



Reflections on Mediation

By Hon. Ellen Sickles James (Ret.)

Having served on the Contra Costa Bench for over 21 years, I was accustomed to the role of judge. After two decades in the courtroom with the continuous flow of disputes and a daily calendar of issues to be decided, I became adept at the routine of listening, evaluating and deciding. My role and focus was to learn the facts, apply the law, and hopefully do justice. The judicial function is structured and constrained by rules of evidence and set procedures, formalized, recorded and subject to review. The idea is to receive information, to be sure, but also to control the flow, to keep arguments within set boundaries, and consider and hear only what is appropriate and germane. The role of the judge is unquestionably tough, making decisions that are in every case so impactful to the parties. Being a judge was a humbling and challenging role, which I was very honored and fortunate to perform.

Currently, and for the last 21 years, I have been a mediator with JAMS; quite a different function, still equally honorable and challenging. The mediation process is open ended and subject to fewer procedural constraints. Here there is no mandate to decide, indeed no power to decide, occasionally not even an expectation that the cause will arrive at a resolution. Basically it is a chance to talk

and a chance to be heard. This may sound trite and simple, but therein contains the magic. As a mediator, unlike a judge, the role is not to control what is said, or to determine what is proper to hear. The role of mediator is to encourage open expression, to set the conditions for a full venting of the legal, factual and emotional basis for the dispute. A mediator is first a listener. Until a person is fully heard, there is little incentive to compromise or for the parties to consider mitigation, forgiveness or contributing responsibility. As a mediator, I am sincere, concerned and fully committed to exploring every avenue that may lead to a resolution. Often this requires cultural, ethnic, and gender sensitivity. As a neutral, I remain open-minded and tolerant of all as bias or pre-conceived stereotypes would be an impediment to developing necessary trust with the parties. My early career as a Deputy Public Defender has, I believe, been relevant and important in my success. Whether it is business litigation, real estate, employment, catastrophic personal injury, or wills and trust, the human element invariably features prominently in the controversy. All lawsuits are, after all, about people.

Once everyone has had their say, my role as mediator often moves from the posture of passive listener to active participant. Here I alternatively become a member of first one team and then

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another. We are joining forces to get something done. This requires a keen sense of the weak points, the barriers, the critical risks, pot holes and speed bumps that stand in the path to resolution. Being creative, focused, persistent and patient is critical during this process. My job is to keep the ideas flowing, to juggle the considerations and equities, with no one dropping the ball. The goal is to build on the progress that has been achieved, to avoid unraveling and back pedaling while maintaining forward motion toward consensus and agreement. Of course anyone can walk out, but everyone knows I will be the last person to do so.

At this stage, the objective is to move all parties from the narrow focus of “I” and “me” to the broader focus of “us” and “we,” from locked struggle to the release and comfort of resolution. The parties themselves are indispensable in suggesting the elements that lead to the path forward. This proprietary aspect, this “buy in” for the parties, is essential for the compromise that contributes to acceptance of the resolution. The fact that the parties articulate their own just, compromised decision is arguably one of the most positive features of the mediation process as opposed to a judicial verdict. To own the solution is everything. Seldom, if ever, during my years on the bench, did I observe the congratulatory gestures, the high fives, handshakes and occasional hugs that follow a mediated settlement. A successful mediation is in this sense, perfect justice.

Once a tentative resolution is agreed upon, the tough job of drafting language that encompasses what has been agreed upon is required.

Here the mediator and the parties step back, as the lawyers draft the language in their professional role. The mediator’s function at this point is somewhat more judicial, in the sense of confirming the neutral articulation of what has been agreed. Until the ink is dry, there is no resolution.

My work as a mediator is continuously exciting and challenging, involving both problem-solving and peace-making skills. It is an active job, both mentally and physically. There is tremendous satisfaction in bringing people together. Sometimes, on a given day, as recorded by my iPhone Health App, I walk miles between floors, back and forth, up and down, keeping the parties at bay, as they are venting, joking, crying, complaining, and strategizing, until such time that they are ready to emerge and often congratulate each other on their contribution and their mutual success upon reaching an agreement. As a former trial judge, and now in this challenging role of JAMS mediator, I am truly honored to do this important work.

Since 1997, Judge Ellen James has served throughout the United States as a JAMS mediator, arbitrator, Judge Pro-Tem and special master in multi-party complex litigation in a multitude of areas of civil law. Prior to that, Judge James served as a Judge (and Presiding Judge) for the Contra Costa Superior Court and has also served on the First District Court of Appeal, the Superior Court Appellate Division and the Mount Diablo Judicial District Municipal Court.

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