CHAPTER ONE

MEDIATION

THE STRUCTURE OF CIVIL MEDIATION:

The structure of Civil Mediation, conducted before a trial, and subsequent to a trial, are somewhat similar, but also have definite differences and distinctions. Much of what is said will apply to the structuring, as to both, prior and post trial, manner and methods of mediation. Structure indicates action toward building a framework or pattern of the aggregate of elements of an entity in their relationships to each other. Content, on the other hand, deals more directly with the significance, meaning, substance and gist within the events; a sort of physical detail and information in a work of art. Mediation as well as arbitration is more an art than a science. While seeking to emphasize structure we may nevertheless also touch upon and elaborate on content. It is difficult to discuss one without sometimes including the other.

HOW TO ARRANGE FOR MEDIATION...VOLUNTARY v. MANDATORY:

Prior to, or after, the filing of an action or claim in the courts either party or their attorneys may suggest the possibility of mediation. In some cases parties may agree to mediate without employment of an attorney. Most of the time parties have employed counsel and mediation is initiated by both sides agreeing to use mediation, or, one attorney

contacting a private enterprise ADR Provider and having the latter invite the opposing attorney and party to use mediation in the particular case. There are many ADR Providers and each has a Roster of Mediators and a Panel of Arbitrators from which to choose. When both parties execute an agreement to mediate and when they have agreed to use a particular mediator, an agreed date, time and location of the scheduled mediation conference is set. Usually the date of the mediation session is two to four weeks later and official notices is sent out to counsel for both parties and to the mediator. The majority of the time the neutral location of the provider is where the session is held, however, it may be held in the conference room of one of the attorneys if agreed to by both sides. A great many cases are now being settled prior to expensive discovery and the procuring of depositions, but many mediations are held subsequent to the latter process.

Where, as in Cobb County, Georgia, mediation is mandatory the plaintiff attorney has the burden of contacting the other side; both then review a list of qualified mediators and select the mediator. The date, time and location of the session is agreed to by all and thereafter the Cobb Mediation Office sends the official notice to all concerned. Most of the time the location is on the 6th floor of the Cobb County Courthouse but it may be held at the conference room of one of the attorneys.

It is not to late to mediate and seek settlement of a case even after judgment of the trial court. After jury trial or judgment of the trial court, and, after a notice of appeal has been filed and within 12 days thereafter where both sides mutually agree, the time period of the appeal to the court of appeals will be tolled for a period of 30 to 60 days, so that

both parties along with their attorneys may sit down and meet at an appellate settlement conference, in order to make one final attempt to settle the case prior to appeal. The office of the settlement conference clerk is located on the 3rd floor of the State Judicial Building, in Atlanta, Georgia. Upon receiving notice that counsel for both sides in a case voluntarily elect to participate in an appellate settlement conference, the clerk then designates a Senior Appellate court judge or a Superior court trial judge with Senior Status to first determine a date, time and place, and then to conduct the mediation conference. Post trial mediation in Georgia is voluntary and not mandatory.

Other states, and some federal courts, have made mandatory, mediation at different levels. Court-annexed mandatory mediation in most civil cases has been adopted in Cobb County, Georgia. On occasions judges in various Georgia courts will single out and refer some of their particular cases for mandatory mediation. DeKalb County has a unique multi-door ADR Program; Fulton County has a non-binding arbitration ADR Program.

BEST LOCATION...DOCUMENTS NEEDED:

Mediators are called Neutrals, and the best location for a productive mediation session is a neutral location, which is usually at the office of the provider. Many times a statement of the facts and issues are sent in advance by each party to the mediator. Often a mediator begins a session without having received any statement from either party. Some mediators prefer the latter method to the former. As to Appellate mediation, the designated conference judge seeks to select a date time, and location convenient with all parties. In the metro area the session or conference is often held in the judges

conference banc room adjacent to the courtroom on the 6th floor of the State Judicial Building, or in the large conference room available on the 3rd floor of the same building, adjacent to the clerks office. Many times the settlement conference session will be held in a conference room of one of the two attorneys in the case.

The documents that are needed by the Judge holding the appellate mediation conference is a copy of the trial judge's order and a copy of the briefs, that was used in the trial court. When both attorneys furnish briefs and copies of the lower court order this proves to be most helpful. If the mediation conference is successful and a settlement is reached, the appeal will be dismissed with prejudice; both sides will be assessed costs, and an order will be issued to all concerned terminating the process. On the other hand if the case is not mediable and no settlement reached, then both sides will be assessed costs. The judge will then issue an order, sending the original to the trial clerk, with a copy to both counsel and the settlement conference clerk. This order sets forth that all have put forth their best efforts but no settlement can be reached, the process is terminated, and the parties may then continue to pursue their appeal.

EARLY HISTORICAL GEORGIA MEDIATION:

The first mediator in Georgia was a lady named Mary Musgrove. (The writers only claim to fame, if any, was having authored Georgia's Woman Jury Bill, House Bill 111, in the 1953 session of the Georgia General Assembly. Prior to that time women could vote, hold office and practice law, but were prevented by statute from serving on the grand and petty juries in Georgia's Judicial System). Over two hundred and fifty years ago Mary Musgrove, whose indian name was

Cousaponakeesa, was active in Georgia ADR. She could speak several languages and aided in settling many disputes between Tomochichi and the Indians, their village located on the southern bank of the Savannah River and General Edward Oglethorpe representing the colony of Georgia. She was more active as a mediator than as an arbitrator. It has been reported that she received about 15,000 acres of land on St Catherine's Island, off the coast of Georgia, plus a large sum of money from the British, in payment of her fees, for the many mediation sessions that she conducted. It might be well to add that her fee is slightly more than we current mediators in our state, expect or receive.

EXAMPLE OF FIRST RECORDED SUCCESSFUL MEDIATION:

Someone recently asked me when mediation first began. My answer was, that when the first man was on earth, many thousands of years ago, he was alone and without a helpmate or playmate. The man said out loud that "I am so lonesome, I would give up a lot if only someone were here with me". About that time a voice from above announced that "I have the power to solve your problem. I can provide you with a helpmate, but it will cost you. My demand is high". The man replied that "I will be glad to mediate, make a generous offer or work out a settlement, if only you can provide me a wife, a companion or someone to be with me. I stand ready to communicate, confer and to consider your demands, and, I have a lot of flexibility. The voice from above then stated emphatically, "it may cost you an arm and a leg". The man then replied "Gee, that's too much, but what about a rib?" This may be an example of what could be the world's first successful mediation. Both sides compromised and gave up something they didn't want to part with, but, many times, the

give and take, is what mediation is all about. In a recent mediation where a settlement was reached I remember one party remarking, "well we did settle, but I'm not sure I wound up with even a rib!"

PREPARE CLIENTS AND PARTIES...UNDERSTANDING THE PROCEDURE:

At the designated time I call the session or mediation conference to order. Where appropriate I like to thank all for being on time so that we may promptly commence settlement discussions. At the outset I often like to make a few remarks about my background in the law in general and about my qualifications and training in ADR in particular. It is stressed that I am listed on the roster of several Mediation Providers and also my name is on the list of many Arbitration Panels. It is emphasized that I am one of many, called neutrals. That we all know what forward, reverse and neutral is on the car; that neutral is in the middle, like I'm sitting at the end and middle of the table. That I can't lean either way, but must be fair, impartial and neutral. That I have had 60 hours of intensive training to become certified as a Mediator. That in addition to training, hopefully, we offer 45 years of experience, training, age, maturity, impartiality and objectivity. That my assignment as a facilitator is taken most seriously in seeking to explore whether there are areas of agreement that may be reached.

The attorneys and their clients along with the mediator are all seated at the conference table and it is suggested that all lawsuits are serious business therefore on most occasions, laughter, levity, jest and humor are best left outside of the conference room. An exception is where the humor is aimed or pointed at the mediator, or, is limited or used with discretion. Some mediators believe a little humor helps break

down barriers and is useful at the session. The rules of the provider generally suggest that the parties are urged to participate in the settlement discussions. When I initially talk to both attorneys in setting up the date, time and location of the appellate settlement conference sessions I remind them they must bring and prepare their clients for the mediation session. That the parties themselves are urged to participate in the discussions with the mediator and to negotiate and compromise wherever possible.

PURPOSE, PROCEDURE, PROCESS...VOLUNTARY v. INVOLUNTARY:

It has been my experience that mediation sessions conducted where both parties originally voluntarily agree to mediate are about 80%, or more, successful. Where county annexed mediation programs mandate mediation in civil lawsuits this is involuntary mediation and the results are about 60% successful. Appellate settlement conferences in our state is voluntary, that is, it takes two to tango. It must be remembered however in this latter type mediation there is already a winner and a loser. When someone is sitting on a judgment they may have less flexibility than if they had elected to mediate prior to trial. Likewise, the one who is the loser may be more anxious to settle and to give up more at this stage than if they had mediated prior to trial. Nevertheless it is exciting to know that close to 45% of the appellate settlement conferences bring about a settlement. Unfortunately, thus far, only about 6% of the cases appealed utilize the settlement conference program.

All the mediation settlements made at all levels as well as arbitration hearings resulting in judgments of finality, lighten the overloaded judicial systems throughout the state

and should bring accolades and applause from the leaders of our judicial system. The over-taxed citizens of our state should endorse the ADR efforts of private and court-annexed programs that will reduce the court case-loads. it should be pointed out that, if successful, mediation settlements always results in having two winners. In court litigation as well as in voluntary arbitration, you have a winner and a loser. Sometimes the participants in litigation and arbitration may feel as though there were two losers. Many time in lengthy litigation, and often with multiple appeals lasting several years, the ultimate winner, may actually be a loser. We all remember the words of Voltaire: "I was ruined but twice. Once when I lost a lawsuit, and once when I won one."

In ADR programs the mediators and arbitrators are paid by the litigants, which is as it should be, rather than the costs being paid by the taxpayers. The only exception is the appellate settlement conference mediation, where the judges are paid by the state.

MEDIATORS OPENING STATEMENT...PARTIES OPENING STATEMENTS:

As I complete my remarks at the session in defining and describing what mediation is about, our goals, and what may be accomplished, I stress and try to inculcate and convey what I refer to as the C's: confidentiality at all times within the session, confidence of both parties in the mediator, communication, courtesy, care, calmness, coolness, collectiveness, concern and consideration, camaraderie, compromise, civility, conciliation, consensus, contract, and maybe a cash settlement among and with the parties. Without disclosing to the parties I may sometimes also seek to pursue and promote the P's among the people present: I may gently

press, pull, prod, persuade, plead and pray with the parties for possible or probable settlement. If the defendant, in addition to counsel, is represented by an insurance official, I always like to ask the official if he brought his checkbook with him?

Most of the settlements made are complete settlements when mediation is accomplished prior to trial. At appellate settlement conferences there are occasions where the appeal may contain more than one enumeration of errors. We recently had a case where there were three points to resolve on the appeal and two points were settled upon agreement of the parties while the third points was not resolved, but, at least the court of appeals did not have to concern itself with the two issues that were settled. An appellate mediation session may settle all the issues or less than all the issues.

NO LEGAL ADVICE GIVEN:

I try to make clear to all persons at the conference that I have never settled a case. That is not my assignment. It is the parties that settle cases. It is stressed that as a mediator I am there to aid them as a facilitator. A mediator cannot give legal advice nor can they make a decision for the parties. It is pointed out to all parties that the mediation session provides a rare opportunity for them to be their own juror, to have a voice in the final say so of their case, rather than turn their case over to 12 strangers in a jury trial or a panel of three judges on the court of appeals that knows nothing of or about "your case". It is stressed that someone, somewhere, will provide finality to the case at hand but it is suggested that the people that know more about the case than anyone else is seated around the table and they are the ones that should "bell the cat" and decide the case, if at all possible. The beauty of mediation is that the destiny of each parties case is always in

their control. If settlement prospects and possibilities look bleak, I may tell the parties that as a mediator, I might get a "blue star" by my name if they can settle the case. Often when settlement does occur a party or the attorney may suggest that "now you can get your blue star."

INFORMAL, AND NO ONE IS UNDER OATH:

At mediation sessions, unlike arbitration hearings, parties are not under oath, there is no direct or cross-examination of parties or witnesses and no closing arguments. Arbitration is less formal than litigation in court and mediation is the least formal of the three. The heart of mediation is that parties [appellant and appellee if at an appellate settlement conference] relate their two position as to facts, the law and the issues to the mediator in the presence of the opposing side. All parties, who have the ultimate authority to settle must be present, along with their counsel if a session is to be fruitful. Both parties and their attorneys are encouraged to participate in the session. The mediator must remain unbiased throughout the session and not judge right or wrong. In addition to generating a climate of cooperation the mediator must listen to both parties attentively and to any solutions suggested by each. It is the mediators responsibility to remain patient with both parties, to stay on target and on key issues in order to seek and reach a settlement agreeable to all parties. When one side presents their case and has had their say I like to ask a few questions and encourage them to invite questions from the other side. Then the other side presents their position with follow up questions as was done with the other.

MEDIATION IS M & M:

During the preliminary remarks of the mediator it is sometimes suggested that mediation is a type of M & M...a

meeting of minds on matters of mathematics and money methodology. That is, most mediation settlements (domestic cases are an exception), amount to an agreement on an amount of money. This being the case, one of the first goals of the session is to find out the dollar amount of the demand and the dollar amount of the offer while the secondary aim is to discover the amount of flexibility the two parties [appellant and appellee, if at the appellate level] have brought to the conference table. Once the mediator determines how far apart the parties are, or how wide is the gap between the two, it is announced that the only way to reach a settlement is see if their are ways and means to close the gap or have a meeting of the minds. During the initial portion of the session both parties and their counsel have been asked the important question by the mediator: "Do your seriously desire if at all possible to settle this case today?" Most all will respond affirmatively. Follow up observations are usually stated by the mediator. As long as progress is being made in settlement of the case all parties are urged to stay at the settlement conference. Sessions may last one to three hours or longer. As long as parties are around the table talking they are not fighting and sometimes I might add that it has been said that if all can be kept at the table until meal time there might be an added incentive to go ahead and settle, so all may go dine. This is followed by stating that at any time if the mediator or either party senses that no progress is being made, and an impasse or stalemate appears inevitable, and that it appears we are wasting the valuable time of everyone, then we can adjourn the meeting. In court-annexed mandated mediation programs all are under court order to mediate in "good faith" for a three hour period. If progress is being made, and, with joint consent of all, the time may be extended, or a later date selected for a second session.

Mediators learn, not only in ADR training sessions, but from discussions with other mediators, as well as from being an observer in the mediation session of someone else. Sometimes in co-mediating with other mediators, techniques and skills of others, are adopted. Many mediators use differing approaches, but are successful in the results reached. One of Georgia's outstanding mediators, and pioneers in ADR, Edward J. Henning, has observed that if he can make at least three trips back and forth, where each party is making some movement in good faith, during the negotiating portion of the mediation session, then the opportunity for settlement, is good.

This mediator likes to admit and acknowledge that no "legal legerdemain has been learned," nor any "mathematical magical methods" or wand possessed by me that will "accomplish and achieve arithmetical accuracy in arriving" at a settlement. In my opening remarks it is stated to all that the mediation session will be divided into three parts: (1) The joint session with all parties having their say; (2) The private sessions or caucus with the mediator meeting privately with each side; and, (3) The negotiating sessions, which I consider the most important, and which most of the time available should be devoted.

CAUCUS...WHEN TO COMPROMISE:

My previous remarks have generally covered what occurs in the first session, the joint session. When the mediator meets privately in the second session, with both parties, what is said in each, is confidential as to the other party, unless one side authorizes the mediator to disclose remarks made. Many times parties will share with the mediator something that was withheld at the joint session. This

mediator does not give legal advice but does seek to point out strengths and weaknesses of each side. The latter is an indirect evaluation of the parties case but must be done discreetly. Some judges refer to the appellate settlement conference as more of a "late neutral evaluation" of a case, than as a mediation session. Sometimes if the parties will share their "magic" number of the lowest demand or highest offer it might aid in facilitating a settlement, however, the mediator cannot disclose any information to one party not authorized by the other, and vise versa. The second sessions generally will last about 5-10 minutes on each side.

DON'T SHOOT THE MESSENGER:

Assuming you have allotted approximately 3 hours for mediation, the first joint session should last about 40 minutes; the second private sessions should take approximately 20 minutes; this should leave one and a half to two hours for the third or negotiating session. This is where we begin to talk money amounts or as some say "talk turkey". I like to keep the two parties in two different rooms during the third session if these facilities are available. As the mediator moves back and forth carrying messages the parties are admonished not to shoot the messenger if you don't like the message. It is emphasized that all will go back into a joint session only if one of two things occur; if a settlement is reached, all will go back in to shake hands and issue a check and obtain releases or to finalize the wording of the agreement. Of course if no agreement can be reached all parties meet again in joint session for a few words from the mediator before adjournment. Many times when there is no settlement at the session, about one-third of the cases where no settlement obtains, will nevertheless settle within ten days after the mediation based on the progress made at the session.

GOOD AND BAD NEWS:

During the third session, with the parties in different rooms, the mediator becomes a messenger going back and forth from room to room to report to the parties if the demand is lowered or if the offer is raised. The mediator is the bearer of "good news and bad news". The mediator might report there has been substantial movement on one side which is good news but the bad news is that it may not be what the other side has in mind. Thinking about "good news and bad news" reminds me of "Preacher Jones". Someone has said: " that of all the good and bad preachers they had listened to Preacher Jones was one of them". One day preacher Jones asked Susie Smith how she was doing, and she replied, "pretty good". Jones said "that's good, real good". Susie said, "well its mostly good but not altogether good because my old boyfriend got married last month". Jones said, "I'm sorry, that's real bad". She said, "it is bad, but not altogether bad, as I married another fella last week". Jones smiled and said, "I'm happy, this is real good". Susie said, "well, preacher, its partly good but not all together good because my husband drinks a lot and can cuss something awful". Jones, said "gee, I's disappointed, that is too bad". She said, "yes it is bad, but not altogether bad, because he's worth several million dollars". Preacher Jones clapped his hands and said "now this is real good". Preacher, it is good, but only partly good, because he said I couldn't have a dime of his money until his death". Jones said, "this is bad, real bad". Smith said, "yes it is bad, but not altogether bad, because he put me in a new home with servants, swimming pool, and a new cadillac with a chauffeur. "hey, this is great, real good" said Jones. "Well, its partly good, but not all good", said Susie, because "that house burned down last night". "Oh, I'm so sorry, said Jones, that is real, real bad". Susie said "preacher you're right its bad, but

not altogether bad, because that rascal husband of mine was in the house when it burned". The preacher said, I'm confused, let us pray! As in this story, mediators must accentuate the positive, eliminate the negative. We must emphasize the "good news" and see what alternatives are available to get around the "bad news."

After the caucus the mediator may make only several trips back and forth before the parties compromise and make settlement. On other occasions several dozens of trips may be necessary before settlement or before recognition that an impasse obtains.

CLOSURE...SETTLEMENT DOCUMENTS:

It must be acknowledged that about 95% of the format and activity utilized in mediation sessions prior to trial is also applicable and appropriate to be used and repeated in appellate settlement conferences. The central point in all mediation is "evaluation of the case" by both sides, in the presence of each other, with the mediator as a facilitator, to assist both parties in seeking honorable alternatives that might lead to settlement. I would suggest to those interested SETTLEMENT LAW AND STRATEGIES co-authored by H. Sol Clark and Fred S. Clark. This book provides techniques and strategies of negotiations and practice tips on how to settle a case. Another recent well written book is entitled ALTERNATIVE DISPUTE RESOLUTION by Douglas H. Yarn. Part of my training was under Dr. Yarn and his book provides helpful hints for the mediator and arbitrator as well as all participants. Another good book recommended is COMING TO THE TABLE by Jack P. Etheridge with Laurel Dooley. When the parties appear in a session to have no settlement, and are ready to walk away, both, who are headed for trial or

arbitration, or, if at the appellate settlement conference, to the Court of Appeals, sometimes reconsiders at this last minute and agrees to a settlement. When the parties are real close, but there appears to be no further movement, and all are really ready to walk away, I ask both lawyers to go into a separate room, by themselves, for five minutes to see if they can resolve the case. Sometimes they do arrive at a settlement and some times they are unsuccessful.

DEEN'S DYNAMITE CHARGE...SLIPPING THE SILVER BULLET:

Rather than at the last minute let everybody walk away without a settlement agreement, I sometimes suggest, when the parties are real close together but both appear to have drawn a line in the sand, what some have called "DEEN'S DYNAMITE" charge. Others have referred to this procedure as slipping the "silver bullet" to the parties. Often at this stage I get the feeling both parties would like for the mediator to suggest a figure, an amount of money or a solution. With the consent of both sides I move into a type of Med/Arb, of being or becoming an advisory arbitrator, or in charge of producing a non-binding arbitration. I place a dollar amount on two pieces of paper and give each party 60 seconds to write yes or no on the paper, and return the vote to me without disclosing how they voted. (My son Sanders B. Deen, an attorney, and, a certified mediator, has remarked: "dad, do you put the same dollar amount on both pieces of paper?" Of course my reply is: "an emphatic yes!") Only if we have two votes of yes do I disclose how the vote went. If one votes no the other will never know but that the other may also have voted no. If either party votes no I announce we have no settlement so the session is adjourned. This charge is a takeoff on the old Allen Dynamite charge used in criminal cases, but, has worked

successfully in 95% of the many dozens of times used.

When settlement is made at a mediation session or appellate settlement conference both attorneys are asked to shake hands and congratulations are extended to all parties. About half the time the defendant has the releases and checkbooks with them and I observe checks written and releases signed at the session. Other times this is handled between the two attorneys within a week or ten days in accordance with their agreement.

Most ADR Providers are listed in the Telephone Directory. The various clerks of court may give advice as to court-annexed ADR programs. For further information regarding the Appellate Settlement Conference Mediation Program you might wish to contact the settlement conference clerk whose office is located on the 3rd floor of the State Judicial Building. (404) 651-8498. Try it, you may like it! I'm told that one or two states mandate this type mediation session after trial, but prior, to appeal, in all civil cases. Thus far, our state has placed appellate mediation on strictly a voluntary basis. This innovative state program is about six years old. Where there is no settlement, the case moves on up as do other appeals, and the nine judges on the court never know whether this case, or any other case went through the appellate conference mediation process, which is, as it should be. Senior Appellate Court Judge Arnold Shulman is Chief Judge of the Appellate Settlement Conference Program. The structure and content of mediation, whether prior or post trial, as well as Early or Late Neutral Case Evaluation, Mini Trial, Summary Jury Trial are all designed to promote settlement and reconciliation among the parties; allowing the parties at the same time, to retain control of their case, throughout and

during, all the procedures and process.

*****NOTE: Effective July 1, 1995, the Appellate Settlement Conference Program was suspended. What has been said in this chapter as to this program is generally applicable to most other mediation programs, processes and procedures.**