

A Conversation With Jacqueline Abel on Small Claims Mediation

Big Impacts

By Jeff Merrick



Jacqueline Abel was mediation coordinator for Multnomah County small claims from 2003 through June 2015. She managed hundreds of mediators who have settled thousands of lawsuits. Many mediators employ skills developed there to resolve disputes in the community, expanding the importance of Abel's work like ripples in a pond. Upon her retirement after over 25 years in mediation, Abel spoke with me.

JEFF MERRICK: What are you most proud of?

JACQUELINE ABEL: The high quality of service. I take pride in my recruitment, training and mentoring volunteers. They are skilled, very dedicated and have a passion for this work. The best part of my job in terms of my accomplishment is working with our cadre of volunteer mediators.

Often, the parties are amazed that part of their litigation experience is this free opportunity to mediate. One party com-

mented, "I love that this is part of my due process!"

MERRICK: "Small claims," can be a misnomer. Some parties weep when they must choose between paying medical bills or paying rent and homelessness.

ABEL: You're right. We see some very high stakes experiences for people.

MERRICK: How could we improve what is already a strong program?

ABEL: It might be valuable to provide more time to work with the parties, but no-shows make scheduling difficult.

Also, I'd like us to pay some honorarium to our mediators to acknowledge their valuable work for the community and the court.

I think unpaid volunteers leave an impression with the public that the service has less value, which undercuts one of the hopes I and others had in the early '90s, that mediation might be a more elemental change in larger systems, not just the court system.

We hoped the public would conclude that mediation was a better approach than filing a lawsuit and that there would be a more proactive use of mediation. When people think, "I'm in a conflict, I can't stand it, I can't get anywhere with the other person," instead of filing a lawsuit, which is what we do in our litigious culture, they might actually think, "Well I have heard that there is this great mediator out there. If I could at least get the other side to agree to mediation, maybe we don't have to stay in this terrible situation and also add the cost of a lawsuit." This proactive use of mediation does happen, but it has developed slower than I had hoped.

MERRICK: About 25 percent of your mediators are lawyers. How do lawyers

grow into mediators?

ABEL: Lawyers learn a different skill set. These are difficult skills, and I am proud of the learning environment in our program. Each day, during confidential debriefing sessions, the mediators discuss with me and other mediators the difficult aspects of their cases. They reflect on them immediately. We talk about what might have been a good approach. We provide immediate supervision and, thereby, improve the quality of the mediations.

Lawyers are accustomed to the evaluative approach where lawyers hire other lawyers to evaluate the case, acting a little more like a judge but also using some mediator-like skills.

We take a facilitative approach. A best practice concept is that the less choice the party has, the more a mediator should empower the parties. In small claims, the parties do not have attorneys, they must appear for mediation, and they do not pick the mediator. So, they should have maximum say over their decisions.

Unrepresented parties are many times driven to file cases because of feelings of injustice, mistreatment, disrespect ... and an evaluation of their legal case may be difficult for a mediator. The parties want to be empowered over what they think is the best choice in their situation.

MERRICK: How can lawyers become better mediators? What makes a good mediator?

ABEL: Lawyers have an approach of "let's focus on the facts, let's focus on the strength of the case." For most parties, the meaning of the conflict is the combination of the facts and their feelings. That is not specific to small claims court. So, lawyers need skills to help parties deal with the feeling or emotional aspects. Then, lawyer-mediators make a huge jump.

Some of those skills include how to be empathetic, how to validate people's feelings and help them move beyond being stuck emotionally and start thinking in a more rational way about what to do now about the situation. When validating, you don't have to agree or look less than neutral, but I think we can all acknowledge their difficult situation or name the emotion you are hearing.

Using open-ended questions is so counter to the basic approach I learned as a baby lawyer, of "never ask a question you don't know the answer to." Here you want to cultivate the ability to ask open-ended questions to uncover hidden interests, underlying issues and also help them start thinking toward the future.

I don't think lawyers have as big a transition with some other key skills. Lawyers can learn to restate a party's position thoughtfully to take some of the sting out. Repeating and clarifying and summarizing in a way that mediators call "reframing" helps people hear it in a slightly different way and start thinking differently.

I encourage lawyer-mediators to allow the parties to tell their narrative — their perspective on what happened. If not, it will likely come back to bite you.

Lawyers tell me that doing this has given them the confidence to let parties express emotions in joint sessions, even if the parties' lawyers think they want all shuttle. They tell the parties their approach is, at some point, we are going to all sit down together and the clients get to speak, not just the lawyers. That is scary for lawyers. Nevertheless, I think mediators ought to think about how to use joint sessions to let parties talk.

MERRICK: You see lawyers develop more people skills?

ABEL: Right, or what I would call emotional intelligence. I think lawyers have it but it is not of high value sometimes. People skills or emotional intelligence is part of your toolbox as a mediator. You are not just dealing with facts. If they want to just deal with facts they might as well have a trial.

MERRICK: What else makes a good mediator?

ABEL: The ability to connect with people.

Viewing people as basically good.

They may be showing some really bad or difficult behaviors, but, basically, people want to do the right thing. Having that ability to see people in conflict as human beings in difficult situations and working with them towards a more positive future.

Emotional intelligence to help people move, step by step, from the position and emotional state they come in with to where they start to see more possibilities for the future, especially if they want some ongoing relationship with the other side, or at least a way out of this kerfuffle they are stuck in.

The ability to listen. If I am observing a new mediator and they talk more than the parties, that is usually a bad sign. The parties do not necessarily need your advice. They are here to talk through their conflict. The parties who feel they are not getting their chance to be heard usually want to end the mediation or they just feel stuck in the past. So, listening is a key skill.

Being comfortable with silence and not always trying to fill it with moving things along is an important skill for a mediator.

Comfort with the other possibilities of how to resolve this — not just being tied to who has the best case at trial.

Having a strategic sense of when to call private meetings and how to use them. Then, build some rapport to delve into the interests of the parties. The position parties walk in with may not meet their underlying need or interest. If you can help them articulate that, then they may not be so far away from where the other person is. There may be some commonality of needs. So, I think working with that interest-based approach is key.

MERRICK: Final thoughts?

JACQUELINE ABEL: It has been a very rewarding career. I feel lucky to have been able to work full time in mediation for many years. It is not the most lucrative area in the world, but it is very satisfying work.

Jeff Merrick (www.MerrickMediation.com), has been an Oregon attorney since 1984 and a mediator since 2012. This interview was edited for clarity and space.

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