

THURSDAY, FEBRUARY 4, 2021

PERSPECTIVE

Why are cooks called chefs?

In search of a title for mediation advocates and specialists

By John H. Sugiyama

When will attorneys who are adept at resolving legal disputes through mediation and other alternatives to trial get a title befitting their skills?

Certain comparisons help illuminate this question. Almost imperceptibly, perhaps with the advent of food-based reality shows over the last decade on cable television's Food Network, cooks have come to be known as chefs. In other professions, there is a similar trend. This transformation of professional titles serves multiple purposes. Some changes accompany a perception of emerging elevated status. Other changes reflect a desire for greater linguistic precision. Teachers are educators. Reporters are journalists. Fire fighters are first responders.

In the practice of law, attorneys in one area of practice frequently are differentiated from those in another based on perceived specialized knowledge. Tax attorneys. Labor attorneys. Probate attorneys. Personal injury attorneys. Civil rights attorneys. Bankruptcy attorneys. The list is extensive.

In the field of litigation, a further distinction is made. Trial attorneys and appellate attorneys are viewed as having different skills.

The two facets of this divide, however, no longer encompass the totality of contemporary dispute resolution practice. Of the contested matters pending in the civil, family, and probate departments of state court systems, an ever-declining percentage will be decided through trials. Many more cases will be arbitrated. And an even greater number will be mediated.

Despite this inexorable trend, the legal profession has yet to develop a suitable title for the attorneys who resolve most of the disputes in our court systems through mediation rather than trial and appeal. The skills necessary for success in mediation are not subject to display through the stage of a courtroom. Nor are the results of mediation subject to scrutiny through the artificial account of wins and losses, or affirmances and reversals. These attorneys are, ultimately, the diplomatic corps of the legal profession, often consigned to performing their work with ninja-like stealth behind closed doors. Bound by the imperatives of confidentiality imposed on mediations, the attorneys are forced to leave the results of their work hidden from public view.

Diplomats-in-Residence

Litigation is a process of persuasion. The process will vary from

case to case depending upon the litigator's assessment of "who" is to be persuaded, "what" is to be achieved through persuasion, and "how" that persuasion is to be accomplished.

In trials and appeals, an attorney's goal is to persuade someone about something. The "someone" is usually a jury, a judge, or a panel of judges. The "something" is often the entry of judgment in favor of the attorney's client, or the reversal of a previously entered judgment.

The components of persuasion are easily discernable. For trial, the process often begins with the selection of a jury, continues with the examination of witnesses, and concludes with the presentation of closing arguments. On appeal, the process usually involves crafting persuasive briefs, presenting a coherent oral argument, and responding effectively to questions posed by a panel of judges.

For mediation, the goal is to resolve a dispute so that a trial becomes unnecessary. Here too, persuasion is part of the process, but the process may be entirely different.

Rather than a jury, a judge, or a panel of judges, the persons to be persuaded in mediation are the parties themselves. Instead of the entry of judgment or the reversal of such entry, the matter sought through mediation is the maximization of gain or

the minimization of loss by the parties.

Also, unlike trial, evidence and arguments are seldom presented, much less welcomed, in mediation. For the latter, sworn testimony, carefully presented by direct examination of counsel or artfully debunked by cross-examination of counsel, is eschewed. Similarly, artful oral arguments by counsel are unavailing.

The process of persuasion in mediation thus is less direct than it is in trial or on appeal. A principal contributing factor to this distinction is the mediator. Unlike a jury, a judge, or an appellate panel, a mediator decides nothing. Instead, the mediator serves as the messenger, the facilitator, the evaluator. The mediator may help guide the parties toward resolution of their dispute. Ultimately, however, the mediator must work within the constraints imposed by the parties.

The attorney attuned to pre-trial dispute resolution consequently must begin the process of persuasion well before the mediation. A trial or an appellate argument may be a focused event. A mediation may similarly seem to be a singular event. But trial, appeal and mediation differ in terms of the timing of the persuasion. A jury, a judge, or an appellate panel presumably is not subject

to persuasion until a trial or an appellate argument. But a party and an attorney may be subject to persuasion well before the commencement of a mediation.

Thus, many pre-trial actions should be addressed to two different functions. The attorney by training and experience may view discovery as a process of accumulating information for possible use at trial. But the attorney also should be guided by how that information may be useful for mediation. Likewise, the attorney may deem motion practice as a means of gaining advantage for trial. But, again, the attorney should be cognizant of the effect of particular motions on possible mediation. Evidence disclosed in discovery and legal rulings obtained pretrial may have a trial objective, but more likely will be critical components in the process of persuasion during mediation.

As a separate skill that has no role in trial or on appeal, the attorney must also know how an offer or counteroffer will be conveyed by the mediator and received by the opposing party. When to demand or accommodate, what to accept or concede, and how to present or modify are matters that the attorney must continuously assess in any mediation. These are matters that the attorney will not confront in trial.

If mediation thus requires skills different from those used during trial, let us consider that in relation to the question posed at the outset of this article: When will attorneys who are proficient at resolving disputes through mediation get their own distinct title? Should they simply be called mediation specialists? Is mediation advocate a more fitting title? Or will a different, more worthy title emerge?

Of course, a related question is whether a special designation is even necessary. The simple answer is: no. But as with chefs, or educators, or journalists, or first responders, a more precise title for the attorneys who serve as advocates during mediation would have many beneficial effects. It would serve as an acknowledgment of the increasing prevalence of mediation. It would also signal the specific skills necessary for successful mediation. Further, it would induce more thoughtful preparation for mediation.

Attorneys who are mediation advocates are in effect diplomats-in-residence in the realm of litigation. They often work behind closed doors, and their work is seldom chronicled by the press. Yet the health of the judicial system is dependent upon their efforts. They have earned their own designation. ■

Hon. John H. Sugiyama (Ret.) is an arbitrator and mediator at JAMS with experience in a myriad legal fields and disciplines adjudicating complex matters through trial and resolving them through alternative dispute resolution processes. Judge Sugiyama presided for 18 years on the Contra Costa County Superior Court. During the last nine years of his judicial career, he served as the supervising judge for the Probate Division. He can be reached at jsugiyama@jamsadr.

