

Volume 39 Number 09 • [chicagolawyer.com](http://chicagolawyer.com)

A Publication of Law Bulletin Publishing Company

# Chicago Lawyer®

September 2016 • ADR & Mediation Issue

## BRING IT TO THE TABLE

Tips for a successful  
mediation





# The mediation toolbox

Mediators share what separates them from litigators and the tools they use to achieve successful settlements



By Emily Donovan

**P**eople cry so much when Karen Shields is trying to help them, she has a routine response.

She puts the Kleenex box that's in every room on the conference table in front of them. She takes the first Kleenex herself, so the gesture is more "we can all use Kleenexes" rather than putting anyone on the spot.

If both parties start crying — and it happens fairly often — she says, "Listen, guys, you can cry all you want but you cannot make the mediator cry."

And they laugh.

Shields, a former Cook County associate judge in Cook County Circuit Court's Domestic Relations Division, is now a family law mediator with JAMS Inc. She helps couples determine the terms of their divorce and solve questions on child custody and visiting hours. In a way, she promotes the crying.

"You can't get to the issues themselves without going through the emotions," she says.

If someone promises he or she will not cry, then "don't cry, don't cry, don't cry" becomes all they can think about — they get locked in, the emotions harden and the defenses go up. But, Shields says, crying can force them to break through that.

Plus, mediation is a safer place for parties to cry or shout than in a courtroom. Judges won't let a party come in and shout about something unrelated to the case that the other party did years ago just because he or she still is not over it. The reasons why two parties disagree isn't the judge's job.

That is, however, part of Shields' job. And it's her job to know how to use the unique set of methods and techniques in her mediator's toolbox that a trial lawyer may not.

*Karen Shields, a former Cook County associate judge, is now a family law mediator with JAMS Inc. Photos by Lisa Predkox*

## What mediation is

Mediation usually takes a day, starting at 8 a.m. and lasting until completion, and the parties have the mediator's undivided attention. Meanwhile, a civil case in Cook County Circuit Court's Law Division in 2015 took an average of 39.7 months — three years, three months, 21 days and seven hours — from filing to verdict.

That delay is a big part of what made Bill Hartgering leave his legal practice in 1981 to become a mediator and arbitrator. He founded the JAMS' Chicago office in 1982.

"We're trained in law school, especially if we want to be litigators when we grow up, that everything is about the trial," he says. "But trials, especially in commercial matters or in parties with ongoing relationships, don't happen as a statistical reality."

Only about 3 percent of cases filed actually go to verdict, according to statistics provided by the court's Law Division. While the court doesn't have a way to track how many of the remaining cases are settled in mediation, Hartgering says lawyers settle most cases without a mediator or even during a pretrial conference with a judge.

"That's why the cases that we get generally are harder and are usually, sometimes, a little overripe," Hartgering says.

Plus, waiting to go to trial means waiting an average of three years, three months, 21 days and seven hours without the client knowing whether they will be compensated for a devastating injury, for example. Even once a case goes to verdict, the losing party could appeal the decision and extend the client's limbo. And, clients have to pay their attorneys for all their time.

Then there's the perk of confidentiality. While anything that happens in open court is public record, a mediation is handled privately. If a hospital doesn't want to be known for accidentally amputating the wrong limb or if divorcing parents don't want their squabbles over who gets the kid which weekend to be gossiped about, mediation can keep them out of the public eye.

Neither major mediation service would release exact percentages, but a JAMS spokesperson says its mediators settle the majority of its cases, and an ADR Systems spokesperson says it strives for mediators to settle 90 percent of its cases. There are also independent mediators, which can

include lawyers who mediate part-time in addition to their regular practices.

Still, says Keith Brown, a mediator with ADR Systems and the former chief judge of Illinois' 16th Judicial Circuit Court (at the time composed of DeKalb, Kane and Kendall Counties), most of the cases that come to mediation are difficult.

"If they could have settled without you, they would have," Brown says.

## Position vs. interests

Airing out underlying problems in mediation opens up more possible solutions, one expert says.

"This is the most important idea in dispute resolution: the difference between position and interests," says Len Riskin.

Riskin is a visiting professor at Northwestern Pritzker School of Law. He researches dispute resolution, publishes books and articles on the topic and won the 2013 award for outstanding scholarship from the American Bar Association's Section of Dispute Resolution.

He says a lawyer generally deals with his or her client's position: What outcome the client wants and thinks he or she is entitled to.

But a mediator, Riskin says, deals more with the party's underlying interests: What the party really needs or why the party wants the item being asked for.

"If we know more about each other than just our legal claims, it's possible we can work out an agreement that suits all of our interests," he says.

Brown says the number one thing in a mediation is to know what the parties' objectives are. He tries to go beyond numbers. He says that in ongoing lawsuits, the parties "don't feel like they're in control" and going to a jury trial can be unpredictable, expensive and emotional. He tries to give them some sense of certainty, talking about exactly what the person can do with the potential settlement money.

"I can't replace someone's leg, but I can give them the tools and the resources to make their lives better," he says.

If the conflict is between people who know each other, he often finds the parties actually just want to reconnect and make sure their relationship isn't altered by a lawsuit.

"I've settled the case on an apology sometimes," Brown says. "After you talk to people, all they wanted was for someone to

say I'm sorry and that helped settle the case."

Sometimes what the parties really need is to vent, says Stuart Nudelman, a mediator and arbitrator with ADR Systems and a retired Cook County circuit judge. What the party asks for may not be what is really needed or what the party wants in the future, but just a starting point, he says.

"The truth is very often what it is at the point that they're telling it to you," Nudelman says. "It may not be the same truth two hours later or three hours later, but it's the truth for that particular time."

Nudelman will sometimes put the parties' lawyers in a room together alone. They might speak more directly with each other when they don't have a client audience.

Sometimes Nudelman will put the two parties in a room together without the lawyers. Especially in commercial cases, he's found parties alone might be more practical. If they're not talking about tricky legal issues, they will focus on the bottom line: How much money they have lost; how much more they will lose paying their attorneys and taking time off for the trial; and what they need to do to avoid losing more money and time.

"They'll walk out 20 minutes, half an hour later, and we've got a case settled," he says.

## Keep them talking

The major thing is to keep the parties talking, Nudelman says.

"Even if you're moving in \$5,000 increments, it may be boring and seem like you're not going anywhere, but as long as everybody's still in the room, there's a possibility you're going to settle the case," he says.

If parties reach an impasse and refuse to believe there are any other options than the extremes, Shields will throw out a wild idea. They might recognize there are better ideas out there if they hear a plan they both hate, like switching child custody to every day.

"They'll go, 'No! We'd never do that,'" Shields says. "And I'll go, 'Well, I know, but it's an option, isn't it?'"

Shields does a lot of talking at the beginning of the mediation to explain the process, but later only speaks to lead the conversation. She also does a lot of listening.

"You know that old thing about you go





*Karen Shields sits at the mediation table with Bill Hartgering, who founded the JAMS' Chicago office in 1982.*

into a therapist and the therapist just sits there?" she says. "They don't speak to you, just sits there and waits because whatever comes out of your mouth is sort of where you need to go."

Shields lets the parties sit in silence in the same room together. People can't stand it.

"It's unbelievable how many times with silence somebody will say, 'How about I do this?' and that gets the conversation going," she says.

### **Snacks and space**

Lay's potato chips, pretzels, Cheez-Its, fruit snacks, nuts, several roasts of coffees, tea, bottled water, sodas, juices, Snickers bars, Milky Way bars and Swedish Fish lay in baskets and mini-fridges at the JAMS Loop office for clients and attorneys to graze.

People get ornery when they're hungry, Shields says. She puts the baskets of comfort food in the middle of the conference tables, which lets people reach over and grab snacks throughout the day without having to get up.

Sandwiches, salads and hot foods are delivered in the middle of the day, which breaks up the mediation into collecting information in the morning and negotiating solutions in the afternoon.

The office space and all the food amenities are key to Shields' successful mediation. She keeps people fed and splits them into separate rooms, from the big conference room with wall-sized windows

and a large table at the beginning of the day, to separate, smaller rooms with circular tables later on.

She's wary of where people are seated, too. People aren't able to focus if the opposing party's attorney has a booming voice and is seated next to them or if their ex-husband is standing over them. It's the same social cues we use in daily life, Shields says, but applied professionally.

Some parties can't stand to be in the same room and should never be left alone without the mediator and lawyers. Nudelman says that while his personal-injury parties generally can recognize it was an accident, some former business partners take disputes personally.

"I've had cases where we've had to split into different floors because they don't even want to run into each other in the bathroom," Nudelman says.

The downtown JAMS office also gives clients more room to throw a tantrum.

Once at 9 p.m. — 13 hours after the mediation had started — one party said he wouldn't put up with it any more. He loaded up his backpack, stood up and said he was leaving. The other party yelled at Shields to run after him and bring him back.

"I said, 'He's not going anywhere. Just be patient,'" Shields says.

The other party wouldn't hear of it and demanded Shields go after him. Shields listened, got up, but took her time. She reached the floor's lobby area to see the first party standing at the elevator bank.

Before he could see her, she watched the elevator door open and close, but he continued to stand before the elevator. He was waiting for her to come get him, she says.

"He doesn't want to leave, but now he's made this thing and it has to look like I went and got him before he could get on the elevator," she says. "But I bet the elevator door had closed 10 times."

### **'Before everybody gets to the table'**

Halfway through one of Bill Hartgering's mediations years ago, one party pulled out a video of the other guy. The guy was in a neck brace and supposedly barely mobile, but on the video he's active and spry.

It was a total "Gotcha!" moment.

In a courtroom, that may have helped win the case. But in mediation, that can make the other party walk away from the table entirely.

One of the worst things that can happen in mediation is a surprise, according to Hartgering and Nudelman. A surprise means they don't actually intend to talk it out that day.

That's why Hartgering will talk with both parties separately the night before the session starts. In addition to giving Hartgering an idea of what each side is thinking, it allows each party to vent directly to Hartgering without the other party in the room, getting some of the emotions out of the way.

Hartgering also tells the lawyers to call him if there's anything else he should know. Every now and again, a lawyer will call later to say his client is difficult to deal with or madder than hell. That warning can help Hartgering avoid trouble before it flares up.

Sometimes one side will have a document or piece of evidence up their sleeve that they tell Hartgering he can't tell the other side about. Hartgering will have to explain the evidence will probably come out eventually anyway, either in mediation or in the courtroom, and if they want to settle soon, they should share.

Similarly, Nudelman has all the parties and lawyers get on a conference call with him before the mediation day. He starts simply, saying the call is for him to find out as much as he needs to know and asking each side for a brief rundown of the case.

Then he asks about the things that have led to bad surprises in the past: Are there any issues with an insurance carrier



claiming there's no coverage here? Is there anyone else who someone thinks should be taking part of the mediation as another party? Can everyone sit in a room together?

Nudelman tells them what documents he needs and encourages them to send copies of their submissions to the other party.

Hartgering says a lot of what mediators do to get people to get along and be willing to resolve their conflict happens well before the actual mediation.

"A lot of that will be what you do before everybody gets to the table and how you structure the table," Hartgering says.

### 'A fundamentally different job'

In eight years of mediating four to five cases a week, Shields has only met two couples where she thought one or both of the parents might just be evil.

Everybody else wants their case settled and to be able to walk away on amicable terms. That's the thing about mediation: Everybody has to go into wanting to settle that day for the process to work.

At worst, Shields will have to talk a soon-to-be-ex-spouse out of an emotional spiral. It can sound like she's talking to children.

"Will you go to your room?" she has asked a full-grown man who was provoking his ex-wife at a joint discussion.

"Are you spent?" she's asked an adult woman who had slumped over the table after pounding the walls and screaming with rage.

An attorney may not tell his or her client off in front of Shields, but the attorney may inform her privately in the hallway that he told his client, "You can't act like this."

Shields has walked into a room to find an attorney responding to e-mails on his phone while his client sobs in the seat across from him.

Going back to her belief it is best to get as much of the emotional baggage out as possible, she thinks an attorney who ignores his client like that can actually be better for a client than an attorney who might hold the client's hand and attempt to protect any hurt feelings.

"We all are willing to wallow in our own emotions if people will let us," she says.

Hartgering says a trial requires lawyers to behave differently than they should in mediation if they want to settle that day.

"Particularly if your whole job is as a litigator, you've got to have an answer for everything, and there's got to be a defense for everything," he says. "It's a fundamentally different job."

A good lawyer for mediation doesn't pound the table to show his client how tough he is, Hartgering says.

In mediation, he tells lawyers to not ask any questions they already know the answers to. What attorneys should want to show their clients is that they have raised issues the other side has to think about differently now, he says. Mediation is about collaboration, not combat.

Shields says most attorneys know how to help make a mediation successful, but she is wary of attorneys who haven't been part of a mediation before. When she opens the mediation, she explains to the parties — fully aware the young attorneys are sitting there listening — that although the attorneys are there and can talk sometimes, the mediation is for the parties.

If there is someone in a mediation who is being difficult or is tearing apart every proposal, Shields will try nudging this person with a reminder that he or she is in mediation to settle the case. If nothing else is working, Shields will bust out her big guns, the line she saves for emergencies: "I don't want you to waste your time in mediation."

### 'It's their show'

Mediation also requires a different role for the mediator. While many mediators — like Shields, Brown and Nudelman — are retired judges, the demands and rewards are different in a conference room than on the bench.

Hartgering says being the mediator means lawyers and clients can tell him more than they might want to or need to tell a judge.

"I get the warts," Hartgering says. "If I don't get the warts, it's going to be harder for me to settle that case."

Brown says having to spend a whole day trying to settle a case makes him much more emotionally invested.

Having more time with the case also means Brown can be creative in his approach. While he would usually cut to the chase as a judge, he gets to use

metaphors and take inspiration from sermons as a mediator.

He tries to simplify conflicts and talk about things that will put the parties at ease. One time when the parties were at an impasse, he got abstract.

"You know the scene out of the movie 'The Good, the Bad and the Ugly?'" Brown asks.

In the film, Clint Eastwood's character — a bounty hunter known as "the man with no name" — and others need to cross a certain bridge in their search for a buried fortune. But the bridge is contested by Union and Confederate soldiers, effectively blocking the group's path to the gold.

"I had them watch the video, then I said, 'This is stopping you, this conflict that you're having, from getting back to your business and doing what you do best,'" Brown says.

Since he won't be the trial judge making a final ruling, Nudelman says he can talk more freely about what he thinks of the case as a mediator. He can also make small talk, chatting about vacations and grandchildren to make the parties feel more comfortable.

Still, at the end of the day, the mediator isn't the center of attention in a mediation.

Brown says he's always thought of lawyers as knights in shining armor. When he decided to be a judge, a friend teased him: "You want to be an umpire? I thought you wanted to be a home-run hitter. No one remembers the umpires."

Nudelman got more attention even as a judge than as a mediator.

"I had the kind of job where I walked into the room and everybody stood up," he says.

As a judge, Nudelman had the last word. In mediation, however, he says, "It's not my show. It's their show."

While a judge tells the parties what they have to do, a mediator's job is only to help the parties decide what they want to do for themselves.

Nudelman cites an old adage: "One of the best compliments a mediator can get in a successful mediation is a lawyer says, 'You know, we really didn't need you here.'" ■

[edonovan@lbpc.com](mailto:edonovan@lbpc.com)