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What Makes a Good Mediator?

By: Margo Keller
Mediator, Arbitrator

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"You mediators have the life," the defense attorney says to me as he leans back into his chair for our first caucus, "No stress, and let's face it, it's just not that hard to settle a case."

I nod in my friendly way. Noncommittal.

Then he tells me he's "Really sorry" but his client won't give him any settlement authority because "the plaintiff's demand made his client "hopping mad." "Sorry," he says again as I leave the room, "but she feels really strongly about this one."

I move over to the Plaintiff's conference room where the attractive, athletic-looking claimant nods helpfully as her attorney tells me that, because of the accident, she can no longer paraglide, and that her damages are "clearly in the six figures." He does agree with defense counsel that he has not named a causation expert within the court deadline, but "he's not worried about that."

I nod again. For now anyway, I am noncommittal.

Although this example may seem unbelievable or at least humorous, mediators are presented with cases like this all the time. They seem impossible and yet they settle. Why? How? In my opinion, tough cases settle because, at least in part, a good mediator

brings to the case a special set of personality traits and skills that help the parties achieve settlement.

A MEDIATOR'S PERSONALITY

-Objectivity. Unlike pure lawyers, mediators are not advocates, except for the process itself. Quite simply, a good mediator cannot have a "bent": plaintiff or defense, employer or employee, etc. A mediator needs to help each side evaluate the strengths and weaknesses of the case, serving as a neutral but trusted "devils advocate". It's a fine line and often I find myself warning parties that the next time I come into the room they may think I am "not on their side". Instead, I am doing what they are paying me to do: present risk in an objective fashion. For example, what happens to the plaintiff's case if the judge excludes the expert witness not identified in time?

-Highly intuitive. A good mediator easily reads verbal and non-verbal cues and can often simply "sense" what approach will be most effective. I sometimes think this is a personality trait one is born with, however, these skills can be honed with experience and attention.

-Patience. Trust me on this one.

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Mediator Focus: Cliff Freed

By: Penny Gans, WAMS Staff

Cliff Freed, in jeans and a polo shirt on a non-mediation day, is a down-to earth, focused listener who would immediately put any client at ease. Cliff joined the WAMS arbitration/mediation panel in 1996 after completing mediation training at the University of Washington. A specialist in employment-related disputes, Cliff maintains an active law practice and has been a partner in the law firm of Frank Freed Subit Thomas since 1986.

According to Cliff, modern employment law has grown out of the civil rights acts of the 1960's and subsequent legislation such as the 1990 Americans with Disabilities Act and the 1993 Family Medical Leave Act. Cliff and his partners represent employees, labor unions, small business owners, and non-profit organizations in cases involving discrimination, harassment, wage and hour disputes, and disability rights. Cliff's clients have ranged from the ousted CEO of a large hospital chain to a female police detective being harassed by her superior to the owner of a small day care facility who prevailed in a dispute with DSHS and is now the successful owner of six day care centers. Today, Cliff's work as a WAMS neutral comprises roughly 20% of his practice.

Cliff believes that patience is an essential tool in mediation. Because emotion plays such a large part in employment disputes, the mediator must take the time to allow both sides to completely air their views. "Employment is a relationship not unlike a marriage," explains Cliff. "People have an incredible emotional investment in their jobs and self-image is often based on the job. It is an especially traumatic event to lose a job, especially if the employee's reputation is hurt.

Employers can be emotional too, believing they have been unfairly accused or that their efforts to address the employee's concerns have been ignored – that 'no good deed goes unpunished.'" In spite of the emotional elements of the cases, however, fewer than 5% of employment disputes go on to litigation. Nevertheless, at the end of a mediation Cliff often hears one of the attorneys say, "I never thought this case would settle."

Cliff's journey from Brooklyn, New York to Seattle and WAMS illustrates the happy results of accepting adventure, excelling at new challenges, and being in the right car pool at the right time. After growing up, graduating from college and beginning a teaching career in Brooklyn, Cliff made a summer visit to a friend who was bartending in a Pioneer Square tavern. After ten days of hiking and Seattle sunshine, Cliff returned home, re-packed his bags, and came back to join his buddy in the bartending business. He later managed the tavern (music seven nights a week), worked as a DJ and sports reporter for a Seattle radio station, took the LSAT, and graduated cum laude from UPS Law School (now Seattle University), where he was Managing Editor of the Law Review. Cliff found his future law partners through a fellow student in his Seattle-Tacoma car pool and met his wife, Eileen, on a blind date arranged by her mother, another Law Review member.

Among his many other activities, Cliff lectures part time at SU Law School and is Chair of the Labor and Employment Law Section of the King County Bar Association. He serves as a member of the Federal Pro Bono Screening Committee and is on the Board of The Homelessness Project, a non-profit agency providing transitional housing for homeless families in Seattle. Ten years ago, Cliff also discovered golf. He and his golfing group enjoy playing at many area courses and are looking forward to a trip to the British Open next year.



...WAMS Buzzz

WAMS House Counsel Diane McGaha hadn't been back to Brazil since 1974, so it was quite an adventure to return as part of a June 2007 risk assessment tour of a girls' school sponsored by WAMS: Bahia Street (www.bahiastreet.org). The school was founded in Salvador, Bahia by University of Washington anthropology professor, Dr. Margaret Willson, after she had conducted a research study in the area. Through their mutual interest in Brazil, Diane and Margaret met several years ago and have worked together to further the mission of Bahia Street in a variety of ways. The Bahia Street trip provided an opportunity for Diane and other trip participants to visit the school, meet the students and gain a greater understanding of the challenges confronting everyone involved with this program in one of the poorest communities in the world. Despite erratic and limited funding, dysfunctional families who aren't generally supportive of education for girls and facilities that can only be classified as "barely habitable" by American standards,

the Bahia Street school is achieving remarkable results. Girls who might otherwise have no opportunity for an education, much less a professional career, are being educated through college and given a meaningful, self-sufficient future. With the help of WAMS and other outside funding sources, the Bahia Street school is achieving success in educating young women that has thus far been elusive elsewhere in Brazil.

In other office news, WAMS is pleased to welcome Leona Shuler and Natalie Snyder to our staff.

Leona started at WAMS in June 2007 as an office manager/paralegal. She works primarily in the Seattle office, but helps in the Tacoma office when needed. Natalie joined us in October 2007 as a case administrator/paralegal in the Seattle office.

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-Persistence. Probably one of the greatest mistakes parties or less experienced mediators make is giving up too easily. The good mediator sticks with you.

-Respects and Genuinely Likes People. I think this is critical. You know when someone has positive regard for you. A good mediator believes all kinds of people are worthy of time and empathy and frankly, enjoys everyone's "story."

-Trustworthy. It is fundamental to the mediator-party relationship that if requested, the mediator can be trusted with anything from a deep confidence to a random thought. Moreover, the mediator must be trusted to communicate the strength of a settlement offer or the complexity of a multi-faceted position.

-Sense of Humor. Many of the folks who attend a mediation have suffered a real loss or are seriously stressed from the litigation process. Although they may not admit it, many attorneys who attend the mediation are also worried or exhausted or stressed out about the case. (I often was.) A little well-placed

humor can ease the situation. It can help the parties understand that yes, this process is much nicer than going to trial, and that after all, life will go on after this case ends.

A MEDIATOR'S SKILLS AND KNOWLEDGE

-A quick study. A mediator must be smart in that facile, "quick study" sort of way. The mediator must be able to grasp the facts of the case quickly and more importantly, be able to clearly identify the legal and people issues involved. In my opinion, the depth of a mediator's knowledge of a particular area of the law is often overrated as a factor when selecting a mediator, however, it is obviously important that the mediator have a good general understanding of the particular law in the case at hand. It is also helpful to have a mediator who has tried cases to both a jury and the bench. This depth of trial experience can assist the parties in analyzing the strength of legal arguments, factual positions, and those emotional appeals everyone loves to rely on.

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Scott Holte

“It was obvious during the mediation that you have a long history of experience in litigation as well as personal relationships with the attorneys and their adjusters. I also felt that the time you took to explain some matters to my clients, who had never been through this process before, was very helpful and calming... I will be thinking about you this Labor Day weekend when I am vacationing with my family rather than preparing for trial in this matter.”

- WAMS client

-Balanced orchestration of the mediation process. This skill comes with experience, intuition, and training. A good mediator knows when to be reflective, when to test a party’s sense of reality or the risks in litigation, and knows when to discourage explosive demands or moves. This is critical: a good mediator knows that settlement expectations are not lowered quickly, and that the process takes some time.

-Good verbal and listening skills. A good mediator can do both: listen and talk. I wouldn’t be able to settle my fictionalized “hurt paraglider” case without first learning about the plaintiff’s magazine contract for a photo spread, and I would definitely need to listen to the way in which the plaintiff communicates about the accident and her needs or losses in order to deliver those impressions to the defense. Occasionally, I have passed on a fact that one or the other attorneys had simply forgotten since the case was filed, which fact was critical in properly evaluating the risks in the case.

-Creative Problem Solver. This is my favorite skill. A good mediator has initiative and the confidence to use it. A good mediator can think “outside the box.” I love the fact that solutions not allowed in a court process can be successfully implemented in a mediated settlement. A good mediator asks the parties about ways to reduce taxes, structure settlements, meet non-monetary needs, narrow issues and agree on a dispute resolution process for future disputes. Just to name a few

In sum, a good mediator does far more than walk back and forth between rooms and deliver “numbers.” A good mediator creates a sufficiently safe but realistic environment to help you evaluate the risk of trial against a proposed settlement offer. Finally, a good mediator allows the attorneys and clients to leave the mediation with their self-respect intact.

Hey, if it was easy, anybody could do it!

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