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Mediation: A Win-Win Situation

Veteran Mediator Cathy Neelan Explains Why By Lu Stasko, Special to *right of way*

Scholars dispute and the case is still before the courts.

— Horace, Roman poet (Quintus Horatius Flaccus) 65 - 8 B.C.



The rancher was angry and he had a gun.

Fortunately, instead of aiming it at the Forest Service people who have been vexing him for years with their inefficient methods of trying to secure a permanent right of way through his land, the frustrated rancher fired shots only into the air. But the long-festering issues between him and his government might have escalated into something far worse if cooler heads hadn't called in Cathy Neelan.

The veteran mediator stepped into the fray with an open mind and a wealth of experience and, in a matter of months, successfully negotiated a resolution to a dispute that had been percolating for years.

These days, Neelan is plying her mediation expertise on behalf of Knight Armour Incorporated (KAI). During the course of its five years in business, the Denver-based environmental, engineering and management consulting service has worked with numerous governmental agencies, utilities, private businesses and individual citizens to construct meaningful resolutions to issues ranging from right of way to environmental cleanup. And what's more, in servicing groups as disparate as the U.S. Environmental Protection Agency, Native American tribes and railroads, KAI has done its job without having to resort to the time-consuming, money-consuming process of litigation. Instead, the company has forged an expertise in alternative dispute resolution—the industry term for mediation.

Few people know the ins and outs of mediation better than Neelan, program manager and senior mediator for KAI. A mediator with 15 years' experience, Neelan agreed to sit down with *right of way* Magazine and talk about her profession.

Let's start with a basic question: What is mediation?

In a nutshell, mediation is the process through which you help the parties decide what the solutions to their dispute will be, without having to resort to the courts.

Why is mediation an advantage over litigation?

Instead of tying up an issue in the courts for multiple years, the intent of mediation is to get something resolved in a more expedient fashion. In virtually all cases, mediation is regarded as cheaper, faster and more flexible than litigation.

In fact, what you find happening more and more often with a lot of disputes is, if there's no clear legal violation or potential for harm, courts are actually directing people to first try mediation.

Besides the time and cost factors, are there any other upsides to mediation?

Frequently, when opposing parties resort to litigation, the process is contentious. You usually wind up with a win-lose situation, where somebody feels they were unfairly treated. With a mediated settlement, you have a win-win situation, where each party controls a little bit of the outcome.

Mediation also works well when there is going to be a continued relationship between the parties. For instance, we're currently mediating a rail yard dispute in Utah that involves the EPA, the railroad, the Utah Department of Transportation, and a local municipality. But once this dispute is settled, as many of the parties are going to have to continue to deal with each other, so it stands to reason that they would use mediation and come away feeling good about the process and knowing they can work together during any future problems.

Mediation can actually make people feel positive about negotiating?

A lot of right of way disputes involve what we call positional negotiations and interest-based negotiations. A positional negotiation is about money: "I want \$500,000 for that piece of land you want to put a highway on." That's pretty cut-and-dry. But a lot of mediated discussions aren't only about money; they're about security issues, psychological needs, and sentimental attachments. They're about simple dignity, being treated fairly. Say you have a rancher and some of his land is needed for a new road or a rail spur. Maybe all he wants is for the construction to be delayed a month, so it won't take place during the calving season. If he feels he's being treated fairly, he may not be so hard-nosed on the positional issues.

Are you saying that mediation isn't just always about dollars and cents?

Absolutely. You asked me about that dispute involving the rancher who fired his gun in the air at the Forest Service. Well, the dispute was about the Forest Service trying to secure a permanent right of way through his land. Now sure, he was old and cantankerous— but once we got involved, we discovered during the conflict analysis stage what some of the reasons for his anger, frustration and hostility were. Nobody in the Forest Service would make a decision. What's more, they kept changing the personnel he had to deal with. In other words, this man felt— and not without justification— that he'd been given the runaround.

Once we got to the heart of this issue, we were able to address other long-festering issues. With this man, there were self-esteem factors. He needed to feel like he was psychologically in control of his land, and who crossed it. But he also needed to feel that he was being treated fairly. Eventually, over some months, we mediated a settlement. But in mediation you have to be sensitive to those issues, which may not always be apparent at first.

What qualities does a mediator need?

They have to be fair-minded, really neutral right from the start. They don't necessarily have to be content experts, but they should have some background in the area. They also have to be quick

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studies; oftentimes, a dispute has a lot of history and a good mediator has to be able to familiarize himself with the facts and details in a hurry. It's also very important that the mediator has familiarity with the diverse cultures and communities that may be involved in the dispute.

What about training?

We use mediators with different areas of expertise. Some of the people we call on may have Ph. D's in environmental areas, if that's the nature of the dispute. We may use lawyers. We even have some judges that we use. It just depends.

It's important to understand that while I'm Knight Armour's primary full-time mediator, we have others that we call on an as-needed basis.

One last question: Are there situations where mediation isn't the answer?

Sure, there are times when you pretty much have to go through litigation. Typically, these involve situations where there has been some sort of legal violation or the potential for harm exists. I mean, if somebody shows up at somebody else's front door with a gun and threatens them, there's potential for harm there. Of course, if that happens, chances are you should have sought out mediation a lot sooner.

Cathy Neelan will speak at the Chapter 6 meeting on February 12, 2002. For more information, please contact Greg Berry at (303) 442-4983.



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