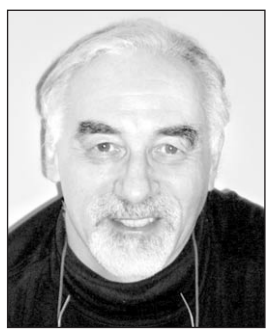
A Holistic Approach to Mediating Litigated Cases

By Milan Slama

It is not a secret that when it comes to mediating litigated cases, attorneys who represent parties prefer a mediator with a legal background. There are some good reasons for that; after all, they want to make sure that the mediator can relate to their profession, and that the mediator understands legal process and legal issues related to the case. But most important, attorneys want to make sure that they will have a meaningful conversation with the mediator, and that they will share the same vocabulary with regard to legal concepts and theory. It is not a surprise that some attorneys are accustomed to mediate with judges even if the cost of mediation is high. It gives them comfort to know that at least, when it comes to merit of the case, they will be well served. Yet mediation is much more than understanding the legal issues and merits of a case.



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Mediation is very much about the interests parties have in relation to their dispute or conflict. It is about the issues parties have to deal with when it comes to their professional and personal lives. In simple terms, it is about practical matters they face when they have to make decisions at the table in order to settle the case. Practicality (or the *pragmatics* related to decision making) is essential for every successful mediator to understand so that he or she can navigate through the treacherous waters of a mediation process. This varies with the type of case. For example, the mediator must understand family matters if he or she practices family or divorce mediation. The mediator must be well attuned to the work environment if he or she deals with employment and labor disputes. Understanding corporate or small business culture is indispensable when it comes to commercial matters.

Another aspect of mediation is the *relationships* between parties involved in dispute. Long-standing or short-term relationship, formal or intimate relationship — these need to be assessed so that the mediator comprehends all the dynamics among participants. Attorneys are aware of this aspect of mediation; after all they have similar issues when it comes to relationships with clients. Firms can have long-standing clients whom they want to keep for a considerable time. Then again, there can be a one-time relationship between client and attorney as in auto/ tort personal injury cases. The attorney can be a family member or friend of the party. To understand relationships means to understand the people involved in the mediation. A good mediator has not only a strong ability to read people, but more importantly he or she has to have the ability to relate to them, work with them, and gain their trust as quickly as possible.

So what, then, is a holistic approach to mediation? It is the approach that accounts for all three aspects of mediation when it comes to litigated cases — legal knowledge, pragmatics, and relationships. One might suggest that there is an equal division of contributory factors, 33 percent legal, 33 percent pragmatic, and 33 percent relational. The ratio can fluctuate but the weight of importance stays relatively stable.

What it all means is that attorneys who chose mediators should not only base their decision on their comfort level with their own professional background. They should evaluate the mediator on two additional features essential to the mediation process.

This claim is not a capricious one. There are lots of mediators who do not have a legal background and who are nevertheless very good at mediating litigated cases. Each case calls for an appropriate fit between the matter at hand and the mediator, based on varying sets of criteria. Sometimes a retired judge is better equipped to handle the issue. Sometimes an attorney with a unique specialty is a better choice, and sometimes the mediator with a holistic approach is the best choice. From my experience with mediating litigated cases (in various types of civil matters) the majority of them address similar legal issues and the same statutes and case laws are quoted and applied over and over again. The majority of cases range from simple to medium in legal complexity. Attorneys that only have a strong familiarity with some issues need to educate themselves on others. The same applies to mediators who do not have a legal background. The bottom line is that while legal aspects of the case are essential, the pragmatic and the relational aspects of mediation are unavoidable.

And yet the holistic approach to mediation is more than the sum of its aspects. What needs to be addressed is a functional and structural unity of the mediation process. This puts more requirements on the mediator's skill set. In other words, the mediator has to have a strong ability to structure the case and the process, so that all moving parts are functioning well. And we all know that there is a lot of movement taking place during mediation. The mediator has to have strong analytical skills to organize all the aspects of a mediation into a well-functioning whole. Interests, parties' relationships, and legal issues have to fit into a bigger picture called the mediation process.

In the end, it might be beneficial for attorneys and mediators to be aware of everyone's contribution to a mediation practice. Being open-minded allows for better cooperation between both professions. The holistic approach is the method that utilizes all aspects of mediation and helps to serve our clients with more efficiency and skill. My plea to all attorneys I work with and would like to work with is: *be open to new vistas*. The holistic approach allows us, both as the attorney and mediator, to mutually enhance our talents, to fully explore all options regarding the litigation process, and to better serve our clients.

Learning to Be a Good Listener Made Williams a More Effective Mediator

Continued from page 1

a mediation involving Korean parties. Before arriving, he quickly called his case manager, Christie Woo, who speaks Korean, and asked her how to say hello in the language.

When he walked into the mediation room, Williams greeted the parties in Korean to their surprise and delight.

"So, we had a laughing relationship for the entire day because I made that one simple gesture," Williams said. "I wasn't attempting to be fluent. I simply was making it clear that it mattered to me to be respectful of culture.

"I guess that underscores one of the things I love about this work. It brings out qualities in me that I really like, and I think are the best side of me. My job is to help people put on the other side's glasses. And when I am successful, it's really cool."

Most of his mediations are completed in either four- or eight-hour sessions. He likes both. It depends on what the parties want. On one hand, the four-hour sessions force him to really focus. With the eight-hour sessions, particularly if strong emotions are involved, he has more time to listen and help people relax.

He makes sure the parties know up front how much time they have, not that he will quit on them, he said. But as a matter of personal integrity, he feels obligated to tell them that if they go over the limit he will have to charge. Follow-up by phone is free, he said, but not as effective.

Williams said he never gets between the client and his or her attorney. His job is to help the lawyer listen to the client and the client listen to the lawyer. He asks questions both to get and to impart information. For example, he'll ask a lawyer to tell him about his client's business. Then, he'll ask the lawyer how he plans to get around a hearsay problem, or does he see a hearsay problem? That way, he's not telling anyone what to do but has got them thinking about the situation.

Williams is a big proponent of choice. It marks the difference between the court's mandatory settlement conferences and mediation, he said. The parties have chosen to be in mediation, and they've chosen him. They're also paying for his time, he noted, so it's likely they will be more invested in the process than if it were a typical settlement conference.

Even as a settlement judge, Williams said, he would try to turn the mandatory conferences into a voluntary process. He'd tell the parties they were in his courtroom because a judge ordered them to be there. By taking that action, they had fulfilled the requirement. Then, he'd say, let's talk about what you choose to do.

Alexander H. Williams III

ADR Services Inc.

Los Angeles

Age: 65

Areas of Specialty: business, employment, entertainment, insurance bad faith, professional malpractice, personal injury, lemon law, real estate

Rate: $400 per hour

Listening to Williams now, it's hard to believe he once, by his own description, was a hard-driving trial judge with little patience.

Appointed to the bench in 1984 by Gov. George Deukmejian, Williams, a University of Virginia School of Law graduate, former Navy JAG officer and former federal prosecutor, served eight years as a criminal courts judge. In 1992, he was reassigned to the new, standing-room-only, fast-track court, designed to reduce the huge backlog of civil cases. Eventually, the stress got to him, culminating in an outburst in a courtroom hallway, in which he swore at litigants and made an obscene gesture.

The incident earned him a public admonishment in 1997 from the Commission on Judicial Performance. It also marked a turning point, he said, when he learned to stop worrying about numbers and start worrying about process.

Designing a process is a concept that is very important to Williams. He uses it in arbitrations and always includes lawyers in its development. It helps narrow the issues and civilize the dialogue. There is no one-size-fits-all. It's an art and depends on each case how it happens, he said.

"The first rule is to listen," he said. "I do not expect anybody to listen to me until I've listened to them. I'm always going to be the Johnny-come-lately to the conversation. I will always know less than everybody else does about the dispute. Therefore, I need their help in persuading the other side of the merits of their case."

Designing a process also carries over to his personal life.

Williams, who is married to Doris Weitz, a former court interpreter, has two daughters by a previous marriage. One is getting married soon and has asked him to do two things: walk her down the aisle and to perform the ceremony.

"So, I've got to figure out how to do that," Williams said. "We will design a process, I'm sure. My only concern is that I don't cry too much."

Here are some of the lawyers who have used Williams' ADR services: John A. Girardi, Girardi & Keese, Los Angeles; Lawrence Grassini, Grassini & Wrinkle, Woodland Hills; Eric E. Castelblanco, Los Angeles; Maryann Gallagher, Los Angeles; Scott Myer, Los Angeles; Debra Meppen, Gordon & Rees, Los Angeles; Craig Roeb, Chapman, Glucksman, Dean, Roeb & Barger, Los Angeles; Dana Fox, Lewis Brisbois Bisgaard & Smith, Los Angeles; Eskel Solomon, Los Angeles city attorney's office.

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The New York Times Crossword

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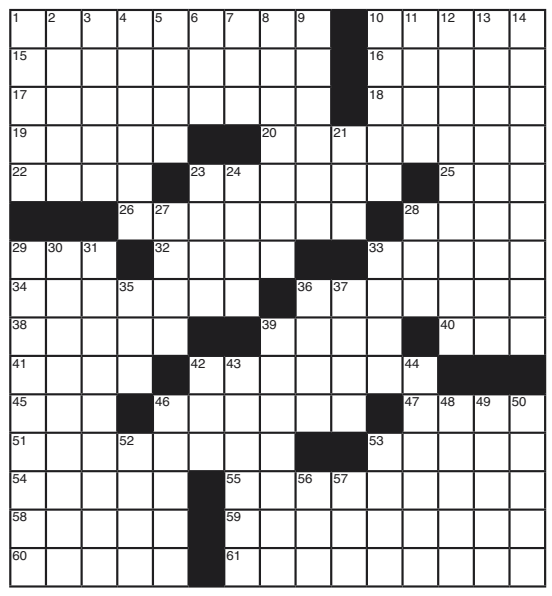

Puzzle by Thomas Heilman

Across

1 "Alas"
10 Is successfully interrogated
15 Summer salon service, for some
16 One of Ariel's sisters in "The Little Mermaid"
17 Directly
18 Swindle
19 Title role in a 1983 black-and-white film
20 Keenly observant
22 Annex: Abbr.
23 "___ End" (1971 Barbra Streisand hit)
25 Org. with the motto "Start With Trust"
26 Lugs
28 Biblical preceder of 27-Down
29 One with an ear and a small mouth
32 What an idea comes to
33 Broadway's "Never ___ Dance"
34 Makeup lessons?
36 Wet bottoms
38 Quietly tells a tale
39 Misery
40 One with delta wings, briefly
41 Wing: Prefix
42 Not mixing well
45 Well-said
46 Decides one will
47 Author Robert ___ Butler
51 Target of some leg-pulling
53 In ___ diagnosis
54 U.S.-born Japanese educated in Japan
55 Violent outburst
58 Brilliant effect
59 At a loss
60 Thinks
61 Saves

Down

1 One of the Pine Islands
2 Like some harrows
3 Viking poet
4 Rifle range activity
5 Make out, to Harry Potter
6 Exclamation at a lineup
7 Something to gaze in
8 Virility
9 Not lost
10 In poor shape
11 Hydrocortisone additive
12 Person prone to proneness?
13 Ups and downs of exercise?
14 Remove graffiti from, in a way
21 Wide receiver Welker
23 Fat, as a chance
24 What "1776" got in 1969
27 Biblical follower of 28-Across
28 Something to land
29 Very full
30 Sales statistic
31 Play furniture?
33 Festive
35 Thrice, to a pharmacist
36 Friends, e.g.
37 Chacon of the 1962 Mets
39 Inimical
42 Mad about, with "over"
43 Gets help for
44 Means of quick wealth
46 Passes by
48 Leader who died 27 days after his election
49 Was faulty?
50 ___ guerre
52 Appear elated
53 Black Knights' home: Abbr.
56 Progress preventer
57 Rescue inits.

ANSWER TO PREVIOUS PUZZLE

	T	B	O	N	E	S		Y	O	U	R	A	N	G
C	H	A	P	E	A	U		O	P	H	E	L	I	A
L	E	C	T	E	R	N		G	E	R	M	A	N	Y
I	R	A	S			S	T	U	D	Y		M	E	D
C	O	R		A	B	H	O	R	S		C	O	P	A
H	U	D		F	E	I	N	T		N	A	D	I	R
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P	I	U		L	O	S	E	R			Z	I	T	I
J	O	S	B	O	Y	S		B	E	Z	I	Q	U	E
A	S	A	R	U	L	E		A	V	E	N	U	E	Q
R	O	L	O	D	E	X		D	A	N	C	E	S	

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