Learning to Use the Mediation Process – A Guide for Lawyers

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Introduction

Mediation is changing law practice. It is the cheapest, lowest risk, and most used form of alternative dispute resolution. And the demand for it is rapidly growing. Public pressure for making the legal system more accessible is responsible for some of the increased demand. Hard-pressed businesses looking for ways to control their legal costs are also responsible for mediation's rise in popularity. Corporate counsel increasingly choose outside lawyers on the basis of the outsider's commitment to ADR, according to a recent article.

You cannot ignore this impending change – and it makes good sense to prepare for it sooner, rather than later. There are three good reasons for introducing mediation into one's practice immediately.

Preparing for the Inevitable

First, you may as well make a virtue of necessity. Exploration of ADR alternatives is likely to be legislated for every civil dispute. California's State Bar Task Force on Access to Justice has proposed legislation which contemplates having the parties in every civil action meet to choose appropriate ADR processes, or having courts require ADR assessment conferences. It is cheaper to require ADR than to build new courts, and the idea of "privatization" has been popular for some time. Additionally, the state bar may decide that lawyers have an ethical obligation to explore alternatives to litigation with their clients. You can learn new techniques now and develop a reputation for skilled, cost-efficient resolution of client problems, or wait until ADR is mandated by statute.

Building ADR Skills

Second, lawyers are dispute resolvers. We counsel clients on avoiding potential disputes, manage and resolve small disputes before they can grow, negotiate resolutions to disputes before and after filing suit, and litigate to resolve the most intractable disputes. All of this dispute resolution requires skillful lawyering, learned in law school and practice.

Mediation is another form of dispute resolution. Using it requires skillful lawyering, new knowledge, and real-world practice. But using mediation effectively isn't part of what most lawyers learned in school, and few have had much practice at it. Even if an attorney is regularly engaged in settlement conferences, this only scratches the surface of mediation.

Mediation is a variety of processes, which can be employed at different times in the progress of a dispute. From pre-filing "facilitated good faith bargaining," to post-filing "managed discovery," to the wide variety of post-discovery mediation alternatives,

mediation offers many options to traditional litigation. Certain mediation processes are most likely to be effective for particular disputes, or at specific times in a dispute. Different processes require different approaches, both by the mediator and lawyer. As a client's dispute resolver, a lawyer helps determine whether a dispute is appropriate for mediation, when mediation might be most effective, and what type of mediator is needed. The lawyer must prepare a client for mediation and help the mediator bring the client's dispute to a rapid, successful resolution. It is a truism among mediators that nothing kills the prospects for resolution more surely than a lawyer who doesn't understand the process.

Building a Practice

Third, these are tough economic times for lawyers. Success in a competitive environment requires mastering a variety of techniques to help clients achieve a cost-effective resolution of their disputes. A lawyer who is adept at skillful, cost-effective dispute resolution may be assured of client loyalty. There are, of course, clients who only want an "attack" lawyer. Psychological limitations narrow the options for dispute resolution that may be offered such clients.

You may be concerned about the cost of client loyalty. A common belief is that mediation relies upon avoiding legal fees to achieve a settlement. That is, the parties figure out how much it will cost them to continue litigating and use those dollars to bring their "bottom lines" into a range where compromise is possible. The only one who loses – according to the theory – is the lawyer who expected to bill for further work. Cynics cite this as a reason lawyers will only talk about mediation, or pretend to support it to avoid other proposals for reforming the legal system. But this cynical view is inaccurate because it relies exclusively upon the settlement conference model of mediation, and misunderstands case dynamics. An example of a non-settlement conference model may be helpful.

At the early stages of a dispute, mediation can help develop alternatives to a "zero sum" game. A mediator can help the parties identify their real interests. Then, the parties may discover that there is a deal to be made, a contract to be written, property to be transferred. All of these generally require legal assistance. What might have been a dispute in which a suit was filed and eventually dismissed, becomes an opportunity for the parties. The success of this form of mediation does not rely on avoided legal fees providing a fund for settlement.

Transaction Costs

But there are cases in which avoiding transaction costs provides the impetus for settlement. Transaction costs, however, are more than just the legal fees that will be expended if a dispute continues. Transaction costs include the time clients devote to the dispute, the emotional price paid by the parties for continuing the dispute, and foregone opportunities for more profitable endeavors because of the mental energy devoted to the dispute.

If these transaction costs – exclusive of legal fees – become too high for one or both parties, the case will settle. Where offers of compromise have been made, the transaction costs get weighed against the additional dollars thought to be available. Again, if the price in transaction costs (exclusive of legal fees) of the last "x" dollars is too high, the case settles. In fact, this may be why so few cases are actually litigated.

If the vast majority of cases are going to settle anyway, then the idea that the "fund for settlement" comes out of legal fees is wrong. The fees that parties focus on are unlikely to

be incurred. While a good mediator will certainly direct the parties to look at these "potential savings," you should not misunderstand the reality. Most cases settle: this one may or may not. There may be very few additional legal dollars expended before the dispute is resolved, although the additional transaction costs can still be quite high.

Types of Mediation

Before you can introduce mediation into your practice, however, you need to consider some basic differences in types of mediation, their uses, and your role as your client's dispute resolver in the conduct of a mediation. There are no rigid categories in mediation. Mediators try to be flexible in anticipating and meeting the needs of the parties to do what will work in resolving a particular dispute. But we can identify two broad categories of approach that are sufficiently different to merit an initial choice and require different lawyer approaches: Information Centered Mediation and Process Centered Mediation.

Information Centered Mediation (ICM)

This type of mediation relies upon the mediator possessing superior information gained through formal study, experience, or both. For instance, a retired judge may have decided 100 personal injury cases. That experience, plus the judge's perceived neutrality, permit the judge to say – implicitly – "I can predict, with a relatively high degree of accuracy and within a fairly narrow range, what the award would be in this case if it goes to trial." Similarly, a litigator who has tried 200 personal injury cases may make relatively high probability predictions about the outcome of a case. In areas where the law is changing, the leading academic expert in that area may make highly informed predictions about where the law is likely to go in a specific jurisdiction. Alternatively, the academic expert may have well informed views on the likely success of each party's theory of the case, which could lead them to reassess their own views of the probability of success. Finally, where the dispute turns on a technical matter (for example, is this emission reduction valve essentially the same as the patented one), the opinion of a neutral technical expert may help the parties reach a settlement.

Choosing a Mediator

In each instance, the choice of a mediator is dictated by perceived expertise. The expertise may be in legal processes, as with the retired judge or experienced litigator, or in a specific subject matter area, as with the academic or technical expert. ICM relies upon perceived stature in the field to help resolve a dispute. The nature of your dispute determines the degree of stature you need – and are willing to pay for. A business dispute which turns on arcane matters of international law may justify engaging the leading expert at the United Nations, while a dispute about a fast food franchise might well be mediated by a local lawyer with significant franchise experience.

How ICM Works

The information centered mediation process involves the parties assenting explicitly or implicitly to the judgment of the mediator. The mediator begins with the stature gained through experience and training. This initial stature is increased by the parties having chosen that mediator for their dispute. That is, each side has an investment in the belief that it has chosen exactly the right person. When the mediator first enters the dispute, it is with an aura of impartiality and expertise. The mediator enhances this aura by careful

listening, judicious questioning and skillful exploration of the nuances of each side's position.

There comes a point, however, when the parties want to know what the mediator thinks is the likely outcome and value of the dispute. That is a critical point in ICM. While delivering an opinion can be delayed, it eventually is given. How the mediator makes an opinion known may affect its acceptability. Another second critical point comes when the mediator defends the opinion. In most cases, both sides are less than delighted with the opinion, although there are cases in which one side is right and the other wrong. The mediator must defend the position and gain substantial acceptance of it without alienating either party. In that process, the mediator may alter an opinion, within a limited range, as a result of additional information, or previously unknown arguments. The mediator often engages in the sort of "shuttle diplomacy" that is the hallmark of ICM. This process works if there is substantial acceptance of the mediator's evaluation; it must be the center around which the parties explore options for settlement.

Success Factors

Typical Uses of ICM

ICM is most effective when both sides are well-informed about the facts of the case, the continuing transaction costs are perceived as high, and either the dispute is a "zero sum game," or the legal outcomes are extremely limited. Personal injury and medical malpractice cases, contract disputes over performance, and marital dissolutions are especially amenable to ICM. It may sound odd to include divorce mediation under ICM, since many lawyers mistakenly confuse it with some sort of conciliation process. But divorce mediation – as it is practiced by some of the most proficient lawyers – involves neutral expertise. Most divorcing couples are only dimly aware of the statutes, cases, and extensive judicial guidelines that are highly outcome determinative in their dispute. Educating the parties in the rules, option, and likely outcomes can lead them to a resolution of their dispute, at low transaction cost. While the mediator may make some effort at reducing the rancor between the parties, it is secondary to the process of reaching agreement on the terms of the dissolution. And this reduction in rancor is not necessarily different from the efforts mediators make in other settings to bring sufficient civility to the process so that it can move toward resolution.

ICM is most effective relatively late in disputes, when the parties have a thorough understanding of the facts. They may have taken earlier positions based upon what they hoped the facts would be, but have not modified those positions because they feared it would be taken as a sign of negotiating weakness. Conversely, ICM is unlikely to be effective when there are unknown facts that could significantly affect the evaluation of the outcome of the dispute. Many attempts at "Early Neutral Evaluation" founder because the evaluation is attempted too early. ICM is least effective when there is a need to re-define the dispute or expand the settlement options perceived by the parties. While it is possible to resolve a well-advanced dispute through the creation of new options, that is not the primary focus of ICM.

Knowledge of Dispute Process

Process Centered Mediation (PCM)

The PCM method relies on the mediator's expertise in the process of disputation and skill at achieving resolution of disputes. The mediator does not claim expertise in the subject matter of the dispute, or the ability to predict the litigated outcome of the dispute. Rather, the mediator claims knowledge of how disputes work and the ability to move them toward resolution. The mediator can help the parties focus on their real interests, expand their options, and resolve their dispute on terms not previously considered. The mediator can help them discover non-adversarial procedures for achieving their ends, help them agree upon a specific alternative to litigation, or help them move more expeditiously to inevitable litigation. The mediator relies upon a combination of perceived stature, neutrality, and specific techniques for resolving disputes.

Choosing A Mediator

While lawyers are usually familiar with "rent-a-judge" services and colleagues who have participated in court supervised early settlement programs, very few are knowledgeable about PCM mediators. The knowledge and skills employed by PCM mediators have usually been gained through resolving labor-management, community, inter-corporate, insurance, or environmental disputes. Information about mediators is available from some bar associations that have begun to compile lists. Also, the American Arbitration Association provides extensive screened lists of skilled mediators. The Center for Public Resources maintains a list of former diplomats, government officials, and other well-known public figures that are willing to mediate.

The selected mediator must be capable of quickly understanding an explanation of the matter in dispute. In addition, the mediator's neutrality is, at times, the critical element in resolving a dispute.

How PCM Works

PCM mediators often rely upon three specific "process" techniques to move the parties toward resolution of their dispute: active listening, identifying interests, and re-framing issues. While there are many other techniques, these may help to illustrate the difference between relying on prediction (ICM) and process (PCM). Active listening is a technique for both verifying the information being received from disputants and convincing them that the mediator understands the dispute. The mediator repeatedly re-states, in his or her own words, what the disputant has said. Each time the disputant is asked to confirm the accuracy of the re-statement. Discrepancies are explored as an aid to identifying the interests of the disputant.

The actual interests of the disputants may be quite different from their stated interests, and the mediator attempts to help the parties identify their real interests. The stated interest may be huge amounts of money and public humiliation of the other disputant, but the real interest may be in reasonable compensation for time expended in some endeavor and the opportunity to end an unproductive business relationship.

The classic example of stated interests creating a dispute when real interests are not in conflict is the two cooks arguing over a single orange. Both have claims to it based on their

relative status and the importance of what they are preparing. Both are convinced they are more deserving of the orange. But one cook wants orange juice for orange ice and the other orange rind for cake icing. In order to resolve this dispute a mediator first helps the parties discover their real (orange juice and orange rind) as opposed to their stated (the orange) needs. Then the mediator helps re-frame the dispute. Instead of a dispute over who gets the orange, the dispute can be re-framed into "who gets the orange at what time." If the second cook gets the orange after the juice has been squeezed out, both can satisfy their real interests.

There are other situations in which re-framing allows the parties to resolve the dispute. What appeared to be "zero-sum" disputes over compensation for serious personal injuries were resolved – when interest rates were high – by structured settlements. These represented a re-framing of the dispute. Instead of a dispute about how much a particular injury would bring from a jury, the dispute was re-framed as "what income stream is necessary to replace the economic loss caused by the injury?" With interest rates high, there was an opportunity to meet the legitimate economic needs of an injured plaintiff while bringing the actual cost to the insurer within a range it could agree was appropriate. PCM mediators help parties discover ways to re-frame their dispute to bring about resolution.

Typical Uses of PCM

There are certain types of disputes for which PCM is most effective, and certain times in all disputes when PCM can be advantageous. PCM is most effective in disputes involving workplace rights and obligations, continuation or dissolution of business relationships, and individual or group relationships. It is most advantageous prior to initiating litigation, before and during discovery, and after discovery when litigation has stalled.

Disputes over workplace discrimination because of age, gender, or other bias are particularly amenable to PCM. The essential dispute is often about individual dignity, respect from peers, and freedom from a hostile environment. Before litigation starts PCM can be most effective because it gives the employee and employer the opportunity to correct a problem and continue their relationship. For instance, claims of sexual harassment can be dealt with in a positive way that changes workplace behavior without stigmatizing the employee who brought the claim. An age discrimination claim, even after suit has been filed, may be more about dignity than money. A settlement that recognizes a former employee's value (perhaps through a paid consultant relationship), may be perceived as more fair than a far larger dollar award. In many lawsuits over workplace relationships, money is simply the available surrogate for lost respect, dignity, and self-esteem.

When business relationships go sour, there is often a unique opportunity for PCM. The parties' real interests frequently cannot be satisfied through litigation, since the legal solution may be dissolution, resulting in the destruction of a productive enterprise or its forced sale. Sometimes intelligent business people neither recognize nor act to further their economic self-interest because they have become deeply involved in a dispute. A PCM mediator can help them re-discover their real interests and uncover options for mutually achieving those interests. Even if the solution to their dispute is to dissolve the enterprise, a PCM mediator can often help the parties dissolve the enterprise in a way that optimizes the advantages to both.

Finally, disputes that involve neighbors, voluntary associations, and even the relationship between governmental agencies and individuals can often be resolved through PCM mediation. In many instances, low cost mediation services may be available through a community based mediation center. The key to these disputes is that the parties must

continue to interact after the dispute is finally resolved. The process of compromising is often more important than the specific compromise reached. Even with governmental agencies, the cost of policing an agreement that is not voluntarily achieved may outweigh the benefits of the agreement. Consequently, a governmental agency may be willing to engage in a PCM mediation.

The Lawyer's Role

To be effective, a lawyer must constantly remember that the dispute belongs to the client. During mediation the client makes decisions about the case. Sometimes these decisions are at variance with legal advice, and sometimes they are made while both the lawyer and a third party are present. This apparent loss of control makes some lawyers uncomfortable, which is why they might choose ICM when PCM would be more appropriate to that specific dispute.

Lawyers feel more comfortable with ICM because it is similar to a settlement conference. While the lawyer's authority is derived from the client, it is the lawyer who appears to be in charge of the dispute. In most instances, the lawyer advocates the client's position while the client remains silent. In PCM the client is more explicitly in charge of the dispute. The mediator needs to hear most things from the client, not the lawyer, in order to decide how best to move the dispute toward resolution. The client usually seeks advice from the lawyer, and relies upon the lawyer to explain the legal implications of a particular action, but the client is clearly in charge of his or her dispute. Being in charge may also make certain clients uncomfortable. Consequently, you need to anticipate and eliminate some of your client's sources of discomfort.

While there are some differences in preparing for, conducting, and terminating ICM and PCM mediations, they both require significant client participation. And this participation must begin with selecting the mediator. The client must choose the mediator. The lawyer can gather information about the mediator and advise the client, but the client must make the choice. The reason for this is obvious. The client must have an intellectual and emotional investment in the mediator. The client must begin with a conviction that this is the person who can resolve the dispute because it is this conviction, in part, which gives the mediator the status necessary to attempt to resolve the dispute.

Preparing for Mediation

Both ICM and PCM mediation require significant preparation, both for the case and client. In California, written confidentiality agreements are unnecessary to protect statements or documents introduced in mediation, since the Evidence Code provides for mediation confidentiality. Specific written agreements may still be necessary in other states. An ICM mediator may require more formal written preparation. Some mediators may ask you to prepare a short summary of the facts and current legal posture of the case, before the mediation. It may be sent to the mediator in advance, or provided at the mediation session. Even if you have not specifically been asked for a summary, it is a good idea to prepare one. At the very least, it will re-familiarize you with the dispute, so you can quickly inform the mediator about the basics of the dispute at the beginning of the mediation. And you can offer the written document to the mediator, as an aid to remembering all of the key facts and issues.

Three aspects of this written document are important. First, it should be brief, relating the major aspects of the dispute but not going into the nuances. Second, it should be neutral in

tone, but not arrangement. If there are disputed issues of fact admit there is a dispute and then present a defensible version of the facts from your clients point of view. You should not comment on the facts through using adjectives, characterizations or obvious legalisms such as "clearly." Third, if the mediator may not be familiar with key technical terms, give the mediator a glossary. A good mediator will learn the terms immediately and speak the language of the parties, in the hope of building the parties' confidence in the mediator's ability to resolve the dispute.

In PCM mediations a written document is not usually requested. Frequently, a PCM mediator will ask the clients, rather than the lawyers, to describe the dispute. This enables the mediator to judge (by the order of presentation, emphasis, emotional charge) what is most important to the disputants. A written document, prepared by the lawyer, is still useful as a checklist and glossary for the mediator. By giving this document to the mediator, you can assure that nothing is omitted or forgotten.

In both types of mediation it is critically important to tell the client what process to expect, the role a client will be asked to play, and the role the lawyer will play, including the fact that the attorney may be asked for confidential advice – and that the process can be stopped – at any time. This is also a time when the lawyer may help lay the groundwork for a successful mediation by asking what the client really wants out of this dispute, not what he or she feels "entitled to." The client's understanding that this is a real opportunity to resolve the dispute may lead to increased flexibility.

Participating in the Mediation

While the client must ultimately make the decisions that will determine whether the mediation is successful, the attorney has the power to make it fail by creating enough doubt about the legal consequences of an action to make the client too timid to settle or by making the atmosphere so contentious that the process is subverted.

Here are three simple rules, addressed to lawyers, which will ensure that they give the mediation a chance to work.

1. Let the mediator take charge of the process. Don't make the mediator arm-wrestle you for control. If you do, you waste some of the initial good-will and stature the mediator brings, without moving anyone toward settlement. If you never permit the mediator to determine how and when things occur, you are wasting the money you spent to buy the mediator's skill and expertise. You might as well go home.

2. Let the client be the center of the process. Allow the mediator to speak directly to the client. Do not try to interpret or explain every word your client speaks. Do not try to protect your client from him or herself.

3. Don't win an argument and lose an opportunity. Often a mediator will appear to take the position advocated by your opponent. (Indeed, sometimes it will be more than just an appearance.) If you simply say you don't agree, but are willing to listen to what comes next, that is sufficient to keep the process going. It is also an adequate signal to the mediator that what follows may not be acceptable. If you insist on proving your opponent wrong, you risk awakening a fruitless debate and jeopardizing the mediation.

Here are some tips to increase the prospect of the mediation to succeeding. Use the mediator. If your client has unrealistic expectations, let the mediator deflate them. If your client believes that "any fair person" would have to view the facts in a certain way, let the mediator offer another view. If your client is absolutely convinced of an outcome, let the

mediator undercut that conviction. The mediator can float "trial balloons," convey positions you would want to disclaim, and hint at the range of acceptable resolutions without revealing your position. In PCM, allow the mediator to probe for real interests by proposing a multi-level contingent resolution, without pointing out every potential problem.

Terminating the Mediation

There are three possible outcomes to a mediation session: resolution, further mediation, or termination. In the first instance it is easy to know what to do: get something written and signed. You need not draft the final documents, but you should at least sign an agreement in principle otherwise you risk new disputes caused by faulty memory.

When it is necessary to adjourn a mediation for any reason, set a date and time for resuming. Try to make it as soon as possible. Mediations develop a "momentum of agreement" that helps the parties move toward resolution. The longer a second session is put off, the more likely that momentum will be lost. Moreover, too long a time between sessions may require the mediator to spend significant time re-establishing a relationship of trust with the parties.

At other times, a lawyer is faced with deciding whether it would in fact be useful to schedule a second session. Ask the mediator. Each side provides the mediator with information and impressions not available to the other side. This information may have shown the mediator there is enough potential movement to provide a good chance of ultimate agreement. Alternatively, the mediator may want to make one last effort to determine whether another session would be fruitful. The mediator may not believe a second session would be useful. If the mediator's view disagrees with the lawyer's assessment, the best person to decide is the client. If the client doesn't want to continue the mediation, it is unlikely to be successful.

In the third instance, a mediation session is terminated because the parties are deadlocked and unwilling to move. It is difficult for either party to know when a mediation is truly deadlocked. When the mediator is moving between separate caucuses, the mediator has a better grasp of what progress is being made. A mediator may know of an available concession but not communicate it for strategic reasons. A mediator may detect movement where neither side is aware that it has occurred. And good mediators have developed an appreciation of the "calculus of despair." They know when keeping discouraged parties at work a bit longer is likely to produce some needed movement.

It is important to give the mediator an opportunity to continue even after you lose your conviction that the case will be settled. Good mediators are unlikely to drag out unpromising mediations. They want a reputation for settling disputes – or at least knowing when further efforts are futile. If they deliberately continue an unpromising mediation, they risk their professional reputation.

Conclusion

As a lawyer you practice dispute resolution. Mediation is simply another dispute resolution tool. This brief introduction, I hope, has served to alert you to its possibilities and make you anxious to begin incorporating it into your practice.

If you want to learn more about mediation the American Arbitration Association offers courses and seminars. In addition, many bar associations now offer mediation courses with MCLE credit.

The most important step you can take, however, is to look at your cases and decide if mediation has the potential for resolving any of them. If it does, review the mediation option with your clients and let them decide. Whatever the clients decide, by specifically considering mediation for every case, you have incorporated mediation into your practice. And that is to your credit.

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