THE MEDIATION PARADOX: COLLABORATIVE COMBAT

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Litigation is, by definition, an adversarial process. It would be naïve to believe that the essentially contentious nature of a lawsuit or arbitration disappears when the parties agree to mediate. Nonetheless, mediation offers a unique opportunity for the parties to come together and maximize the chance that they will be able to resolve their dispute.

It is a virtually self-evident proposition that parties to a dispute forfeit a substantial degree of control over their case upon the filing of a lawsuit or arbitration. The "rules of the road" are established by the tribunal, discovery is often protracted and almost always very costly, the finder of fact - whether a judge, jury or arbitration panel – is determined with limited or sometimes virtually no input from the parties. The types of relief that may be granted are circumscribed by well-established legal principles and whatever relief is awarded is likely to arrive only after the passage of many months, if not years.

The most recent statistics regarding federal civil litigation indicate that the average time between filing and disposition by the district court is over two years, and fully one in six pending cases are over three years old.[1] [2] Appeals can extend this period substantially. FINRA arbitrations typically take almost sixteen months from initial filing to decision.[3] Although arbitration, because it is designed to be a streamlined vehicle, is less costly than a similar full-blown lawsuit, it is nonetheless expensive.

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[1] U.S. District Court – Judicial Caseload Profile http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2010Dec.pl

[2] In 2010, there were 282,895 civil cases filed in the federal district courts. This was a 2% increase over the previous year. In sharp contrast, only 13,805 cases were tried that year. http://www.uscourts.gov/Statistics.aspx

[3] Dispute Resolution Statistics June 2011, http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/

In view of the above, it is not surprising that only a small fraction of civil cases and arbitrations actually go to trial. The overwhelming majority are either withdrawn, dismissed or settled. In the first six months of 2011, FINRA arbitrations were resolved by action of the arbitrators 21% of the time.[4] Of the roughly 80% of cases which are resolved by the parties directly, there are no reliable statistics as to how many are mediated versus those which are disposed of without a mediator. However, of the cases that are mediated through FINRA's mediation program, 85% are settled.[5] American Arbitration Association statistics show an identical success rate.[6] Clearly, mediation offers a very attractive venue for resolving cases that the parties are, for whatever reason, unable to settle directly.

Recent legislative, regulatory and economic developments have the potential to profoundly affect the likelihood that mediation will become even more attractive and may assume a larger role in the resolution of cases involving the financial services industry.

For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank" or the "Act") [7]has brought into question the continued viability of pre-dispute arbitration agreements, increasing the probability that securities customer litigation will be filed in the courts. To the extent these cases migrate to the courts, this will (a) increase the time from filing to resolution of disputes, (b) increase the cost of litigation as cases become subject to motion practice and greater discovery, and (c) increase the risk of an all-or-nothing resolution as cases are increasingly determined on the basis of legal, rather than equitable, principles. All

[4] Id.

[5] Id.

[6] . See AAA, A Guide to Mediation and Arbitration for Business People, Sept. 1, 2007, at 2, available at www.adr.org/si.asp?id=4121

[7] H.R. 4173, 111th Cong., § 921(a) (2d. Sess. 2010).

of these factors will tend to favor settlement over adjudication. [8]

Dodd-Frank also requires the SEC to evaluate the effectiveness of the existing standards of care for brokers and investment advisers and determine whether there are regulatory gaps in the protection of retail customers with regard to the standards. [9] After the SEC conducts the required study, it may issue new rules imposing a fiduciary relationship upon every financial intermediary which provides personalized investment advice to retail customers with respect to those customers. Although the implications of such a change are unclear, they are likely to increase the complexity, and hence the cost and uncertainty of customer litigation. [10] This

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[8] Some commentators have asserted that a blanket ban on mandatory arbitration of investor disputes would ultimately be to the detriment of public customers. See, e.g., The End of Mandatory Securities Arbitration, Jill I. Gross, 30 Pace L. Rev. Article 5. While acknowledging that investors perceive that FINRA arbitration is not even-handed, those commentators maintain that SEC oversight renders the process substantially more customer-friendly than other consumer arbitration rules allow, that the rules facilitate investor access by subsidizing cost, allowing representation by attorneys and non-attorneys and ensuring that awards are paid promptly. They point out that the courts, especially the federal courts, are far more hostile to investor claims than FINRA arbitration where principles of equity largely govern. In court, plaintiffs face far more procedural hurdles to even survive the pleading stage of a lawsuit and would have to bear substantial costs of discovery, particularly depositions.

There is also the risk that a repeal of mandatory arbitration could lead to a repeal of FINRA Rule 12200, which imposes a duty to arbitrate upon member firms and associated persons at the request of the customer. Were the Rule to be repealed, arbitration would virtually cease to exist as a venue for resolving customer disputes since the cases where the customer might prefer arbitration (e.g., a sympathetic claim with legal stumbling blocks or a case where the probable recovery is not likely to justify the expense of a lawsuit) are probably those where the broker-dealer defendant would take a contrary view.

Whatever the ultimate fate of mandatory arbitration, reform is clearly in the air. To the extent cases begin to be filed in court as a result of Dodd-Frank, more cases will likely be resolved by settlement because of the increased cost and time considerations, as well as the greater probability that cases will be decided by motion before trial and the risk that cases which do go to trial will often result in an all-or-nothing judgment.

[9] H.R. 4173, 111th Cong., § 913 (2d. Sess. 2010).

[10] As usual, the devil will be in the details. The courts that have addressed this issue appear to uniformly hold that to state that someone is a fiduciary is only to begin the inquiry. As the California Court of Appeals stated in Duffy v. Cavalier, "there is in all cases a fiduciary duty owed by a stockbroker to his or her customers; the scope of this duty depends on the specific facts and circumstances presented in a given case. These include the relative sophistication and experience of the customer; the customer's ability to evaluate the broker's recommendations and exercise an independent judgment thereon; the nature of the account, whether discretionary or nondiscretionary; and the actual financial situation and needs of the customer." 215 Cal. App. 3d

will make settlement increasingly attractive.

At first blush, attorneys for retail customers may view any expansion of fiduciary obligations as a significant leg up in establishing liability. However, such a development may be more symbolic than real. At least in the context of arbitration where motions to dismiss are not favored, panels may already be holding brokerage defendants to a higher standard than the law requires, particularly where the customer is not sophisticated or the investment is complex. A study commissioned by the SEC in 2008 suggests that juries may be inclined to do the same notwithstanding instructions to the contrary[11].

Conversely, counsel for the broker-dealer must acknowledge that the stakes will increase if the legal issue going forward is no longer whether a fiduciary duty exists, but the scope of that duty in light of the specific facts of the case. Until the SEC proposes and adopts the rules called for by the Act and the courts have an opportunity to flesh out the proper application of the statute and the related rules, counsel will have serious challenges in evaluating and applying the new standards. Clearly, the practical implications of the Act are unclear in this area.

Dodd-Frank, the impending rulemaking to implement it and the likely increase in the cost and time investment in litigation suggests that the relative number of cases settled, rather than tried, is only likely to increase.

1517, 264 Cal. Rptr. 740 (1989). Whether, as a practical matter in arbitration, these factors differ materially from the evidence generally offered in support of a suitability claim, any new SEC rules in this area are not likely to be more categorical than the Duffy analysis.

[11] In 2008, the RAND Institute for Civil Justice released a study commissioned by the SEC . http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf. One of the more interesting findings of the RAND study was that most retail customers, who are likely to be at least as sophisticated as the typical jury pool, did not understand the distinction between a non-fiduciary broker-dealer and a registered investment advisor, even after the difference was explained to them.

Chances Are, Your Client Will Be Better Served By Settlement Than By Litigation

Studies demonstrate that litigation outcomes are often worse than the last offer of settlement. Approximately 85 percent of commercial matters submitted to mediation result in a written settlement agreement.[12] At least where the parties choose to voluntarily mediate, the settlement rate probably reflects the fact that both sides have made a commitment to try to resolve the matter. However, despite the convincing percentages of mediations resulting in settlement, one is led to ask whether mediation indeed achieve results that are preferable to litigation? The evidence suggests that it does.

In 2008, Randall Kiser of DecisionSet in Palo Alto, Calif., and Martin Asher and Blakely McShane of the Wharton School published a study that analyzed more than 2,000 California cases in which one party rejected the other's final demand or offer and proceeded to arbitration or trial. In "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations,"[13] the authors sought to determine whether the rejecting party achieved better results through arbitration or trial than the last offer he rejected.

Ignoring the time, costs and fees associated with trial, the authors compared the proposed settlement numbers with the eventual verdicts. They discovered that plaintiffs actually received an award equal to or less than the defendant's last settlement offer in a majority of cases (61.2 percent), with a verdict that was on average $43,100 less than the last settlement offer. Defendants generally performed better at trial or arbitration, but in the 24.3 percent of cases where they performed

[12] . See fn. 5, supra.

[13] Journal of Empirical Legal Studies, Vol. 5, No. 3 (September 2008), pp. 451-491, available at http://www.blackwellpublishing.com/jels

worse, defendants paid on average $1,140,000 more after trial than the last settlement demand. The authors validated the results by expanding data from California to New York, with consistent results.[14]

The study strongly suggests that settlement, while it represents compromise, is frequently not a decision to accept "half a loaf," but may be an agreement to take a whole loaf, or more.

Mediation Prospects Are Best Served By Viewing It As A Collaborative Process

Litigation, by its very nature, calls for an aggressive pursuit of the client's position. Indeed, professional ethical requirements require an attorney to represent his client zealously within the bounds of the law.[15] However, once the parties have determined that it is in their best interests to try to resolve the dispute amicably, advancing the client's interests may require the lawyer to abandon – or at least suspend – a "scorched earth" approach in favor of a more collaborative process. While the obligation to zealously advance the client's interest remains, the circumstances may now require a tactical change in meeting that obligation.

In a very real sense, the decision to attempt to settle, whether through mediation or otherwise, should shift the emphasis from "victory" to "resolution" in the light of the ongoing risk and expense of continued litigation. Because the parties have agreed to try to resolve the matter among themselves, it is important to try to remove barriers to resolution that may have been generated by the underlying dispute or the litigation process itself. Instead of advocating as a zealous adversary, you should now advocate as a zealous problem-solver.

[14] See Linda R. Singer, "Preserving Value Through Mediation," Law360 (August 16, 2010), available at http://www.jamsadr.com/files/Uploads/Documents/Articles/Linda%20Singer%20-%20Preserving%20Value%20Through%20Mediation.pdf.

[15] See, e.g., Canon 7 of the New York Lawyer's Code of Professional Responsibility. See also, Comment [2] to Rule 1.1 of the Proposed Rules of Professional Conduct adopted by the Board of Governors of the State Bar of California

Strategies and Techniques

In 2006, the American Bar Association Section of Dispute Resolution formed a task force to address issues of quality in mediation (the "ABA Study"). [16] The task force members included lawyers and non-lawyer mediators, lawyers who represent clients in mediation, academics and administrators of court-connected mediation programs. It focused on mediation of civil cases where the parties are generally represented by counsel, excluding domestic, family law and community disputes. It worked with outside counsel, in-house counsel and non-attorneys, such as insurance industry managers, risk managers and human resources managers. The participants consistently identified the same four issues as important to mediation quality:

- Preparation for mediation by the mediator, parties and counsel;
- Case-by-case customization of the mediation process;
- Analytical assistance from the mediator; and
- Persistence by the mediator.

The first two of these issues are the province of counsel, at least as much as they are the mediator's responsibility. They underscore the fact that the parties "own" the mediation and should try to structure the process in a way that will maximize the chance of success.

Historically, lawyers have approached mediation like the settlement negotiations with which they were familiar. By agreeing to mediate, both sides signaled a willingness to seriously engage in meaningful negotiations. The process then proceeded as a traditional negotiation, albeit with an intermediary expected to moderate the process and, on occasion, to evaluate the case. While this approach is

[16] http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf

still widespread, many practitioners are now viewing the process as fundamentally different from direct settlement negotiations. After all, if the traditional settlement "dance" worked, the parties would probably not be mediating the case. Strict adherence to the traditional negotiation approach may result in a missed opportunity to optimize the prospects for a good settlement.

Because the parties control the mediation, it can be structured in whatever fashion will address their respective interests and maximize the chance of a successful outcome. At the end of the day, the collective imagination of the participants allows for almost infinite flexibility. For example, where both sides recognize early in the process that the matter needs to be settled, or there are cost or time considerations – such as an ill or elderly client – they may decide to engage in limited, expedited discovery as part of the mediation process to accelerate possible resolution. The level of knowledge necessary to evaluate a case for settlement purposes and persuade your adversary of the fairness of your position is often not the same as the level that may be necessary to prove your case in court or before an arbitration panel. One commentator has written that:

> "One approach is to follow the 80-20 rule: 80 percent of the relevant information that parties learn from discovery often comes from the first 20 percent of the money they spend. Tracking down the last, difficult-to-obtain data is the most expensive part of discovery …. If parties conduct initial core discovery, they may find all they need to know in order to resolve the case appropriately…. Often this will give them everything they need to determine their negotiation position with reasonable accuracy."[17]

[17] Senger, Jeffrey M. (2002) "In Practice: Tales of the Bazaar – Interest-Based Negotiation Across Cultures." 18 Negot. J. 233.

In considering whether to voluntarily exchange information in advance of the mediation it is important to remember that while you may need documents, or even limited testimony, to properly assess the value of your case, your position may also be advanced if you voluntarily share information with your adversary that will help the other side better appreciate the facts.

At the same time, the process generally cannot be rushed. Particularly if the lawyer does not have a long-standing relationship with the client, a suggestion to mediate the case too quickly may be perceived as a lack of faith in the client's position or the lawyer's abilities. In addition, delay can sometimes strengthen one side's bargaining position, but this is not inevitable, and not without cost.

Another reason to get creative with the mediation process involves the client who needs to "vent" before getting down to serious negotiations (or the lawyer who needs to let his client see him vent). If the parties agree that opening statements would be useful, it may make sense to have separate meetings with the mediator before the joint session to "let some of the air out of the balloon" and to structure the party's interactions with the other side. If you don't drain emotional pressures off, they will find their own escape routes – often to fuel more arguments and harden positions. While it may be impossible to prevent a volcano from erupting, careful planning may ensure that the lava is channeled away from "Pompeii" and into the sea.

Preparation

The first step in preparing for the mediation is usually a call or calls between counsel and the mediator. Many of the ABA Task Force members felt private rather than joint calls to prepare for the session were more effective, as they permitted the parties or their counsel to alert the mediator to "hot button" topics or to discuss the use of opening statements, whether there will be briefing or other mediation

techniques. These calls also offer the mediator an early opportunity to establish expectations as to how the parties and their counsel should participate in the process and to encourage the parties to view their cases realistically and to consider alternative types of settlement arrangements. If private calls are preferred, it may be advisable to have a brief follow-up joint call to ensure counsel for all parties and the mediator are in agreement as to how the matter will proceed.

When you participate in a mediation, there is, statistically, close to an 85% chance that you will settle the case. As a result, you should treat the mediation session as if it will be the last substantive event in the case, and prepare your client accordingly. It is not prudent to tell your client that you are all just engaging in a formality or "some free discovery", and then find yourself in serious bargaining to settle the matter.

Mediation is a process which must proceed at its' own pace if it is to be successful. It is generally not productive for the parties to begin exchanging offers until there has been an opportunity to work through important issues in the case. Consequently, the client, who may never have participated in a mediation, should be advised in advance that hard bargaining may not take place until after several rounds of caucuses with the mediator and that he should be neither surprised nor discouraged if initial proposals seem unrealistic.

Because mediation is likely to be a defining moment in your case, it is important to put your best foot forward with a persuasive brief. You can be sure that the mediator will read it, and will share your most forceful arguments with the other side. At minimum, you may also wish to prepare a supplemental statement of your position to the mediator, which will not be disclosed to your adversary

As discussed above, you should consider whether you wish to propose a structure which differs from your usual practice, either because you need to give your client a chance to vent or wish to obtain additional information which will increase the

probability of resolution. Obviously, there can be other reasons for modifying the process, but the guiding principle should always be "will this make it more likely that the matter can be satisfactorily concluded."

It is vital that the participants try to come to agreement in advance as to who should attend the mediation in order to maximize the chance of success. It has been said that CEOs settle more cases than Vice Presidents because, among other things, a more senior representative is less likely to be concerned about later criticism of his decisions and may be better able to take a global view of the dispute.[18] In addition, a more senior corporate representative is less likely to have been involved with the behavior at issue. In certain situations, a company may not be able to make a deal without permission from its insurer, so it is important that someone be present or available to bless any settlement on behalf of the insurance carrier. On the other side of the table, an individual party may feel it necessary to consult a spouse or other family member before committing to a settlement, even if the family member is not a party to the dispute, or counsel may conclude that the presence of a spouse may temper the combative instincts of an overly emotional client. Failure to ensure that all key decision makers are present can delay or even sabotage a settlement. The probability of a settlement can be substantially increased where all parties are represented by "peacemakers" who have actual authority or, if it becomes necessary to obtain additional authority, can do so quickly.

The Joint Session

Once the ground rules have been established, the participants identified and the clients told what to expect and how to behave, other pitfalls still may remain. For example, many attorneys shy away from opening statements in a joint session because they believe such presentations only inflame the clients or that there is no benefit in restating the parties' positions, which are well known to both sides.

[18] This is not to suggest that it is desirable, or even possible, to have the head of a major company attend every mediation.

One reason for concern about inflaming the clients may be that opening statements are often primarily directed to the mediator, much like an opening statement to an arbitration panel or a jury. In fact, the "jury" you should be trying to persuade in mediation is not so much the mediator as your adversary. Accordingly, fire and brimstone is not likely to be effective and may in fact be as inflammatory as often feared. It is never a good idea to poison the well from which you hope to drink.

Although no hard and fast rule can be applied, a reasoned summary of the facts supporting your position and the impact the dispute has had on your client can set a tone which may be helpful in resolving the case. While a strong opening statement by your adversary may offend your client, the experience of directly speaking to an opponent can help the parties let go of emotions that could impede their decision-making later in the process. Particularly if the client is going to participate in the presentation, an opening statement can help your adversary see your client as an individual who feels deeply aggrieved, as much as to demonstrate the strength of his position and the impression he is likely to have on the fact finder if the case goes to trial. In employment cases, where emotional distress is often an important component of the case, a plaintiff who can persuasively explain how he has suffered may increase the settlement value of the claim. However, mediation is not the place for a hostile, aggressive or emotional attack. Because he is not emotionally invested in the underlying dispute, the mediator is much better positioned to address inflammatory issues with the other side.

Lawyers are almost congenitally reluctant to permit their clients to address the other side directly in litigated proceedings. However, unless the client is particularly unappealing or inarticulate, serious consideration should be given to permitting a properly prepared client to speak at a joint session, even if the parties decide not to make formal opening statements. Your adversary may not have met your client or attended a deposition, so has no sense of the impact your client could have on an arbitrator, judge or jury. An articulate presentation of the client's view

of the dispute and feelings about the case can often have a substantial impact on the others in the room. People pay more to, and accept less from, parties with jury appeal. It should go without saying that a passionate presentation should never be confused with a vitriolic ad hominum rant.

President Lyndon Johnson once famously said, "when you're talking you're not learning anything." If you're not listening, you're also not learning anything. Litigants often seem incapable of giving open-minded attention to what the other side is saying, and seem to be preparing a rebuttal as soon as the first words are spoken. Presumably, you already have a thorough understanding of your case. Mediation offers a unique opportunity to develop insight into the other side of the coin. Careful listening will not only help you understand your adversary's view of the case (which may come in handy in the event the mediation fails), but may suggest a path to settlement.

Bargaining: Some Tactical Considerations

Depending on the situation, a party may decide to focus his bargaining position on either monetary issues or non-monetary terms. Generally, in customer cases money is the focus, whereas in employment matters or other cases where the claimant is interested in continued employment in the financial services industry or, in some cases, an ongoing relationship with the respondent other issues may be important. Mediation allows lawyers to pursue either objective.

Claimant's lawyers are often reluctant to advance non-monetary issues because of concern that they will signal that their client is not committed to his monetary claims or can be induced to compromise them. Defense lawyers often would prefer to focus on these issues because they see them as a tool to reduce their economic exposure. Mediation can help you have it both ways. Counsel can press his monetary claims aggressively during "public" negotiations, while asking the mediator to explore non-monetary issues during private discussions, perhaps

without attribution to the other side. Once counsel becomes comfortable that his monetary claims will not be compromised, he can take ownership of the other issues.

Mediation also permits counsel to assume a tougher bargaining position than might be productive in direct negotiating discussions. Because the parties have made the explicit strategic and often emotional decision to mediate and because mediation often requires significant effort to set up and incremental cost to pursue, a party is less likely to terminate discussions because of an "insulting offer." More important, a mediator can be counted on to work to calm the party who erupts in response to the other side's position. In other words, the mediator can play "good cop" to the lawyer's "bad cop."

Of course, one of the risks of the "insulting offer" is the response it is likely to provoke. If a plaintiff makes an initial demand of $995,000 on a $1 million claim, it would not be surprising to receive an equally extreme offer in response or no counterproposal at all. While there may be reasons supporting such a demand, in practice it is not likely to advance settlement prospects.

Part of the value a skilled mediator brings to the process is the ability to go beyond what a party says to convey his view of what might or should happen next if the matter is to be settled. Because both sides see the mediator as neutral, he can suggest conveying a message to the other side that would break an impasse. For example, a mediator might suggest to a defendant confronted with the demand in the preceding paragraph that the mediator be permitted to go back to the plaintiff with the following message : They are not prepared to respond to your initial demand. However, if I could tell them that you are prepared to lower your demand to $900,000 if they will put $100,000 on the table, I think we could begin to make some progress.

By phrasing the issue this way, the mediator has accomplished two things: he has presented the offer as hypothetical; it is not yet "soiled" by the fact that the defendant has actually made it, and he has tentatively endorsed its' reasonableness. If the plaintiff buys into this approach, the mediator will have partially inoculated it against being devalued if it materializes. Obviously, this strategy should be used sparingly to be of value and to avoid creating a situation where the mediator becomes the de facto negotiator. This undermines the mediator's credibility and threatens the ultimate success of the mediation. Counsel needs to think of the mediation more like a game of chess than like a checkers tournament. In addition to projecting confidence in your position, you should consider the reaction your proposal is likely to provoke and how you will respond to the likely counterproposal. Tiny, tit-for-tat moves from opposite ends of the playing field are not likely to result in an agreement at the end of the game.

The hypothetical proposal is more powerful if it is used to finally settle the case, rather than to move the parties past an impasse at an early stage. In effect, proposing an actual settlement may result in getting the parties to make a special effort to bridge a gap if that will buy ultimate peace.

If the parties can't get to an agreement through direct bargaining, and the hypothetical proposal isn't successful, another route to settlement may be the mediator's proposal.

A mediator's proposal is one where the mediator suggests terms under which the case will be settled with the ground rule being that each side must tell the mediator privately whether he will agree to the proposal if the other side will also. If either side rejects the proposal, it never learns whether its opponent would have accepted. Such a proposal can be effective because the parties know that they can settle the case by saying yes, but, if the other side declines, their bargaining position has not been compromised. This is a powerful tool because of this feature.

The mediator's proposal carries its own set of risks. The primary risk is that it has a take-it-or-leave-it quality. Once made, both parties are likely to resist agreeing to any settlement terms less favorable than the mediator has recommended. It is important to remember that, as a neutral, the mediator has a strong interest in a settlement, but not in any particular settlement; i.e., he must remain impartial. Therefore, unless the mediator has been specifically asked by the parties to evaluate the case, in cannot be assumed that the mediator's proposal will necessarily reflect his view of what is likely to happen if the case goes to trial.

The last of the four issues identified by the ABA Study as important to mediation quality is persistence by the mediator. If, in spite of everything, the case does not settle at the mediation session, all is not lost. A good mediator will continue to try to find a way to a settlement until the parties tell him categorically to stop and he concludes there is no plausible way to change their minds. Therefore, you should do everything possible to not close the door too firmly when you leave an apparently unsuccessful mediation session.

At minimum, the parties should leave in a professional and respectful manner. Good manners cost nothing, and the client who walked in the door seeking to crush the other side may leave with a more conciliatory opinion if he feels the negotiations were conducted respectfully and in good faith. It may also be productive to agree that you will continue to keep talking, perhaps after some additional discovery if you feel you need more information than was anticipated before the mediation began. In such a case, the mediator can be a valuable ally in obtaining a favorable response to a reasonable request if it seems likely to advance settlement prospects.

Other Important Considerations

As indicated by the ABA Study, careful preparation, adaptation of the process to the circumstances of the case, analytic assistance and persistence by the mediator are critical to making the mediation process successful. However, there are other reasons mediation is a useful tool.

Direct settlement negotiations frequently fail to gain traction because, although the parties may recognize that their self-interest would be well served by settlement, emotional issues – particularly anger – are obstacles to productive discussions. Mediation can create an environment where a rational discussion of the merits and the risks can be considered in a less contentious setting. Often as the mediation unfolds and the both sides' positions are carefully considered, an individual plaintiff – either a customer or a discharged employee – will recognize that he is not prepared to accept the risk of an all-or-nothing decision if there is a prospect of a reasonable resolution. Mediation may also be the first time a more dispassionate senior representative of the defendant has been asked to focus on the dispute in a concrete manner. One reason cases often seem to settle "on the courthouse steps" is that an impending trial may be the first defining event before both parties and lawyers get serious. Mediation can offer a similar kind of focus to both sides. An effective mediator can help the parties focus on the matter is a way that they haven't before.

Jeff Kichaven, a California attorney and mediator, has pointed out a counterintuitive aspect of mediation; i.e., in mediation, your effectiveness as an advocate will often be directly proportionate to that of opposing counsel, not the inverse proportion you might expect in traditional litigation where success is often measured by how severely you are able to punish the other side.

> "In this sense, you and opposing counsel have become each other's best friends. You have given each other's clients what you often cannot give your own: The means by which one can achieve a balanced perspective … with the craving to clobber taking a back seat. Let's face it: It's tough for a lawyer to

> break bad news to his or her own client. It's tough on clients, too, to go beyond denial, even when that bad news is broken with candor and compassion. Yet in virtually every unsettled case, bad news needs to be broken and accepted. In some cases, it's the other side that needs it. In others, it's your side. In most cases, there's plenty of bad news to go around.
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> "In mediation, you and opposing counsel have found uniquely qualified messengers to deliver this essential communication – each other. The mediator works along with you to make sure that the bad news is not only delivered to your client, but also received. Effective mediation advocates, therefore, must be able to hold both conceptions of 'the win' ["clobbering" the other side and satisfying your client's needs, regardless of whether the other side suffers along the way] in mind, simultaneously, side by side, each in its appropriate place, each conception taking the forefront when appropriate."[19]

Another reason mediation is effective is that it offers the parties an opportunity to talk about things that might not be considered relevant by a court or arbitration panel. As apparently peripheral matters are discussed, the path to settlement may be smoothed. This is particularly true in employment cases where extrajudicial relief may be important, such as an agreement as to what the company might say to a future employer asking for a reference or the deletion of disputed material from the former employee's file.

Mediation may be particularly helpful in international disputes. The United States is notorious as a litigious society, and the litigation process does not easily accommodate cultural differences. Mediation, because of its' flexibility, can adapt in ways no court would ever consider to take account of these differences. In some respects, the process itself can be conducive to resolution. For example, some non-

[19] Kichaven, Jeffrey G. (1999) "How Advocacy Fits in Effective Mediation," 17 Alternatives 60.

Western cultures are uncomfortable with direct confrontation and may find a more consensus-oriented process more familiar. A mediator who has experience with and sensitivity regarding cultural issues can often help both sides find their way through potential misunderstandings to a solution.

Conclusion

Almost nine out of ten of the cases handled by a typical civil litigator will be settled, and a meaningful percentage of those cases are likely to be mediated. Studies indicate that parties who are unsuccessful in settling their cases often fare worse after trial, even before adding the economic, emotional and delay costs to the analysis. Accordingly, it is in the interest of all parties to maximize the probability of a successful settlement process.

Fortunately, mediation allows great flexibility in adapting the process to meet the unique circumstances of a given situation. The timing and the structure of the proceeding are generally completely controlled by the participants. Facts that may be persuasive, but perhaps would not be admissible at a hearing, can be raised in mediation. The confidential, without-prejudice nature of the proceedings and the ability of a good mediator to facilitate communication allow a degree of candor that would not be prudent in a different context.

Failure to recognize and take advantage of the opportunities mediation offers may be the difference between a mutually agreeable resolution and a costly, time-consuming litigation where both sides surrender the ability to be master of their fate. As indicated by the Kaiser-Asher-McShane study[20], the party who throws in the towel and decides to proceed to trial is likely to find that he or she has paid a high price for this decision.

[20] See fn. 13, supra