

Coming to Terms

How mediation can resolve campus disputes without litigation

By Ruth D. Raisfeld

DO ANY OF THE FOLLOWING campus disputes sound familiar to you?

An academic department chair is struggling with warring factions among the faculty who do not get along and are engaged in petty in fighting.

A long-term clerical employee complains that she is passed over for promotion because of her race, while younger Caucasian student workers seem to get better assignments.

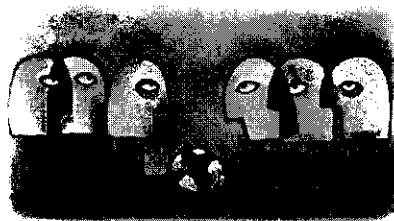
An adjunct faculty member denied a permanent position files a charge of discrimination alleging he has been discriminated against because of his recent heart surgery.

A student serving as a research assistant to a professor complains to the dean of students that she is being sexually harassed; her parents want the professor removed and their tuition payments reimbursed.

Any university counsel's office knows that when an employee or student files a complaint or threatens legal action, the dispute becomes a voracious eater of time, attention, and resources. Given the expense of defending litigation, the emotional issues frequently involved, and the potential for negative press both on campus and off, certain campus disputes are well suited to early and speedy resolution through mediation or the "ADR" process.

WHAT IS ADR?

ADR, or "alternative dispute resolution," refers to a range of options for resolving conflict, typically with the intervention of a trained, neutral, third-party professional. These processes include arbitration, fact-finding, neutral investigation, use of an ombudsman, and mediation.



Mediators must keep the parties negotiating even when those parties appear hopelessly far apart.

ADR procedures have been institutionalized in various government programs throughout the world, and increasingly in the United States. They're often used in matters of domestic relations, commercial, employment relations, civil rights, construction, energy, securities, environment, and personal injury, as well as in community disputes involving neighbors, small businesses, landlords and tenants, etc. With mediation, one form of ADR, a trained third party is selected by the parties (or appointed by a tribunal) to assist the parties in resolving their dispute.

The mediator does not make decisions for the parties. Rather, as the Association for Conflict Resolution (www.acrnet.org) describes the process: "*Mediation [helps] people engage in conflict constructively and discuss difficult issues. The mediator helps to identify key issues and gather relevant information. ... Mediators do not tell people how they should resolve their differences, but some mediators may offer suggestions for the parties to consider. ... Mediation often saves both time and money for clients. ... It allows*

the parties themselves to retain control over the process and outcomes."

WHO ARE MEDIATORS?

Mediators are often members of a court-annexed panel or associated with a dispute-resolution organization such as the American Arbitration Association (www.adr.org) or JAMS (www.jamsadr.com). Other mediators have independent "solo" practices, and may have expertise in a relevant industry or with certain types of disputes.

The hallmark of mediation is that the mediator meets with all parties, in joint or separate meetings known as "caucuses," guiding them through exchange of information and exploration of interests and positions in a confidential setting, with the goal of enabling the parties to reach agreement themselves.

Unlike a judge or an arbitrator, the mediator has no power to render a binding opinion or impose a settlement. Generally, discussions that take place during the mediation are deemed to be confidential or are treated as "settlement discussions" under state and federal evidentiary rules.

The work of the mediator is to keep the parties engaged in the negotiation even when the parties appear hopelessly far apart. The mediator will continue to question the parties about the facts, relevant law, and interests, and will attempt to get the parties thinking about the strengths and weaknesses of their case as well as their adversaries' case. Some mediators ►

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use a “decision tree,” which maps out the costs and expenses of continuing with the dispute and the risks associated with each stage of the process, together with an analysis of likely outcomes. With patience, persistence, and creativity, mediators can often help parties forge resolutions that contain both economic and non-economic terms.

HOW CAN MEDIATION RESOLVE CAMPUS DISPUTES?

What is it about mediation that can save colleges and universities the expense and distraction of disputes that can drag out and even end in litigation?

Mediation gets all the parties and counsel in a room at the same time for a condensed and focused discussion of the problems that may otherwise take weeks, months, or years. Those involved in campus disputes are familiar with the seemingly endless months of phone tag and unanswered correspondence or e-mails, which delay and deter full discussion of the issues and possible resolution proposals.

It can be a challenge even to get parties to focus until there’s a crisis or some other deadline. A mediation at which counsel and decision-makers for the parties must be present provides a unique opportunity for all stakeholders to be focused on the issues and interests that led to the dispute in the first place. Sometimes the mere scheduling of a mediation forces counsel and the parties to pick up a file, review the facts, law, and outstanding issues, and brainstorm possible ways to achieve a resolution.

A mediator can offer a fresh perspective on the facts and law. Quite often, counsel and the client get so involved in the minutiae of waging a legal battle that they “lose the forest for the trees.” Counsel may dread the call from a client wanting an update on the status of a matter that hit their desk long ago; the client may become dissatisfied with counsel’s view of the matter, which has migrated from “optimistic” to “doubtful.”

In such cases, a mediator can provide a “reality check” about the prospects for success in litigation that counsel may have difficulty communicating to a client. A medi-

ator who is experienced in the relevant law, who has been briefed on the issues at hand, and who has had an opportunity to “size up” the evidence and witnesses may be in a better position than counsel or client to assess a case’s strengths and weaknesses.

Merely scheduling a mediation can force the parties to brainstorm possible resolutions.

Similarly, a mediator doesn’t have the same emotional investment in “winning” that the counsel and parties have and is able to give a dispassionate viewpoint that can move parties away from a stalemate.

Also, in a mediated settlement parties can obtain results that may not be awarded by a court or jury. Mediation can be an extremely effective dispute resolution tool when the parties need to continue working together—such as with a staffer who is several years from retirement and feels she has been underpaid, or a student who wants an apology from campus police.

Remedies unavailable in litigation may be fashioned by the parties themselves. These things could include reference letters, apologies, a procedural change, or provision of certain kinds of benefits for which the party may not otherwise be eligible.

In addition, mediation provides “face-saving” cover for settlement discussions. Counsel may be reluctant to engage in these discussions for fear of being seen as “weak” or uncertain about their case’s strengths. Counsel may also be concerned about appearing zealous and confident in front of their clients. Mediation can facilitate the passing of offers and counteroffers, eliminating or reducing the amount of ego often found in settlement negotiations.

While mediations can and do get contentious, an effective mediator can encourage a “let’s-just-get-along approach” that impatient adversaries may be unable to accomplish on their own.

Mediation provides confidentiality and

avoids publicity. The privacy afforded by mediation processes is a key factor contributing to the success of mediation to resolve a campus dispute.

Educational institutions may wish to avoid the glare of public attention and media scrutiny. Airing disputes before a judge or jury may affect the reputation of witnesses and interfere with the conduct of daily campus affairs. Mediation provides an ideal setting where personality conflicts and academic disputes can be worked out or new assignments can be considered. The confidentiality provided in the process encourages candor, problem solving, and creativity.

Mediation is more predictable than litigation as well. The institution’s president and board of trustees want certainty and closure. No lawyer, however, can ethically or practically guarantee a particular result in court. Litigation is unpredictable: a document can surface that no one remembers, a witness can crumble on the stand, a jury may not appreciate the nuances of an argument.

Litigation involving academic decisions or multiple parties on a college campus can be particularly complicated. Mediation can avoid the consequences of submitting a disputed matter to a judge or jury that may not have the time or expertise to hear and understand the facts that led to the dispute in the first place. In mediation, without rules of evidence or procedure, the parties can use less structured and more accessible means to convey the heart of a problem to the mediator and the other side, which may facilitate effective settlement discussions.

University counsel should seriously consider using mediation to resolve simmering campus disputes or to settle threatened or pending litigation. While many campus disputes seem intractable, the presence of an outside neutral person may help all parties gain a different perspective on the matter, enabling them to develop strategies to get along, avoid continued conflict, prevent litigation, and reach creative solutions. **U**