II. TRANSFERRING ARBITRAL EXPERIENCE TO MEDIATION: OPPORTUNITIES AND PITFALLS

HOMER LARUE*
AND
HOWARD LESNICK**

LESNICK: We want to talk with you today about the ways in which training and experience as an arbitrator can be useful in working as a mediator, and the ways in which mediation calls on new or broader skills and talent. Our intention is to explore that question in a somewhat unconventional format. It derives from our experience as colleagues in a new educational venture, The City University of New York Law School at Queens College. The School was begun three years ago in an effort to reexamine the goals and methods of legal education. We would like to use here some of the approaches to lawyering and to learning that we are grappling with at CUNY.

First, we have attempted to emphasize working collaboratively as well as individually, because we believe that that is what lawyers do. We teach together and we ask the students to work together (a rather awesome thing in a law school). We also emphasize experiential learning. Rather than simply have students sit in a room and listen to the teacher, we try to have them also learn from their own experience, that is, the experience they bring with them, which we value, and the experience that comes from engaging in work at the Law School.

Finally, we encourage people to learn from their experience. Our model is one of reflective lawyering, not simply doing something and then going on and doing something else, but asking what did I do, and why, and how would I now want it to be different?

I say all of this because we are going to try to conduct this session in a way that is consistent with those themes and purposes. We are going to work together, and we are going to involve you to some extent in what we are going to do, in examining what the differences are between one's function as a mediator and one's function as an arbitrator.

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*Homer LaRue, Associate Professor of Law, City University of New York Law School at Queens College, New York, New York.
**Howard Lesnick, Distinguished Professor of Law, City University of New York Law School at Queens College, New York, New York.

LARUE: As Howard has indicated, we are going to be talking about mediation and arbitration, and we want to involve you in that discussion in an experiential way. To begin with, we would like you to join us for a few minutes in a very short exercise. First, I'd like to have all of you put yourselves into groups of three's. [Pause]

Okay, now that the introductions have been made and you are in your groups, two of you will be parties, the third person will be a neutral. Select who the neutral will be, and the other two will be the parties. [Pause]

In a few minutes the two parties will present arguments to the neutral acting as an arbitrator. Each of the two parties will argue for his or her right to possess a 38-volume gold-leaf set of the Proceedings of the Annual Meeting of the National Academy of Arbitrators. Both parties want this very badly. That is the focal point of the dispute. The neutral will have to render his or her decision within four minutes. Any questions arising between the parties as to procedure or allocation of time between the two arguments is to be resolved by the neutral. By the end of the four minutes, the neutral will have heard all arguments and should have disclosed his or her decision to the two parties.

In just a moment I am going to give the parties one minute within which to think about their arguments and then I will give the signal to begin. The two parties take a minute now and think about the argument that they want to present to the neutral. [Pause]

The proceeding will begin now. [Pause]

Please complete the first part of the exercise.

In the second part of the exercise, those who were parties in the first exercise will remain parties, and those who were neutrals will remain in the role of neutrals. This time, however, assume that the parties have selected the neutral as a mediator. The objective of the exercise is still the same: a 38-volume set of the Academy Proceedings. There will be five minutes within which the parties may say whatever they wish to say and either come to an agreement or come to an impasse with regard to the volumes. The parties and the neutrals will have one minute to think about what they want to say and how they wish to proceed. [Pause]

Okay, the mediation session begins now. [Pause]

Either you have come to a settlement by now or we will consider that you have come to an impasse.

LESNICK: As a final segment of this exercise, we would like to spend a few minutes on one aspect of the experience that relates most closely to what we are doing here this afternoon. In a moment, I am going to invite those of you who were in the role of arbitrator and mediator to consider several questions and then, if you have responses to any of the questions, to come to the microphone and briefly share them with us.

Recalling that those of you who were the neutrals were in a setting in which at first you were responsible for deciding the dispute, and in the second portion of the exercise there was no decision unless both parties agreed, these are our questions:

(1) How did that difference change the way you saw your job?

(2) How did it change the way you listened to the parties?

(3) How did it change what you listened for?

(4) How did it change (so far as you heard) the way that the parties spoke to you and to one another, and the way that the parties listened to one another?

Take a minute or two to consider your experience of the exercise as it relates to these questions. [Pause] Now, I invite anyone who has thoughts in response to any of those questions to say briefly what they were.

[Audience comments and colloquy, not transcribed]

We would like now to shift from your experience to ours, and explore some aspects of the afternoon's topic through a case study that Homer will present. Following that he and I will briefly discuss some questions raised by the case, after which we will invite discussion among the group.

LARUE: The case study that we are going to look at involves a small suburban town somewhere outside of New York City. The town has a population of approximately 12,000 people, and it is surrounded on three sides by three other communities, all of which are relatively wealthy. Our town, we will call it Newville, on the other hand, is a working class community. The other three communities surrounding it are all white, while Newville is all black. Newville is a town that prospered during the Viet Nam War, because of its proximity to a munitions factory which was in full-force production during the Sixties and Seventies. With the winding down of the war, the economic base of Newville fell.

The dispute is between the teachers' union and the school district. The relationship between the teachers' union and the school board has been a stormy one for some years. The teachers' salaries are well below those of the surrounding school

districts. The teachers, however, had gained some concessions with respect to work rules during the last round of bargaining. Moreover, the union had prevailed in a number of arbitrations during the course of the administration of the last contract.

During this round of negotiations, the school board was determined to regain ground that it had lost through the arbitration awards and at the same time to hold down the cost to the district. The board and superintendent were also determined to raise the quality of education in the district, which had been rated at next to the bottom in the county. They were convinced that the best way to accomplish the task of raising the educational level of the school district would be to initiate a merit pay program.

The contract negotiations went on for months without agreement, merit pay being one of the major issues separating the parties. Finally the teachers went on strike. The district was able to maintain some level of instruction in the schools, mostly through the use of substitute teachers. Very soon the dispute translated itself into one not only between the teachers and the school district, but involving the community as well.

The school board, which was all black, saw itself as representing the interests of the community and its desire for higher quality education. While the community was overwhelmingly black, the teachers' union was predominantly white. After the strike had gone on for some weeks, the community became frustrated with it. By the end of October the strike was in its 30th day. Representatives of the community began to demand to be a part of the negotiation process. They wished either to participate as active members, or in the alternative, to be in the room as observers of the negotiations. While the community representatives felt a stronger allegiance with the school board than with the teachers' union, they were intent upon putting pressure on both parties to resolve the dispute.

Both the board and the teachers' union resisted having the community participate or observe the negotiations. The community, the school board, and the teachers' union all professed the same interest, that is, to raise the quality of education in the school district. The board wanted to accomplish this by instituting the merit pay program and by gaining greater control of the curriculum and work rules in the school. The teachers vigorously resisted this, and insisted that if quality education was to be achieved, a merit pay program could not be instituted, and that the teachers and the school district had to reach a higher

level of cooperation with regard to the curriculum and other work rules affecting the teachers.

A little bit about the role of the mediation during this dispute: first of all, once the strike started, both sides requested the assistance of a mediator. I might also add that mediation was mandatory in this particular instance under state law. As the mediation began, the essential issues were: the merit pay program, control of the curriculum, and work rules. Obviously, the union's demand for a salary increase commensurate with that being paid in surrounding school districts was also of great importance.

One of the objectives of the mediation was to get both parties to see the priorities and the realities which the other side perceived. Additionally, both needed to understand how the community saw each of them. Both the teachers and the board continued throughout the mediation to bombard one another with statements that each was the true representative of the interests of the community. For the most part, the community remained in the background in the dispute, not an active participant.

In an attempt to get the parties to see their own realities in the context of the community's perceptions of them, I and my comediator decided to hold a community meeting. Representatives of the teachers and of the district made presentations of their position on the open issues. A representative of the community also made a presentation from the perspective of the community, but the meeting was one in which the teachers and the district were in the forefront, and the community was in the background.

Eventually, as is true in all disputes, this one came to a settlement. The school district dropped its demand for merit pay. Had it prevailed with regard to merit pay, this particular school district would have been the only one in the state with a merit pay program. The final package still left the teachers in the district behind in terms of salary compared with that of teachers in other districts. Some small degree of cooperation as to the curriculum and the work rules was agreed upon between the teachers' union and school district.

We are now going to take a look at a few aspects of this case history.

LESNICK: We would like to do that through a conversation between the two of us. To start: Homer, how would you have

proceeded differently in this dispute had you been acting as an interest arbitrator rather than a mediator?

LARUE: First of all, it seems to me that had the setting been one of interest arbitration, the participation of the community would have been much more tenuous. As a matter of fact, it probably would not have happened at all. The community would not have been able to put its views before the arbitrator without the consent of the parties. From the resistance of the parties to the community's presence in the negotiations, it is fairly safe to assume that the parties would not have consented to the community's participation in the interest arbitration proceeding.

LESNICK: Why is that? Why would the fact that it was mediation rather than arbitration lead you to bring the community in?

LARUE: The mediation setting seems to me to provide greater latitude in defining who are parties to the dispute. That is so because we are concerned with the interests of the participants in the mediation. In arbitration, we are concerned about rights. Those rights are defined to some extent by the issues, and the issues in this case revolved around the terms and conditions of employment. Such a definition of the issues defines the parties as the employer and the employee, the district and the teachers in this situation. The arbitration setting, by definition, provides far less latitude in the definition of parties and the interests involved in the dispute.

LESNICK: Are there other ways in which you would have proceeded differently in an arbitration?

LARUE: One of the things I would have handled differently is the issue of the merit pay program. Assuming that the teachers made a strong argument (and it seems to me that there were a number of strong arguments against the merit pay program both in terms of philosophy and in terms of it having been tried in other districts and having failed), arbitration would have provided me as an arbitrator with a logical basis upon which to rule against the district on the issue of merit pay. In a sense, in doing so I also would have been implementing some of my own notion of fairness, based upon the proofs which the parties presented.

LESNICK: You would have ruled against merit pay because you think you probably would have found that it was not a proper provision to put in the contract?

LARUE: That's right.

LESNICK: And what did you actually do with respect to merit pay in the mediation?

LARUE: Well, as we went into the mediation, the district seemed intent on having merit pay in the contract. It seemed to me that as mediator it was not for me to make a decision as to whether it was a good or a bad thing. My role as mediator was either to get the district to drop that issue because it was an impediment to a settlement, or—absent the union's ability to resist the inclusion of the provision in the contract—to make merit pay one more issue which had to become a part of the teachers' reality in terms of the need to make a settlement. So that the issue of merit pay, which could be disposed of based upon reasoned arguments in the arbitration setting, would be less likely to be disposed of in that way in mediation.

LESNICK: In mediation, then, it could be disposed of by the school board dropping it or by the teachers accepting it, and either way there would have been an agreement.

LARUE: That's right.

LESNICK: Are you saying that in mediation your own judgment as to the value of a merit pay program in the contract simply drops out of the equation?

LARUE: It becomes far less important, except as a way in which I as a mediator might be able to persuade one side or the other as to what position they need to take in order to reach an agreement. But certainly my opinion as to whether it is a good or a bad thing is not part of the equation.

LESNICK: When you think back on it now—and this is a long time later—would you say that as a mediator your main job, your role if you will, was to help the parties reach an agreement, with much less concern for what the agreement was, while as an arbitrator you have to consult your own notions, as shaped by the presentation, of what that agreement should be? What do you think now about the role you played as a mediator, putting that much primacy on reaching an agreement without much regard to the content?

LARUE: Two thoughts come to mind. First of all, it seems to me that it is still correct that the mediator complicates the situation by putting himself or herself in the position of judging the merit of a given issue. The mediator obviously has no authority to impose a decision. Essentially, the model of labor relations, in the public as well as the private sector, is one of representational

democracy. The parties are both represented by advocates and it is for them and their principals to determine the goodness or the fairness in an issue, so that it seems to me that the role of mediator overwhelms the issue of fairness.

LESNICK: Thinking back again to what you did in that dispute as a mediator, and what you have been saying about the role of the mediator, what are your thoughts now about the way that the community input was structured?

LARUE: I still think that the mediation process provided a greater opportunity for the community to have input than the arbitration process would have. However, the mediation process had its limits because of the model of mediation we were using. That model defined the parties to the dispute as the teachers' union and the school district. It restricted the degree of participation that the community could have. The kind of town meeting which we conducted was essentially one of the community listening to the positions of the two parties, rather than there being a true interaction between the community and the parties with regard to the dispute.

LESNICK: In a sense, it was still a hearing, except that the community rather than an arbitrator was the court.

LARUE: Very much. Each party made a presentation, an argument, and the community made a presentation as well. In a sense we were trying to achieve an expansion of the reality of both the union and the district. We were trying to get them to hear what the interests of the community were. The input of the community, however, was in the background, so much so that the community's articulation of its interests had little effect on either party.

LESNICK: Each side was trying to convince the community that it was right. If you think now about a different way that it might have been structured to be more fully mediative, are there other ways that you could have proceeded?

LARUE: It seems to me that one of the ways we could have seen our roles as mediators would have been to recognize that there were actually three parties to this dispute. We could have expanded our notion of whose interests were involved in this dispute and included the community. That would have required the community to be organized in such a way that a representative or a representative group of the community could participate in the process. The nature of that participation would still be a matter for discussion among all involved in the dispute.

However, as long as the community remained as dispersed as it was, it was very difficult for it to be articulate. It seems to me that one of the tasks that the mediator may very well have, when involved in a dispute in a community, is the need to understand the organization of the community and possibly even the need to organize the community so that it may be in a position to articulate its interests.

LESNICK: We have used this example to illustrate several aspects of the issues that are raised for one who is brought up in the arbitral tradition. Our premise is that mediation is not simply another way of resolving disputes. It is that, but it is one which is fundamentally different from others we are used to. The contrast, for example, between arbitration and litigation is far less than between arbitration and mediation, primarily because the neutral does not decide the dispute and does attempt to aid the parties to come to a decision that they are both willing to adopt. So much flows from that difference. The two aspects of the difference that we focused on are the effect of your own sense of what the right answer should be, and the extent to which mediation challenges your skills as a listener. I want to say just a word about each of those and then invite your thoughts.

To be a good arbitrator, what qualities do you need (other than the ability and willingness to sit through meetings like this one)? You need to be able to sort things out, to have a sense of relevance; you need to be open, to listen to the parties' arguments as an input for your decision; you need judgment, and the ability to act on your judgment.

Many of those qualities are relevant to being a mediator, but some less so, and others become more salient. Your sense of what the right answer is, your sense of fairness or of what the law says, becomes a much more complex matter. Homer felt and still feels that it was inappropriate to bring his views on merit pay into play, or to say simply, "I don't think merit pay is a good idea and therefore you should drop it." And yet he thinks now that he would not say that he has no concern for what the result is so long as there is a result; he would try to help the parties express to one another, and truly hear from one another, their own priorities and the concerns that underlie them.

LARUE: I am not at all certain that the mediator in a situation outside of the labor area can take exactly the same tack as he or she would in a labor-management setting. In a community dispute, there is no sophisticated party who knows how to maneu-

ver in the situation; the mediator may, therefore, very well be called upon to exercise other faculties in addition to those that Howard has indicated in order to ensure that the outcome of the mediation is one which will be lasting. A settlement which is patently unfair for one side or the other is probably not a lasting agreement. Yet, as soon as the neutral steps over a line and becomes too concerned about the issue of fairness, he or she is no longer neutral. I submit that it is a problem which those of us who have been trained in the labor-management model find most troublesome when we move out of that model and into an alternative dispute resolution model.

LESNICK: The listening that goes on as a mediator is a much more subtle and complex, layered form of listening. Of course you need to listen to what the parties say, but it is not enough that they convince you that they are reasonable or right. Each party needs to listen to the other, not to agree of course, but to understand one another's priorities, their realities, what is pushing or pulling them. And the mediator needs to help that process along, help the parties to hear one another.

There is much in the traditional way that we, we lawyers particularly, think about disputes that requires some adjustment in that context. So, for example, the community meeting that was held, although it was a bit of an innovation and might not happen in an arbitration, was set up primarily as a way that the parties could speak to the community. It was not primarily designed for the reverse to happen. Yet, the idea of a community meeting as a mediative act changes the dynamic by introducing the participation of the community into the thinking of the parties. Until you get to the stage where the parties are speaking to one another, and not speaking to persuade a third party, they are not really engaged in the process.

What mediation requires, therefore, are the talents that go into arbitration, and something more, something harder to describe.