

## UNLOCKING THE POTENTIAL OF MEDIATION

By William D. Dowling

How can Ohio lawyers unlock the unrealized potential of mediation? First, they must understand the process better and realize that **mediation can be a beneficial *alternative to litigation, not merely a step in the process of litigation.*** Then, they must be willing to discuss with their clients and with opposing parties the possibility of early mediation as an alternative to a lawsuit. **They must explore the real interests of their clients, as opposed to just their legal positions,** keeping an open mind that early resolution of the dispute through mediation may well be the best possible outcome.

Unlocking the potential of mediation is not easy for most lawyers and is especially challenging for litigators. Litigators are trained to be zealous advocates, focused from the beginning on strategies for winning the case through the adversarial process. It is difficult indeed to advise a client (especially a paying client), that **the better route may be early mediation and the search for a resolution that will address the real interests of both parties.** But a true devotion to the client's best interests requires that mediation be considered as an *alternative to litigation*, not just as a step in the litigation process intended to help reach a settlement.

Thirty years ago, mediation was virtually unknown to Ohio lawyers, and to litigators in particular. Early mediators joked that their colleagues thought they were promoting the practice of "meditation" and that their business cards contained typos!

What is mediation? Mediation is assisted negotiation, in which the mediator helps the parties in fashioning the resolution of their dispute. The core value of mediation is that it allows the parties to explore the basis for their dispute and search for a resolution through **a process that is less adversarial, less antagonistic, less expensive and more creative than the**

**litigation process.** Mediation encourages parties to engage in meaningful dialogue about their disputes without the constraints of litigation. It permits them to fashion resolutions that may be different than the legal remedies permitted by the courts. While mediation may increase the number of settlements and avoid trials, **the fundamental premise of mediation is that it is better for the parties to find meaningful compromise themselves than to have resolution imposed on them by a third party.** The role of the lawyer in mediation is to assist the client in exploring ways to solve the client's problem, not to be a warrior zealously advocating the client's legal position.

Court mediation began in Ohio as a component of the litigation process. In 1994, the Ohio Supreme Court established a pilot program in four courts of common pleas that provided mediation services for civil cases in litigation. The primary impetus for the program was to resolve the glut of civil cases in the courts. The program was an unmitigated success. Now, court mediation is available in virtually every county in the State. During the last five years, approximately 900 cases per year have been settled through the mediation program of the Summit County Court of Common Pleas alone. To many Ohio lawyers and especially to litigators, mediation has become synonymous with these court-based programs. Mediation has become a well-established step in the litigation process in which the parties and their lawyers explore the possibility of settlement and mediators assist in the negotiations.

But the focus on the litigation process misses much of the promise of mediation. Too often, the mediation of litigated cases is driven by the lawyers with little input from their clients, other than approval or disapproval of proposed settlements. Mediations can be little more than settlement conferences in which the mediator shuttles back and forth between the adversaries, exchanging settlement proposals in the hope of finding a monetary settlement that will be

palatable to both sides. While these assisted negotiations can promote efficient settlement, they pay little heed to the core values of mediation. They do not promote open-minded client communication and exploration of client interests. They do not realistically explore resolving disputes in creative ways that may deviate from traditional legal remedies. They perpetuate the perception of the lawyer as warrior, rather than problem-solver.

The evidence is clear: mediation is the preferred method of alternative dispute resolution for Ohio lawyers. Still, as a litigator for thirty-plus years and now as a mediator, it is clear to me that much of the promise of mediation is unrealized. We must understand the unlocked potential of mediation if we are going to really serve the best interests of our clients.

My strong belief in the effectiveness of mediation is why I've shifted into a mediation role at this point in my career. If you would like more information on how mediation can work for your clients, please feel free to contact me.