



INTEGRATING MEDIATION INTO YOUR PRACTICE

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I. INTRODUCTION

Given the tremendous growth of the field of alternative dispute resolution in all case types and at all levels of court, it is imperative that lawyers have a greater awareness and understanding of the mediation process and the key role attorneys play in representing their clients in all aspects of that process. Every case involves at least two major tasks: determining the substantive law applicable to the facts of a case and choosing a dispute resolution process that is best suited for the case. Lawyers are trained to accept litigation as the standard process for resolving disputes without necessarily focusing on the strengths and weaknesses of litigation as only one of the many processes available to resolve disputes. Research has shown, however, that issues of process may be as important as the substantive matters in determining whether the final result for the client is the best attainable.

Images in the press and popular culture, as well as the focus in law school curricula on the importance of court decisions, convey the impression that a court is the only forum for resolving disputes. This may affect a lawyer's consideration of the spectrum of processes available to resolve client disputes. Most professionals are inclined to use the process they are most familiar with and for which they have exclusive control. As a result, litigation is presumed to be the best method of dispute resolution. For attorneys, litigation is the first place to start in the study of alternative processes. Only after understanding the limitations and advantages of litigation can mediation be appreciated.

Limitations and Value of the Judicial Process

The public's perception of resolving a dispute through traditional adjudication is that the time and expense involved is overwhelming. Disputants have become frustrated with long court delays and discovery processes, the complexity of the law, and the unproductive use of their resources. At the same time, some studies of the litigation process reveal that trials are rare and most cases conclude through settlement negotiations. The courts serve as a background for bargaining between the parties and their lawyers. Regardless of whether one takes the position that the judicial process is expensive and intrusive or that the litigation process should and already does focus on settlement, there are other shortcomings of the adjudication process, which should be noted, and support the idea of alternative dispute resolution processes.

In resolving a dispute, a court most often relies on the use of objective rules and laws. Given the complexity of a dispute and the infinite number of elements and variables, the court will select what is relevant and place the dispute in a pre-existing category, such as breach of contract. The appropriate rule governing the category is then applied. Courts rarely consider the personal characteristics of the disputants, the nature of the relationship, the long-term interests, or what the parties consider critical to the dispute. The lawyers and judge participate primarily in the resolution of the dispute as opposed to the parties who are the owners of the dispute.



A consequence of the judicial model is that the solution may not be well adapted to the parties' needs and interests. The range of remedies available to the court is limited. An apology or acknowledgment of fault may not be awarded. The court is not in a position to try to salvage a relationship, whether it is commercial or domestic. The court's decision is also binary in nature, one is right and one is wrong. This polarizes the parties, creates the need for self-justification and escalates the dispute into an emotionally charged process.

It must be recognized, however, that the importance given to the litigation process is well deserved. Adjudication does offer choice of representation, trial by jury, the opportunity to establish precedent, the opportunity to hold those who violate public norms accountable for doing so, basic fairness, a relatively level playing field, and some measure of predictability through precedent. By supplementing court adjudication with appropriate dispute resolution processes, parties can resolve conflicts more creatively and effectively.

Alternative dispute resolution offers efficiency and can enhance the quality of dispute resolution by permitting a wider array of outcomes and more client participation. The national trend has been for parties to become interested in resolving disputes on terms, which they have agreed to as opposed to leaving the decision to a jury and/or judge who does not know the parties or understand the issues as well as the parties do. Clients have begun to demand that their attorneys pay attention to process issues as well as substantive issues, and now expect their lawyers to be knowledgeable about the full range of dispute resolution options.

II. REPRESENTING THE CLIENT IN MEDIATION

Mediation is a process in which a neutral third person facilitates communication between parties to a dispute to assist them in achieving a mutually acceptable resolution of their dispute. A party who chooses to resolve a dispute through mediation may or may not be represented by a lawyer at any point in the process. At the option of the party, for example, a party may be represented by a lawyer from the moment the party's first pleading is filed, enter the case unrepresented and secure representation at some point later in the case prior to or during the mediation process, complete the mediation process and consult a lawyer only to review the terms of the mediated agreement, or complete the mediation process and enter an agreement without a lawyer's assistance.

A. Pre-Mediation

For many Lawyers, the threshold questions are whether they should attend the mediation session(s) at all, and if they do, what role they should take in the session(s). Upon accepting a case, a lawyer should advise the client about the advantages, disadvantages and availability of dispute resolution processes that might be appropriate in pursuing the objectives of representation. By assisting the parties in making informed decisions about the mediation process before the process begins, the lawyer encourages the party to take responsibility of resolving the dispute, consistent with the principle of self-determination, a core-value of mediation.

The lawyer should explain to the party the nature of the mediation process, what to expect during mediation, the relevant law governing the mediation process, and how the mediation process complements the court procedures. The lawyer helps the party make an informed choice of a mediator based upon such factors as the nature of the party's case, the background and experience of the mediator, the mediator's style and the potential fees involved.



The lawyer assists the party in determining whether timing is a factor in choosing mediation. For example, a lawyer may recommend mediation at the beginning of a case in order to explore settlement before positions become entrenched, or may recommend that mediation be deferred until completion of all or part of the discovery process.

The lawyer advises the party on the substantive law relevant to the case. This enables the party to understand the range of outcomes that are possible if the case is litigated and to formulate a range of acceptable outcomes for the mediation process. Advice that helps the parties understand that there may be more than one solution which meets the party's needs helps the party enter mediation willing to consider various options for settlement.

B. During Mediation

During the mediation the lawyer continues to advise the party on the substantive law relevant to the case and helps the party understand what information may be important to share or learn during the mediation, the options available, the potential consequences of each option, and the possible outcomes to anticipate if an agreement is not reached in mediation.

Throughout the mediation, the parties are encouraged to take responsibility for resolving the dispute. This responsibility includes participating actively in problem-solving discussions with the assistance of a trained mediator. The lawyer's role is to assist the party in negotiating for him or herself, bearing in mind the non-adversarial nature of mediation.

The lawyer guides the party in negotiating by encouraging the party to express thoughts and feelings, helping the party define interests, helping the party gather necessary information, generating options, and examining consequences. The lawyer can guide the party through settlement discussions whether the lawyer attends the mediation sessions or not. The lawyer might also consult with and advise the party before and after the session(s). The lawyer might also advise the party of when it would be wise to take request a break in mediation for the opportunity to consult with the lawyer for additional information and advice. In some cases, the party and the lawyer may arrange for the lawyer to be available by telephone for consultation while the mediation is being conducted.

The lawyer manages the legal process for the party while mediation is being conducted, keeping the party informed of important dates, responding to and filing necessary pleadings, and conducting discovery.

There is no prejudice if a party attends without their attorney. Dispute resolution proceedings are not on record, rules of evidence do not apply, mediators don't make findings of fact or impose decisions, and mediators don't make reports to the judges (they can only report the terms of agreement that was reached or that there was no agreement). Mediation is governed by the rules of confidentiality which prohibit the disclosure in any judicial or administrative proceeding any materials in the mediator's case files and any communications made in connection with the mediation.

The decision to attend is based on the party's needs. Because mediation is a cooperative problem-solving process, the fundamental consideration is whether the party is capable of participating effectively without the lawyer's presence. Any impediment to a party's ability to communicate, to understand, and to make informed



decisions should be considered in deciding whether it would be appropriate for the party's lawyer to accompany the party to mediation. Another consideration should be the relationship between the parties and whether each party has comparable power to affect the outcome and engage effectively in the problem-solving process.

C. Post-Mediation

If an agreement is reached in mediation, counsel should review it for the client and help the client assess whether it serves the client's best interests. Counsel may also be responsible for preparing the formal agreement. If the parties reach an agreement, the attorneys for both parties may ask that the agreement be entered as a court order where appropriate. If necessary, the attorney may assist in enforcing the terms of the agreement in the same manner as any other contract. Where a mediated agreement is incorporated into a court order, the contempt power of the court is also available. If no agreement is reached, the attorney will assist the client in continuing with the adjudicatory process which will ultimately resolve the case.

D. Points to Remember for a Successful Mediation

1. Allow adequate time for the mediation process to work.
2. The length of mediation depends on the complexity of facts and legal issues and degree of emotion. It usually will take a full day. Parties need adequate time to identify the issues, factual and legal, that all sides of the dispute believe exist, and then react to information and negotiate a satisfactory conclusion.
3. Parties with increased understanding of the other side's interests and the risks of trial are more willing to reach an agreement.
4. Parties want to engage in give and take rather than be presented with an ultimatum from the other side.
5. Each side wants to know it has had a fair opportunity to be heard before agreeing to collaborate.
6. Parties want to vent feelings, even in business disputes, before they can separate emotion from issues.
7. The caucus meetings are designed to enable the parties to understand the other side's perspectives and the breadth of positions on the issues. This helps counsel assess the strengths and weaknesses of their case and determine whether litigation poses greater risks than previously believed.
8. The lack of an appropriate representative at the mediation session (with the necessary authority and discretion) is the most frequent reason that mediation sessions fail to result in settlement.

In sum, attorneys today have numerous options available to them to assist clients in resolving disputes. Mediation has proven to be an excellent alternative to litigation. A lawyer's skills can positively contribute to a successful mediation and early resolution of disputes. Attorneys who are able to effectively integrate mediation into their practice may not only enjoy greater client satisfaction, but also a more rewarding law practice.