

Mediation: Resolving disputes in a civil style

By Linda Stamato

The future quality of care at Northwest Covenant Medical Center (and the terms and conditions of employment of its staff) is the subject of a lawsuit in Morris County; the case, involving the hospital and 15 anesthesiologists, has been joined by several professional organizations including the New Jersey Association of Hospitals and the Medical Society of New Jersey.

The location for a 150-foot antenna tower is the subject of a lawsuit involving Mendham Township, Mendham Borough and Bell Atlantic Mobile Systems Inc.; while evidence strongly supports the communication system's need for a tower in the area, Bell's chosen site, on the roof of the Black Horse Inn, is not acceptable to the township.

Do these cases belong in court? Not according to the judges assigned to hear them.

In the first instance, Judge Kenneth MacKenzie has ordered the parties to mediate; in the second, Judge Reginald Stanton has challenged the parties to negotiate, Stamato specifically to cooperate in finding a site acceptable to all.

What is going on here? In short: Finding a forum to fit the dispute.

Justice has never been the exclusive domain of courts. In fact, throughout American history, private or community forums resolved the inevitable disputes that arose between individuals. In the last century, justice by adjudication won the day.

If recent trends are any indication, however, litigation may have passed its prime. Mediation has captured the imagination of growing numbers of individuals and groups in this society.

Why? Because it is less formal and expensive, generally, and likely to be more accessible, but primarily because it responds to problems underlying the dispute, attends to the interests of the parties, and can produce resolutions that are more efficient, effective, and enduring. In mediation, solving a problem is more important than proving a point.

Mediation is a flexible, largely informal, problem solving process in which a third-party neutral, the mediator, attempts to assist the parties in reconciling their differences. Unlike judges or arbitrators, mediators are not empowered to render decisions. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

Mediation is not for every case, however. Courts retain a crucial and indispensable role. In certain circumstances, courts have a unique capacity to make things right.

Courts do well in holding institutions to statutory mandates or procedures; they are an appropriate forum for picking a winner or awarding damages when such a decision settles the issue permanently. And, sometimes, the courts set the ground rules by which many disputes are resolved outside of litigation.

Justice is more likely to be attained in a system in which judges deal with those cases they are best equipped to handle, while other dispute-resolving mechanisms, less costly, formal and complex, but no less committed to equity, complement the judicial process.

Courts are the proper forum for resolving constitutional matters, for example, for clarifying legal principles and for establishing a precedent of public importance.

On the other hand, mediation is more appropriate for handling matters where the litigants' participation is needed to implement their agreement, (i.e., compliance is a variable and modification may become necessary); there is no need or desire for precedent; a mix of decisions is needed (not a hearing-imposed fiat); there are underlying issues pre-sent; and resolving the dispute is more important than satisfying principle (e.g. money to an injured person; cleaning up a toxic waste site).

And, especially, where there are continuing relationships, (e.g. mothers and fathers, relatives, neighbors, debtors and creditors, individuals engaged in commerce or linked by contracts), a process that pits one against the other and determines a winner and a loser', is ill-suited for devising remedies that work.

Accordingly, finding a site for an antenna that is acceptable to a community and establishing a standard of care (and wages and working conditions) at a medical center are suitable subjects for mediation.

Indeed, complex public and policy disputes, such as those concerning sites for prisons, group homes, halfway houses, or, for that matter, those involving allocation of resources, say, distributing block grant monies among competing social service agencies, are issues not readily dealt with in an adversary setting. I

What is needed is what mediation can provide: A process in which the interests of parties and the public's interest can surface and be served.

New Jersey has been preparing its justice system for a future in which mediation will play a significant part, complementing adjudication by judges and dispute resolution by arbitrators. The State Supreme Court has encouraged the use of mediation for resolving child custody and visitation disputes, for small claims squabbles, neighborhood, community and consumer disputes, and arbitration for automobile accident claims.

A new initiative, to provide mediation for civil cases in all the counties, has been introduced, although it has yet to take hold.

The initiative of judges in Morris County, however, such as the above examples suggest, reflects movement in that direction.

If these actions begin to constitute a trend, perhaps the future, at least in Morris County, may be less contentious, less adversarial, and notably less litigious than the present.

LINDA STAMATO of Morristown is deputy director of the Center for Negotiation and Conflict Resolution at Rutgers University.