

MEDIATION

Is it just a business meeting by a fancy name?

By John W. Hughes

Mediation is a significant instrument to settle civil litigation. It became prominent in Texas during the late 1980s with the passage of Section 154 ... People in conflict may be angry, hurt, greedy, vengeful, defensive, ... or a combination of several of these and other attributes. These emotions may cause the parties to have unrealistic expectations of their respective position. A mediator, with probing questions, creativity, and intensive listening skills can guide the parties to "reality". Once people enter the realm of reality, solutions may become obvious to the participants.

I see litigation to be a ditch. Once begun, the parties are in a ditch. It is not like buying or selling a horse or a house. If a desired deal fails, one may just go buy another horse or house. However, in the litigation ditch, no one gets out unless he or she mutually agrees to get out or it runs its adversarial course to the end. Then the judge will let all out: at best, one a winner and one a loser. Litigation is expensive, time consuming, emotional, hurtful, and brings many sleepless nights with it. This is a real photo of where the parties are. A photo not well displayed on TV and theatre presentations to the public. They think they are at the typical bargaining table and can win their unrealistic expectations.

Peace has a price. So, one may value obtaining peace; i.e.: getting out of the ditch of litigation. For that one may pay more or take less than expected upon realization of the reality of the position. Expectation yields to the reality of the matter. Do not misunderstand me, some cases need to be litigated; but most cases need to be settled. Kleber Miller once told me: "Before mediation, I had to try 10% of my cases. Now, with mediation, I settle 90% of my cases." His pun points to when we did not need mediators. (A subject we may take up another day.) However, it also affirms that most competent mediators are involved in seeing that 80% to 90% of the cases mediated *do settle*. Part of the unsettled cases need to be tried because the claims and defenses are too defined to settle. An example might be: one who has the valid oil and gas lease (a title question). The values are too great to divide. I believe the *Southland Royalty v Gulf* of the 1970s was such a case. It determined the ownership of million upon millions of dollars worth of oil and gas production. The 50-year term lease had run its time. Southland believed it was a "sure thing" that the lease would terminate by its own terms on July 1, 1975. Gulf Oil had no choice but to try to get the courts to somehow extend the term of the lease. I cannot imagine that case settling. Then there is the case full of such emotion the parties can find no satisfaction but their respective day in court. Finally, there is the unmeritorious case

that the defendant refuses to appease. These are the small percentage of cases that do not settle.

Mediation is the place where these decisions occur. The parties, not the lawyers or mediator, make the decision. Therefore, we have a business meeting. A business meeting is a place where adversarial victory is not the matter. It is getting to reality and making a judgment call on how to get out of the ditch with a solution one is willing to accept (not want, wish, or necessarily like), but a loss with which one may be willing to accept. The atmosphere needs to be that of businessmen "selling" their respective positions of risk and reward to the other side. Such greater understanding guides the parties to something better than litigation.

As mediators, we enjoy, yes enjoy, struggling with people over something very important to them to get to a solution that is better than litigation or to a decision that confirms the need for litigation. We cause them to consider all the fact, law, and other factors which lead to rational conclusions, not emotional driven error.

Being a mediator is a privilege I have enjoyed for over 20 years. Next time we will take up ideas on preparation for mediation.