cases were used for the roleplays: a divorce and a partnership dissolution. Each roleplay was followed by critiques by the participants and trainers. Training sessions covered contracting for mediation; working with the patterns and content of conflicts; the relationship of mediation to law; developing and evaluating options for conflict resolution; and concluding a mediation.

Friedman was assisted in the course by mediators C. Benjamin Moya of the Western Network, and Stephanie A. Allen, who is developing a mediation center at Sunrise Springs, the resort where the training took place. Course materials consisted of memoranda developed by Friedman, a bibliography, and a selection of law review articles.

A Closer Look

The most important aim of mediation, Friedman said, is "empowering the parties." He encouraged mediators to resist every attempt by parties to burden the mediator with the responsibilities that the parties themselves need to assume. Even procedural issues, such as the order in which options will be discussed or when and how to break an impasse, should be resolved by (or at least with) the parties. If Friedman was directive in any sense, it was in his insistence upon the parties' assumption of autonomy.

He described lawyers in the adversary system as making sure that their clients were "protected." He explains to clients the contrast between mediation and legal representation this way:

"In doing mediation, I do not provide that kind of protection. There's both an up and a down side to that. The up side is that you have the possibility to talk here and say what your real concerns are. On the other hand, you need to protect yourselves in the sense that it is up to you to assert what you think is fair. In this respect, you are vulnerable."

The voluntariness of mediation is one of its most empowering aspects, he said. The fact that either party may leave at any time is crucial to the process. All of the course participants agreed that the power of the parties in conflict resolution is one of the main benefits of mediation. As one put it: "To me it is common sense to believe that only a collaboration will allow a durable, lasting resolution of a dispute."

Mediation and Law

The purpose of mediation is to enable the parties to reach what they consider to be a "fair" resolution of their conflict, Friedman stated. Although he emphasized the degree of power that individuals have in mediation, as opposed to their limited autonomy in a lawsuit, he insisted that legal standards are always relevant. The question, he said, is how to make them apply to mediation.

"Bringing in law relevant to a particular case requires the mediator to walk a thin line between, on the one hand, viewing law as determining outcome, and, on the other hand, viewing it as irrelevant," he explained. Since he believes that the parties should decide for

themselves what is a fair resolution, he discourages mediators from making any statement concerning applicable law that might "stop the dialogue."

Legal standards do not decide the outcome of mediation for two reasons, he said. First, "the law is often not that clear . . . The reason lawyers go to court is that they disagree about the law. At best, lawyers make a prediction of what a court would do, and I am willing to do that." Second, even when the law is absolutely clear, parties in mediation "do not have to follow it, or put it before their own sense of fairness." He tells parties: "You are not bound here by the law, although you are free to use it as a reference point."

It would be a mistake, Friedman said, "to pretend law does not exist." Mediation does not take place in a vacuum, he stressed, and law is an indication of societal standards and underlying principles as well as a benchmark for what is obtainable in the legal marketplace. Often, he said, parties want to compare their options in mediation with what they might have received had they gone the adversary route.

Friedman's willingness to make a prediction concerning what a court might do in a case he is mediating was the subject of heated controversy among the course participants. Many of the lawyers questioned whether a "neutral" statement of applicable law can ever be made. Some saw potential ethical and practical problems. Others advocated leaving all legal advice to the parties' lawyers, while a few proposed the use of an impartial "legal consultant" as an adjunct to the mediation. Attempts were made to differentiate legal advice from "information" concerning the law, such as a statement that "this jurisdiction has guidelines for child support." Everyone agreed that this is a difficult issue and that the added expense of referring the parties to their own lawyers should be a concern.

Working with Conflict

Friedman warned that mediators and parties have to be prepared to deal with conflict, often intense. Avoiding the issue doesn't help resolution. He tells parties: "It's often difficult to stay with the dissonance, one person wanting one thing and the other person wanting something else . . . It's really critical that you each be willing to assert yourselves in terms of what you need and think is fair. . .I can't help much if you don't do that."

He explained that one purpose of mediation is to enable each party to hear and take in the other's point of view, without perceiving it as threatening the legitimacy of his or her own different perception. This should be a mutual process, Friedman said, which then permits the disputants to engage in real dialogue with each other. Honest and truthful communication is one of the most important benefits of the process, he stated.

Friedman said that conflict takes place at three levels: in parties' concrete demands; in their underlying needs; and, at the deepest level, in their world views. No conflict can be satisfactorily resolved, he said, unless the parties acknowledge their inconsistent views at a deeper level. The mediator must develop that attitude by restating each party's views without attempting to reconcile them.

The mediator needs "inner freedom" to help the parties, Friedman indicated. That freedom is achieved by the mediator's awareness of his or her own reaction and biases. He suggested that mediators can prevent their own reactions from interfering with their neutrality by expressing those reactions openly, spontaneously, and without characterizing the action to which they are reacting (for example, "I am confused by what you say," rather than "You are not making sense").

Friedman's approach to mediation involves a good deal of introspection and self-analysis. Not everyone at the sessions was equally comfortable with this and his methods struck some as unduly confrontational. A few participants suggested that Friedman's model over-emphasized the "emotionally charged, personalized dispute" at the expense of the business disputes that can be mediated with less heat. But in their evaluations of the course, they concluded that it was stimulating and relevant to their concerns.

Participants' Conclusions

The participants determined the program's priorities, indicating whether they wanted to spend more or less time on any one issue, and they chose the topics for evening discussions.

An evening discussion of the possibility of mediating an environmental case in which one of the attorneys present was involved raised the question of the value of mediation in an institutional, rather than a personal, dispute. The debate focused on problems of power imbalance, the role of deeply felt principles, and the neutrality of mediators in a public setting. The group concluded that, in spite of these problems, mediation would enable the parties to consider each other's views in a way that has no equivalent, and they recommended mediation.

All the participants shared their evaluation with BNA, and all praised the program. Their only reservation seemed to be a request for more "nuts and bolts" training, even for experienced mediators. Some examples of their comments are: "helped me integrate my intuition and knowledge of people into my knowledge of law"; "stimulated me by pushing me past old concepts and views into new territory"; and "just the right balance of lecture, participation, group dynamics. . . a remarkable opportunity for discovery and creativity."

Editor's Note: Sunrise Springs is available at a discount for courses and conferences on mediation. Contact Stephanie A. Allen, Route 14, Box 203, Santa Fe (La Cienega), N.M. 87505, 800-772-0500.