

The advantages of mediation versus litigation or arbitration, including its costs, and how your firm can utilize this process to equitably settle the conflicts that will inevitably arise

Even competent and ethical practitioners in a profoundly personal profession such as funeral directing encounter occasions of conflict between employees, with vendors or, sadly, even with clients. Attorney Doug Meyer of Woodland Hills in southern California, who specializes in management representing funeral homes, mortuaries and similar facilities, says: "Family members may complain that final wishes were not carried out, that the deceased's appearance was not as requested, that they were treated in an impersonal manner, that services had been mishandled or worse." In some cases, the funeral home might be caught in the middle of a family dispute about how a service should be handled – even in cases in which preneed arrangements have been made.

Burying the



What complicates an already unfortunate situation is that merely trying to help a family during an internal dispute can embroil you in unwanted conflict. Furthermore, defending yourself against a client complaint tends to create an adversarial relationship, and even if you “win” a case, the side effect might involve ill will in the heart and mind of a client.

Some customer service trainings teach “the 3/11 Rule,” which states: “A satisfied customer may tell three people about your good service, while an unsatisfied one will tell 11” (Sherry Greenleaf, *Impact Training & Development, Cleveland, Ohio*). This, of course, can be devastating in a profession so dependent on goodwill and good reputation.

The problem in such cases might not involve the quality of your practice at all or even the type of client with which you are dealing, but the process of dispute resolution itself. This article explores the use of alternative dispute resolution (especially mediation) to resolve disputes that arise in funeral homes. It describes differences and similarities among

mediation, arbitration and litigation, including the costs and benefits of each option. Some funeral directors are avoiding litigation and simplifying resolution of disputes by using alternative dispute resolution, including adding language to their contracts making alternative dispute resolution a first line of defense.

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The Advantages of Mediation

Many businesses know that litigation of a dispute comes at a cost beyond court and attorney fees. The process is by nature adversarial and impersonal, and its course is directed by others, not the parties involved. Attorneys might encourage you not to communicate except through legal

channels (through the attorneys themselves or in court). The entire process focuses only on who is right or wrong, in violation or not, and little attention is given to what disputants really want: the *personal* context of their legal complaint. Rarely, if ever, do disputants get to sit down and negotiate a solution that might be workable or acceptable to *both* sides.

Because of this, some businesses stipulate in their contracts that arbitration, not litigation, will be used as a first venue for dispute resolution. On the surface, this presents some advantages, perhaps chiefly reduced costs. After all, arbitration takes judges and courts out of the picture and often takes far less time and money than litigation. Nevertheless, many times arbitration is nothing more than a courtroom-type setting without the protections of the law. The third party (in this case the arbitrator instead of the judge) sets the agenda and determines what is and is not appropriate to discuss. The process still focuses on issues of who is right and wrong, who will compensate whom and how, and so forth. Outcomes might be lim-

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ited to only two choices – namely what each of the two parties wants. Because of these and other shortcomings, arbitration still fails to satisfy in many cases.

The increasingly popular alternative is mediation. Unlike litigation and arbitration, the mediation process encourages those in dispute to communicate with each other directly. This takes place with a third party, the mediator, in the room. Unlike a judge, jury or arbitrator, however, the mediator is a neutral party who has no decision-making power. That power stays with the people most affected, as it should be. The mediator's job is to control the process of discussion, not its outcome, and to get people in dispute (sometimes angry, hurt, scared people) to talk to each other, listen to each other, understand each other and work together in a cooperative manner to resolve a dispute.

Results are often startlingly successful. When parties are free to discuss more than "Who's right and who's wrong?" or "What does he owe me?" or "What does the law say we must do?" a much broader range of options might open up. Even people who start with only two options ("my way versus your way") almost always come up with possibilities that are more constructive because they are working cooperatively rather than as adversaries.

In our experience in the field of conflict resolution, we find that most people respond favorably to this different option. In a surprising number of cases, the persons raising the complaint do not want to be compensated in the typical sense. Rather, they want the other party to explain fully what happened or for the other party to understand fully what the impact was on them. Often people want to know what happened but believe the only way to get full disclosure is in court. This suspicion is likely born out of our experience of the litigation process, in which one or both parties might disclose only the minimum information necessary as a means of self-protection.

The Impact of Apology

We find that many in dispute want only an apology for a mistake or some assurance that what happened

to them will not happen to someone else. Many practitioners, on the other hand, want to apologize either out of a need to make amends for a wrong or just in empathy for someone who feels injured. Yet they might feel reluctant to do so in fear that it might be construed as an admission of guilt or that anything they say might be used against them in court.

In many cases, mediation allows statements of regret or even apologies, and certainly full explanations, without the possibility that such statements will be used in court. Because of this, mediation satisfies many disputants and resolves many disputes without escalation into the arena of litigation.

When people with complaints do want compensation, and when it is agreed that compensation is appropriate, the mediation venue also offers far greater flexibility in determining what compensation is satisfactory.

Doug Meyer notes that most people "don't hear about mediation, don't know how it differs from arbitration and seldom use mediation in the formal sense; however, I believe it would be very effective." He notes that mediation offers a venue in which we can "diffuse the emotional aspects of the conflict because it often includes

time for an apology."

Mediation is already in use in a variety of conflicts, and its use is expanding rapidly as new industries come to appreciate the benefits, including not only savings in time and money but also how mediation humanizes the process of conflict resolution.

Mediation Contract Language

On many funeral home Websites, mediation is listed as an option for disputes, though at the time of this writing and after phoning several funeral directors' associations, including California, Oregon and Ohio, to name a few, we were unable to locate a funeral home that actually includes contract language stipulating that in the event of a dispute, mediation is to be used as the first means of resolving the dispute.

Jennifer Baugess of the State of Ohio Board of Embalmers and Funeral Directors tells us that dispute resolution methods are not regulated by the states, and that each funeral home generally has the onus of responsibility to decide for itself how conflicts are to be resolved.

Attorney Meyer notes that it is prudent to consult with legal counsel and your malpractice carrier to ensure

Suggested Contract Language

Below are samples of recommended language to be included in contracts between funeral homes and clients, stipulating the use of mediation to resolve disputes arising from the contract.

Basic Mediation Clause

"If any dispute, controversy or claim arises out of or relates to this contract, which is not resolved by direct conversation between the parties, both parties agree to try to settle the dispute by mediation using a neutral, third-party mediator before resorting to arbitration, litigation or other forms of dispute resolution."

"If no resolution acceptable to both parties can be reached using mediation, either party shall retain the right to seek resolution by other forms of dispute resolution."

Optional Specific Clauses

"The mediator to be used will be acceptable to both parties."

"The fees and costs of the mediator shall be borne equally by both parties."

"At least five days before the first scheduled mediation session, each party shall provide the mediator with a brief memorandum on the issue(s) to be resolved, including the facts surrounding the dispute and that party's position on the issues. Such memoranda shall be filed on a confidential basis and are not to be exchanged between the parties."

A Judge or a Mediator?

Here are a few of the advantages of using a mediator to settle disputes rather than going to court:

Mediation

- Reduced conflict
- Respectful communication
- Disputants control decision-making
- Far less costly
- Much shorter time involved

Litigation

- High trauma/drama
- Attorneys encourage parties not to talk except through them
- Attorneys control and direct decisions
- Expensive attorney fees
- Can be protracted time with attorneys and/or courts

that they are open to the concept and to the precise language. Moreover, Meyer advises that because many clients are unfamiliar with the concept (and might, for instance, confuse mediation with arbitration), it is recommended that you highlight this section of your contract in boldface type and require clients to initial the section to indicate their understanding. This is not only a legal safeguard to ensure the validity of the contract, but it also serves to plant the idea that if a problem arises, you and your client will talk about it together and seek a mutually agreeable resolution before resorting to other methods.

When people understand this concept, it most often shows you to be truly interested in serving their needs in a compassionate way during a difficult time.

Locating a Mediator

If you decide that mediation is something you want to consider, your next question might concern how to proceed. If you wish to use a professional mediator, you will likely find one in the *Yellow Pages* of most big-city phone books, listed under "Mediation" or "Conflict Resolution." Be prepared for a bit of a shock, however. Although you will find page after page of attorney listings, mediators take up just a fraction of that space. (In Cleveland, Ohio, the ratio is approximately 110 pages of lawyers to a half-column of mediators!) Although many agree that alternative dispute resolution is a good idea, most people, unfortunately, still resort to litigation.

The next shock might arise because your mediator is not licensed or certified, since in many states (including Ohio), mediation is an unregu-

lated profession. This is changing slowly, in the same way that mental-health professions were slowly being regulated state by state 40 to 50 years ago. In case mediation remains unregulated in your state, feel free to ask "smart consumer" questions of prospective mediators, such as: How long have you been in practice? Do you have experience in resolving conflicts in my industry or in related businesses? Remember that your goal is to learn whether a potential mediator is extensively trained or has simply decided to "hang out a shingle." As in many businesses, word-of-mouth recommendations can prove invaluable.

Mediation Fees

Fees are typically charged on a per-hour basis and range considerably. Experienced mediators usually charge between \$100 and \$150 per hour in the Midwest to more than \$450 per hour in California, for example. A mediator who is new and still seeking experience might charge much less, but the usual caveats about quality apply here.

When considering the fees for these services, there are a few points to remember. First, the hourly rate for mediation is usually well below the typical rate for legal help. Second, mediation tends to be a much briefer process than litigation, so you end up paying for far fewer "billable hours." In contrast to litigation, there is usually only one mediator, not two or more attorneys, so the total spent by parties in conflict is again dramatically less. Finally, the cost of the mediator is typically shared by the parties in conflict, both as a matter of fairness and to avoid the appearance of partiality. (If you paid the fee alone, it might seem that the media-

tor is "your guy" instead of a neutral party.) All of these factors combine to make mediation a far more economical process.

Staff Mediators

The second way of using mediation to settle your disputes is to have your own in-house person instead of hiring an outside specialist. This tends to work better in larger organizations, such as major corporations, universities, etc., where it is cost-effective to have on-staff persons trained in mediation because conflicts can arise more frequently and because many of those conflicts occur in-house, i.e., between employees, between employees and managers, etc.

In those cases, employers might want one or more employees to undergo mediation training (which is available in most larger cities) so that they can act as in-house conflict-resolution specialists. This might not be financially feasible where conflicts are (gratefully) uncommon or where conflicts involve clients and vendors rather than employees. In the latter case, again, the issue of neutrality can prove very significant, as a customer might doubt "your guy's" impartiality.

One final question involves the logistics of mediation. Must it be face to face or are other methods available? The simple answer is that face-to-face meetings are always preferable and prove by far the most common because of the richness of nonverbal information available both to the mediator and to the disputing parties. As human beings, we simply work better that way.

In rare instances – usually involving parties in different parts of the country – meeting in person is simply not feasible. At such times, telephone conference calls or video tele-

conferencing can offer a workable substitute. In our practice, we have performed a handful of such cases, and it might be useful in the funeral industry when an out-of-state relative has a concern but cannot stay long after the services or cannot return to your city without significant added cost.

No matter how you do it, however – face to face or otherwise, using a trained in-house person or an outside specialist – mediation can help you resolve unfortunate conflicts in a way that saves you and your customer time and money, thereby maintaining the customer relationships that are so vital in the funeral industry. ★

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