


PEOPLE
PROFILE

The superstar of mediation: Lee Jay Berman and his high-profile cases

BY **CRAIG
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LEE JAY BERMAN IS A GO-TO PERSON FOR mediation in the United States, and over 2,300 mediated matters in close to 25 years backs that up.

Mr Berman's bread and butter is business, commercial, real estate and land use disputes, but he has intervened in cases involving actors, athletes and warring bands. And there are some tales to tell on those latter ones in particular. Which he does on a typically wet and windy day in Wellington.

Mr Berman was in the capital in early September for the annual conference of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), where he was one of the keynote speakers, alongside former Prime Minister and ex-head of the UN Development Programme Helen Clark. It was a trip made possible by the assistance of the New Zealand Law Foundation.

He is an American Arbitration Association Master Mediator for employment matters, and national panelist on its commercial and construction panels.

Sideways route to mediation

The path to mediation for Lee Jay Berman ("My mother is from the south in the States, and down there they all have double names") began over a land dispute in San Diego, California in 1993.

"I was working with a large developer on large pieces of land, and one section had a lot of natural resources on it and my boss and his boss were saying 'compete with them and win and get this piece for us'. The Nature Conservancy was trying to also buy this to set it aside as a permanent ecological reserve and I thought that this

was stupid because neither one of us should really end up with the whole thing 'cos it's not cost effective for either party.

"So, I contacted the Nature Conservancy and talked with them about us buying it together and collaborating to make it the best of both worlds. After that I read an article about mediation changing the legal landscape and it was all about the flexibility of mediation to reach win-win solutions and I thought that's what I was doing naturally without knowing what it was called.

"I took some training, quit my job with the developer and started my own mediation practice," says Mr Berman, whose family owned a clothing business.

"It was a very unique move because at that time no one knew what mediation meant."

Brainstorming to a solution

He believes that while mediation in both the United States and New Zealand operates on similar levels, Aotearoa has one fundamental method that could help mediators in his home country.

"In New Zealand it feels like mediators are still doing all the good things that we don't always do in the States but haven't developed any of the bad habits that we have. For example, having everyone involved in the same room for the majority of the time.

"In the States, we do it that way but then we tend to run off into separate rooms and go back and forth and you don't get the same magic, you don't get the same collaboration. The saying in the States is that the best solution is one where everybody walks away *equally unhappy* and I think

here they shoot higher: they try to find a real win-win where everybody gets the most out of something. And we don't get to do that enough in the States."

Mr Berman says when seemingly small matters appear to be stalling a larger agreement, there may be issues that are not at surface level.

He uses the example of an actual relationship break-up situation in New Zealand where the house, cars, dogs, etc were all agreed on, but a single purple broom was holding up progress with the respective lawyers tearing their hair out to get a solution.

"If the broom is that important to that person it's probably not about the broom, it's probably about what the broom means to them and so if I was involved I would have a private session with that person and try to figure out what is so important about the broom. It might have a family connection that means a lot to them.

"The beauty of mediation is that we get to ask those questions and find out what's really driving people and what's important to them. At a trial it's so much about what's right and wrong."

Rock'n'roll

Aside from various business disputes, Mr Berman has been involved in several matters involving top-class athletes and actors.

And then there's the case of the rock band that had hit a wall. Mr Berman won't reveal this band's name, due to client confidentiality, leaving me to ponder if it could be a band I have every record by. But it is a classic case of egos and money, and of things that really matter to people.

"The business manager sent them to



The band worked out their differences, stayed together and have earned about four or five times what they were earning before they reached the impasse, and “are now all over the radio”.

Mr Berman says being based in Los Angeles he gets a lot of other cases involving high-profile people.

“I’ve mediated with the Oscar-winning actress, the famous singer, and the talk show host we all know. Those situations are really interesting, but they’re also some of the hardest. There’s a high-profile case I’m working on just now that involves a piece of art worth somewhere between 30 and 40 million (US) dollars and there are outside influences that are making it difficult for us to figure out how to resolve this, because everyone’s worried about what precedents will be set. The high-profile cases are often trickier because I’m not just dealing with the people in the room, but with the ripples and the public perception.

“If you and I are having a dispute it’s purely about whatever the dispute is over, but with high-profile figures it’s less about the dispute and more about whether their public persona will be damaged to such an extent that they get paid less for their next feature or the album is a flop.”

Lawyers doing the hard yakka

Mr Berman admits that when he started in his industry he was wary of lawyers’ participation, fearing there might be unnecessary interference. But that view was soon dispelled after his initial sessions.

“The lawyers are our best friends, usually when it comes to communicating with the clients. And also lawyers do such an amazing job of framing a client’s understanding of what can and cannot be done and of helping them understand the boundaries of the problem-solving and managing the expectations about the negotiations.

“If the lawyer is their advocate and on their side it makes my job really easy. Good lawyers are going to contribute to a settlement by offering solutions and recommendations, rather than simply rattling sabres.”

But while lawyers’ assistance is crucial it is the mediators who are, in effect, responsible for helping the parties reach a consensus in any dispute and a cool head is not the only thing that is needed in sessions that can be very testy.

“Mediation is about the people involved, and something that came out of the [AMINZ] conference loud and clear is that it’s all about who the mediator is and what their training is. You can drive a car in the States at 16 years old but after 10 years behind the wheel it’s a whole different level of driving and mediation’s kinda the same. You want highly-trained mediators who are credentialled and have the experience, who come to conferences like this to learn more.”

Mr Berman took one session at the AMINZ conference where they “sliced and diced” an entire case and at the end of the day

me because they were on the verge of breaking up. The lead singer, who wrote all the songs, and was the face of the band, turned to his three counterparts on the first day of mediation and said ‘I could hire a back-up band to go on the road with me and pay them a lot less than you guys, ‘cos right now I’m paying you guys 75 cents of every dollar we bring in.’

“So I said to each of them, ‘what is it about the band that is so important to you?’ One said ‘I love our music’, another said he loved to play the guitar and get all the adulation from the women in the crowd, and the third member said ‘I think we’re on the verge of becoming a band that are timeless like The Beatles and The Stones and I would hate to see us quit before we can see if we can reach that.’

“And the last one, said ‘I’m short, I’m balding and in 10 years no one is going to want to see a short bald guy front the band and pay good money for that. I have a window of 10 years to earn all the money I can to put my kids through college and give me enough money that they can be financially secure.’

“So I had to make them understand that he needs to make enough money and at the same time he has to understand that the others can feel like a rock star. If that had been a strictly legal process it would have been about rights and entitlement, and the band would have broken up and gone their separate ways.”

the participants felt they left with a “whole lot more tools” to use in their work.

He also coaches people in the field and while that might sound counter-intuitive, there is a logic to this.

“People often ask me why I train people who could be my competitors but I reply by saying that I want to raise the level of practice because I want people to have a satisfying experience and come out of those mediation sessions saying ‘that was amazing, not only did we each get a lot of what we wanted but we came to understand each other a whole lot better and we know what to do if we have a dispute after this’. And the courts like that because they’re not inundated with repeat cases.”

Growing the pie

Mr Berman’s keynote presentation at the conference was entitled “Grow Your Own Practice Now!”

“It was about the notion that if the mediation marketplace is a pie, rather than arguing over who is going to get which piece of that pie, and seeing each other as competitors, it’s more important to shift to saying let’s grow the pie by further educating the marketplace – the lawyers, the business community, the insurance sector – about the benefits of mediation through articles, public education, giving presentations, etc, so that there’s a greater demand and understanding for mediation and working together to create more opportunities for everyone.

“When people go to a mediator who’s trained, with credentials and experience, there’s a safe environment, and great things can come out of it.”

Mr Berman’s other conference solo presentation was on “How to Avoid and Overcome Impasse”, which, of course, is something every mediator experiences.

He says being prepared for all eventualities can take the sting out of unpleasant surprises.

“When that happens it’s frustrating for mediators because we’re trying to help people solve their problems and if we don’t get there it’s a hard day for everybody.

“So, one of the things that we focus on as mediators is trying to do everything we can to anticipate what could go wrong when we all come together and try to manage or fix things before we all get into the room together for the actual mediation.

“For example, if you’ve got a couple

If the lawyer is their advocate and on their side it makes my job really easy. Good lawyers are going to contribute to a settlement by offering solutions and recommendations, rather than simply rattling sabres.


of business people coming together and one of the decision-makers isn’t there, we might come to a solution where everyone (in the room) says that’s a great idea but we’ve got to get Charlie or whoever to approve it and then it loses steam if Charlie wasn’t in the room and doesn’t understand how we came to that conclusion or doesn’t understand the proposal or wants the team to negotiate more. We have to figure out therefore how to work round that by ensuring in advance that we have the decision-makers and influencers in the room or on the telephone or available to us in some other way.

“Getting a deal that’s going to last is of the utmost importance in mediation.

“Mediation is not like arbitration where you win or you lose. In mediation its creative brainstorming, it’s collaborative problem-solving. People get to make their own decisions and control their destiny. Ultimately, that’s why I think it’s becoming so popular in New Zealand and around the world.” ■

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