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Neutral Loves Magic That Mediation Makes Possible

Kenneth Cloke

Mediator, arbitrator

Santa Monica

Age: 63

Affiliations: ADR Services, Center for Dispute Resolution

Location: Santa Monica

Specialty: Labor-management, criminal, divorce, corporate and international disputes

Rate: \$0 to \$250 an hour

By Don Ray

Kenneth Cloke is in it for the magic.

The veteran mediator, arbitrator, law professor, speaker and author sees his job as being about more than getting people to agree.

"It's one thing to recognize that mediation is a useful mechanism for resolving disputes," Cloke says. "But it's another thing to experience the magic that mediation makes possible when people who have been unable to speak to each other all of a sudden have conversations with each other and are able to resolve their disputes in a unique and creative way."

He says the legal process is really just the backdrop for what he calls the primary solution: helping people take responsibility for what led to the dispute, then talk openly about solutions.

"Virtually every mediator who is open to having this kind of experience," he says, "will experience it at some time in their life - that is, this magic that happens."

Often, Cloke says, the litigants aren't always as interested in money as they are in abstract things: an apology, recognition of how they were wronged, an opportunity for direct conversation or, simply, an acknowledgement.

With what he calls interest-based negotiations, it's possible, he says, to structure conversations in a way that focuses less on enunciating specific demands and more on exploring what makes a particular position so important.

"You can say every conflict breaks your heart," Cloke says. "In certain cases, what people actually want is an opportunity to have a direct, open, heart-to-heart conversation with each other."

That especially applies to divorce, he says, where the real issues sometimes are not anger but grief.

"It makes sense because the divorce is the loss of the most important relationship in their life," Cloke says. "But mediators are not always trained to facilitate conversations about grief."

Cloke, 63, is the director of the Center for Dispute Resolution in Santa Monica and charges up to \$250 an hour. He even takes cases pro bono when the need

arises.

He says he most enjoys working with clients where there are intense emotions involved.

That's one of the reasons Marina del Rey attorney Nancy Bornn of Bornn & Surls turns to Cloke to resolve disputes. Bornn's been working with Cloke for 20 years.

"He's especially skilled at resolving highly charged, emotional disputes," she says. "I've used him in rape cases, sexual-harassment cases - any cases where there's a long-term personal relationship between the parties."

Bornn says Cloke is especially adept at recognizing and using the mediation process as catharsis for the parties.

"He's particularly sensitive and empathic to the parties before he addresses the financial issues," she says.

At first glance, Cloke may appear to be leaning toward the touchy-feely, but he backs it up with a solid legal foundation. He did his undergraduate work at the University of California, Berkeley, and graduated from Boalt Hall in 1966.

He earned a Ph.D. in history from UCLA and a master of laws degree from UCLA School of Law in 1980. Cloke also did post-doctoral work at Yale University School of Law.

Professionally, Cloke served as an administrative law judge for the state Agricultural Labor Relations Board from 1978 to 1983 and for the Public Employment Relations Board.

As a bench officer, he soon began to understand that his task was to reach a result that was just, he says.

"Part of the job of a judge is to do justice," Cloke says. "It wasn't clear to me exactly what that was, except that I knew that it was difficult to get to, given the nature of the way in which attorneys went about presenting their cases - that is, hiding information, engaging in adversarial conversations with each other, ignoring the emotional issues in cases or not being willing to talk about what was going to happen in the future."

He says he found that mediation was a justice-based, rather than a law-based, process and that everybody was much more satisfied with the outcome when they had an opportunity to talk about what was important to them.

Cloke's views were cemented, he says, when he later served as a judge pro tem for the Los Angeles Superior Court.

Also, he has been an arbitrator for two decades in labor-management disputes. He has taught law, mediation, history, political science, conflict studies, urban studies and other social science classes at Southwestern University School of Law, Pepperdine University School of Law, Antioch University, Occidental College, USC and UCLA.

Cloke also wrote several books about conflict resolution. His latest book, "Into the Heart of Conflict: A Guide to Resolution, Transformation and Transcendence," will be out next year, he says.

"Ken Cloke is a hero, a role model and one of the true pioneers of the field," Los

Angeles attorney-mediator Jeffrey H. Kichaven says.

"Mediation in Los Angeles would not be what it is if he hadn't led the way," Kichaven says. "He's a big giant, and a lot of us are standing on his shoulder."

Cloke has an extremely gentle personal style, Kichaven says.

"But at the same time, he speaks the truth, and he deals with the challenge," Kichaven added. "Ken is both kind and firm at the same time - in a way that helps people move from conflicts."

Dan L. Stormer of Hadsell & Stormer in Pasadena says Cloke is a pioneer in the field of mediation.

Stormer says Cloke sets the standard for understanding the concept of mediation versus settlement. He not only engages in the concept and the process of mediation, but he also embraces it emotionally, Stormer says.

When potential clients ask Cloke about his hourly rate, he tells them he uses a sliding scale: \$250 at the top, sliding down to no cost at all.

"It's actually a point of principal for me to make the price reasonable," he says.

"To me, it's just a question of making the process available to as many people as I possibly can."

Cloke says he's cautious about not allowing the mediation process to skew the conversation in the direction of a final outcome. Rather, he helps to guide it in the direction of process, relationship, feeling or underlying interest.

"All of those are involved in every litigation. Even commercial litigations involve emotion," he says.

The outcome of a mediation, Cloke says, will depend on the level of conversation one is able to have. He says there are five levels - and litigators are usually only concerned with the first three.

The first step, Cloke says, is to stop the fighting, which is relatively simple and almost anyone can do. The second is settling the issues, which he says most attorneys think of when they think of litigation.

"The third," he says, "is resolving the underlying reasons that gave rise to the dispute and will continue to generate new disputes until they're resolved.

"The fourth level is forgiveness, which is more difficult to get to."

It's rare in a litigated setting that anyone ever gets to forgiveness, Cloke says.

The system is not designed around it, he says, and forgiveness is even seen as a distraction.

"And yet, for the individual people who are involved, forgiveness is not about the other person," Cloke says. "It's about releasing yourself and allowing you to go forward with the rest of your life."

The final level, he says, is reconciliation, because you can let go and still not be reconciled.

"Litigators are generally not concerned with the last three of these," Cloke says, "because that's not their job. But it doesn't mean that that isn't a concern of their client."

He says the collaborative law movement is recognizing this and making efforts

to structure negotiations between parties in dispute in ways that are not counterproductive or even destructive of process and relationship.

"When litigators get into adversarial arguments with each other," he says, "I think the best that you could say is that those arguments are ineffective. That's the best."

At worst, Cloke says, they are positively destructive of the process and the relationship.

"Ken has always been a peace activist, and mediation is the logical extension of both his personal and political beliefs," Stormer says.

Cloke recently returned from Ireland, where he was helping to improve the communications between the Catholics and Protestants in Northern Ireland. The Irish government was his client.

"We're looking at how to build small agreements between people that link them across lines," he says.

Another problem with the conventional, courtroom-based system of resolving disputes, Cloke says, is the assumption that the goal is finding the one truth and one winner, he says.

"If you come out with the answer that says one or the other is going to win, you've lost the whole nature of what it is you're talking about," he says. "That's the problem."

"Mediation permits paradox, contradiction and enigma. It not only permits it; it affirms it as a source of learning."

Cloke points out that every mediator mediates differently.

"If you were trained in mediation," he says, "you couldn't mediate the way that I do and I couldn't mediate the way you do."

"What you bring to it, fundamentally, is yourself, because mediation is a place that isn't exactly neutral - it's more unbiased than neutral."

Cloke says he's comfortable with legal issues and legal reasoning, but he says that a lot of other people out there are qualified to do that.

"What I think I bring to the process," he says, "is a lot of experience with what is taking place beneath the surface of conflict, surfacing it and bringing it out into the open."

Here are some of the attorneys, companies and organizations that have used Cloke's services:

- *Attorneys: Nancy Bornn, Bornn & Surls, Marina del Rey; Jeffrey H. Kichaven, Los Angeles; Belle C. Mason, Silver & Freedman, Los Angeles; Raymond Shonholtz, San Francisco; and Dan L. Stormer, Hadsell & Stormer, Pasadena*
- *Businesses: Disney Feature Animation, Hughes Corp. and Wells Fargo Bank*
- *Associations and labor unions: California Nurses Association, California Federation of Teachers and United Teachers of Los Angeles*
- *Government agencies: Federal Emergency Management Agency*

- *International organizations: Mediation Institute of Ireland; University of Havana, Cuba; and Ministry of External Affairs, Nicaragua*

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