

Michael Brooke Fisher
MEDIATION PHILOSOPHY

As a judge I was a strong proponent of judicial settlement conferences. And now as a retired judge/mediator I am an even stronger proponent of the mediation process. This process has two components that a settlement conference does not. First, in a mediation the parties are more invested emotionally and financially. They come into the process somewhat predisposed to settle. Second, the mediator can speak separately and directly to the parties in an unfettered fashion. While a judge in court may have an on-the-record discussion with the parties concerning a settlement, his or her responsibility to preside over the trial somewhat inhibits any discussion.

I have often thought of trial lawyers as gladiators preparing for battle. That can make it difficult when the lawyer proposes a settlement. The client may perceive his or her gladiator as suddenly suggesting surrender. This is where a mediator can be invaluable in persuading the client that the lawyer has battled to achieve the offer, and is still ready to do battle, but that a negotiated peace or settlement is the best outcome.

A mediator must have a combination of personal skills. He or she must be able to intellectually analyze the legal issues in dispute and yet have a practical approach to resolving the matter and the ability to maintain a calmness and civility throughout the process.

The mediator needs to have spent sufficient time reviewing the submitted materials to have a perspective as to each party's position and to assure the participants that the mediator fully knows the fact and understands the disputed issues. Then,

when appropriate and in confidence with each lawyer, the mediator should share his or her opinion as to the weaknesses and strengths of the case to establish a monetary value and ultimately a settlement. Discussing a monetary settlement number or range should not be the first thing discussed.

A mediator, a true mediator, should not simply be a messenger delivering offers and demands. I am that mediator, in the truest sense of the word. I am not just a messenger. With that statement I offer my services as a mediator and as an arbitrator.