

# LAW MEMO

## The Challenges of Getting to “Maybe”

At the St. Louis Volunteer Lawyers and Accountants for the Arts, where arts-related mediation services have been available since 1997, it is often harder to get disputing parties to agree to talk than it is to reach agreement once the talks have started.

Why is getting to “maybe” more difficult than getting to “yes?” How do we “sell” the process? This issue of *Arts Law Memo* answers these questions, provides a dispute solution glossary and promotes an upcoming demonstration of the mediation process.

### WHAT IS MEDIATION?

The purpose of mediation is not to judge guilt or innocence but to help

Mediation is particularly well suited for the arts because it addresses relationship issues (like trust, respect, fairness, friendship) and procedural issues (like how decisions are made) as well as substantive issues (like money).

disputants get at the root of their problems and devise their own solutions. Mediation uses an independent, neutral third party to facilitate the process.

Mediation is a “win-win” proposition. Both sides come away with something. Both sides give in a little. Both sides have aired their feelings.

The mediation process is particularly well suited for the arts because it addresses relationship issues (like trust, respect, fairness, friendship) and procedural issues (like how decisions are made) as well as substantive issues (like money). In fact,

interpersonal and institutional issues tend to overshadow our clients’ financial concerns.

Mediation is most effective when:

- The parties are friends or colleagues.
- The parties may work together in the future.
- Damaged reputations are a concern.
- There are alternative remedies to explore.
- The parties really want the dispute to end.
- One party’s goal is not to gain personal compensation, but to prevent others from being exposed to the same type of behavior or situation.
- There are emotional issues underlying the surface problem(s).
- The parties feel uncomfortable confronting each other unless someone else is present.
- The amount of money in dispute is small.
- A decision needs to be reached quickly.
- Other people are involved or indirectly affected by the dispute.
- The agreement was oral.
- The parties doubt their own ability to work out the problem without assistance.
- A third party (such as a funding agency) suggested mediation.
- One or both parties don’t want to be represented by an attorney.
- One or both parties want to avoid going to court or to arbitration.

### NO TYPICAL CASES

While a case may involve a writer’s contract with her publisher, landlord-tenant matters, ownership of intellectual property, a problematic collaboration or a board’s conflict with staff over decision-making responsibility, no case is really typical. What is typical is that our office is contacted by one of the parties, who is distraught, frustrated or, as our brochure says, “mad enough to sue.”

Although they may be angry or even combative, the callers seem more intent on venting than in securing the services of an attorney, and they rarely mention litigation.

Mindful that our intake procedures should be consistent with the mediation process, we try to build trust and credibility

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Volunteer Lawyers and Accountants for the Arts (VLAA), *Arts Law Memo* is mailed, free of charge, to more than 850 Missouri and Southwestern Illinois arts organizations, VLAA volunteers and corporate sponsors.

VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



This issue was written by Sue Greenberg, VLAA’s executive director.

*This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.*

### St. Louis Volunteer Lawyers and Accountants for the Arts

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by stressing our impartiality, promising confidentiality and establishing rapport.

We ask the caller to explain the matter in dispute and suggest that mediation may be an effective way to resolve the conflict. We also offer to refer the client to one of our volunteer attorneys to explore the legal issues surrounding the problem and its likely settlement through more familiar means.

With very few exceptions, the parties who initiate contact with our office say they are willing to consider mediation. Some are eager to jump into the process right away.

At the request of the first party, we contact the second party, usually by phone. Again, we listen to the information about the dispute and provide information about our referral and mediation services. We follow up with a letter, brochure and additional phone calls.

#### **OBSTACLES**

We face several obstacles in gaining a commitment to mediate. First, written contracts are unusual, and when they exist, the agreements do not include an “embedded clause” requiring mediation.

Second, other interested parties, particularly government funding agencies, have not recommended mediation — not because they don’t believe in the process — but because their constituents are reluctant to tell their funders that they have a problem.

Third, we usually get involved too late. Second parties are frequently so hostile or emotionally damaged that they seem incapable of understanding that there are productive means to solve their disputes.

Fourth, they are frequently the more powerful disputants, which makes them unmotivated to address their conflicts or accept the services of another party, especially when they are unfamiliar with the St. Louis Volunteer Lawyers and Accountants for the Arts.

Fifth, statistics are not on our side. Single-party requests for mediation result in fewer instances of mediation. The rate of refusal in community and interpersonal disputes, even when free

or low-cost services are offered, is very high — anywhere from 30 to 50 percent.

According to Christopher W. Moore, author of *The Mediation Process*, “researchers attribute rejection of mediation services to 1) unfamiliarity with the process, 2) rigid adherence to a win-lose approach to dispute resolution, 3) intense emotions that block communication, and 4) habitual attachment to judicial means of dispute settlement.”

We keep these findings — as well as the factors that make mediation attractive— in mind as we attempt to “soft sell” our services.

Any activity, institution, or process that is strange or new can be intimidating and is much less likely to be used than one that is well-known. Mediation is not a familiar process for much of the public, including the arts community.

Compared to other states, including New York, Michigan, North Carolina, Massachusetts, California, Florida, Ohio, Texas and New Jersey, Missouri and Illinois have fewer community-based mediation programs, and only a few family courts are requiring mediation in child custody disputes.

#### **REASONS TO BE OPTIMISTIC**

On the brighter side, more area elementary, middle and high schools and some colleges are turning out students who have had direct experience with mediation/conflict resolution programs or curriculum. These graduates not only bring conflict management skills, they also bring expectations about how they should manage and respond to conflict.

Although polls say increasing numbers of people believe that reaching a win-win is in their best interest, our disputants often lack confidence in resolving their own conflicts through a non-adversarial process. In order to see mediation as a viable option, we must shift their belief systems concerning the ways in which fair outcomes are determined.

For us, avoiding the cost of litigation is not the most compelling

argument. Instead, we do point out the benefits in terms of personal costs such stress, as loss of dignity and damaged reputations.

To stress the mutual advantages of using mediation we emphasize that:

- Mediation is informal and voluntary, and that either party can terminate the process at any time, so neither party is able to intimidate, exploit or manipulate the other.

- Mediation allows the parties to control the outcome by helping them recognize each other’s legitimate needs and design creative options that meet those needs. The parties are much more likely to comply with the terms of an agreement they have worked out themselves.

- Mediation provides a structured negotiating environment in which the parties can express their emotions in the presence of each other and of a respected neutral — an important first step toward resolution in most disputes. Mediation is not therapy, but it is therapeutic.

- Mediation parties leave with their self-respect intact, reducing the risk that one might feel the need to “get even.”

- Mediation allows the parties to continue to work together or terminate the working relationship with mutual respect. The arts community is closely-knit. Simply ignoring the other party as a means to resolve conflict does not come as easily as it does in some other arenas.

- Mediation has an enviable success rate. According to the American Arbitration Association, more than 85 percent of mediations result in settlement.

#### **GETTING TO “YES”**

Mediation requires two ingredients: the good faith willingness of the parties to mediate and a skilled mediator.

VLAA’s Arts Resolution Services can provide the volunteer mediator. We encourage artists and arts organizations who need assistance in resolving or preventing disputes to exercise their good faith by embracing this process, which can yield quick, confidential and satisfying results.



# How Mediation Works

a theatrical lecture-demonstration

**Tuesday, March 11, 2003**

**7:00 p.m. to 8:30 p.m.**

**at Focal Point**

**2720 Sutton Blvd. in Maplewood**

(south of Manchester, a few blocks east of Big Bend)

Don't take our word for it. See for yourself how mediation can help resolve conflicts.

The advance registration fee is \$5. Registration at the door will be \$10.

*Refreshments will be served.*

For more information, contact Sue Greenberg, 314/652-2410 or [vlaa@stlrac.org](mailto:vlaa@stlrac.org).

*St. Louis Volunteer Lawyers and Accountants for the Arts is supported by the Regional Arts Commission; the Illinois Arts Council, a state agency; and the Missouri Arts Council, a state agency.*

**Please return this form with your check no later than Friday, March 7.**

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## DISPUTE RESOLUTION GLOSSARY

**Litigation** involves a judge and/or jury who determines guilt or innocence. A decree or sentence is imposed by the court depending on the decision, which is based on the presented evidence.

**Arbitration** involves an independent third party who resolves a dispute. The third party hears both sides of the problem, then decides what the solution should be. The process is called "binding" arbitration if the parties agree to accept the arbitrator's decision in place of a decision rendered by a judge from the public court system; this decision may be confirmed by a court and enforced by the judicial system. "Non-binding" arbitration gives the parties the opportunity to seek the opinion of a neutral third party without committing themselves to implement it.

**Mediation** involves an independent third party who facilitates the resolution of the dispute. The third party hears both sides of the problem and helps the disputants reach a satisfactory decision about the issue at hand. The mediator provides a forum where the disputants can construct their own mutual agreement. Mediators work directly and in-depth with the disputants. They encourage discussion, but are not concerned with elaborate rules of evidence. Mediators try to help disputants reach their own agreement; they do not decide what the solution should be. Mediators help disputants achieve lasting solutions they have no authority to enforce agreements made by the parties.

**Negotiation**, which may take place throughout all of these processes, involves the parties' own strategic bargaining to reach a mutually acceptable agreement. Negotiations may or may not involve a neutral facilitator. If it does, the facilitator assists the parties by helping them to clarify and communicate their positions to each other, while encouraging them to identify possible areas of agreement and mutual benefit.

Adapted from material provided by the the California Lawyers for the Arts and the Neighborhood Justice Center of Honolulu.