The Case for Mediation Optimization Orders

The Litigator's Guide to Successful Mediation Advocacy

By David W. Henry

Thoughtful and timely preparation can more often than not help avoid the common pitfalls that lead to settlement impasses.

Mediation undoubtedly will continue to serve as a frequent if not mandatory feature of commercial litigation in nearly every state. In 2010 more than half of the states and over 94 federal districts had mandatory or court-annexed mediation programs. D. Peters, *It Takes Two to Tango, And to Mediate*, 9 Rich. J. Global L. & Bus. 381, 386 n.24 (Fall 2010). While some states have already embraced mediation as a routine practice, some jurisdictions inexplicably fail to use it consistently in the state and the federal courts. Where mediation is uncommon, the "lawyering" attendant to that process generally is inconsistent. This is partly because civil mediation advocacy is, in the Hogwarts sense, a dark art. It is difficult to teach and not well appreciated as a lawyer's art or skill, and some factions of the judiciary and trial bar even view it skeptically. As one commentator notes, "legally trained advisors tend to be inherently suspicious of informal and unstructured resolution processes, in which the neutral party is not required to adhere to strict legal principles." S. Corbett, *Mediation of Intellectual Property Disputes: A Critical Analysis*, 17 New Zealand Bus. L.Q. 51 (Mar. 2011).

Litigators often need to improve their mediation preparation and advocacy skills partly because the mediation process does not depend on applying fact to the law, rules of procedure, or precedent—the bread and butter material of a typical law school education. Mediation does not depend on the art of lawyering in the ordinary sense. Mediation sits far too often in the "dark shadows" of trial. *See* L. Riskin and N. Welsh, *Is That All There Is—The Problem in Court Ordered Mediation*, 15 Geo. Mason L. Rev 863, 900 (June 2008). Mediation is a dark art in large measure because of confidentiality and privilege rules. Brilliant advocacy in mediation is not and cannot be recorded or memorialized by transcript, video, or narrative. Careers and the reputation of counsel are not made or broken based on mediation results. Mediation by its nature is private and confidential, stabilizing and normalizing; great gains and losses are avoided by negotiation. No heroes emerge in the process. Unlike the big budget production that is a trial, mediation is more akin to unscripted improvisation without elaborate rule-driven staging, dialogue, and le-

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gal analysis. The mediation process will not be value affirming. Although it certainly offers more "healing." F. Yee, *Mandatory Mediation: The Extra Dose Need to Cure the Medical Malpractice Crisis*, 7 Cardozo J. of Conflict Resolution 393, 418 (2007). Mediation will not reveal justice publicly. No one will witness a stinging cross-examination, and no one will hear memorable closing arguments. A trial offers the public spectacle of high theatre; mediation is private, sequestered, trapped in a black box.

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But this black box is powerful! What of this cloistered environment that has the capacity to resolve even the most complex cases in a day or two? What of this process that is so magnificently simple on the one hand but also full of analytic, emotional, and psychological layers? Mediation, for purposes of this article, means putting the key decision-makers in a room with a trained mediator who operates as facilitator, nay-sayer, truth-tester, and champion for settlement. The mediator asks the parties to share information, explores varied and often contrary or conflicting interests, separates needs from wants, and helps structure deals. It is a remarkably low-tech and comparatively low-cost process in contrast to commercial cases that involve substantial investments of time and money, information technology, and support.

Lawyers spend much of their careers first learning, then mastering, then billing clients on all matters antecedent to trial, such as dismantling experts, coordinating through electronic discovery, preserving privileges, developing effective openings and closings, and engaged in the application of fact to law in time consuming and ultimately costly ways. This author believes that a a lawyer's reluctance to embrace and champion mediation is on one level not surprising—he or she may be uncomfortable with the emotional content, irrational outbursts, and nonlinear decision-making process. Additionally, the confidentiality inherent in mediation makes it difficult to teach and appreciate on an intellectual, moral, and value-centered plane. Because it does not require the same procedural choreography and analytical preciseness, nor by custom or rule require the same investment of time and money, lawyers and clients might naturally view it as less important than the more commonly understood lawyering practices. *See Corbett*, *supra*. The secluded nature of mediation restrains lay persons and lawyers from witnessing its true greatness. Whereas churches, temples, and mosques visually and verbally reinforce the power, strength, and benefits of a spiritual life, mediation sessions do not have publicly accessible pews.

Mediation Optimization Orders Make Sense

One way for litigators to improve their mediation practice is to intellectually accept the importance of this process to clients. A calendar and court and rule-imposed deadlines drive, in large measure, a litigator's practice and attention. On the other hand, mediation is less rigid and less rule-oriented and informal and so in the context of a litigated dispute, mediation will not command the attention of a lawyer or client in the same way that a trial date will. To begin to achieve intellectual parity between mediation and litigation and to force litigators to become better mediation advocates, courts can and increasingly will mandate mediation in nearly every civil case. *See*, *e.g.*, Fla. Sta. 44.102; *Peters*, *supra*, at 386. Courts should only rarely grant exceptions to mandatory mediation. Because mediation simply does not command the same attention as trial and does not have rule-based procedural and evidentiary components, some litigators do not know how to prepare themselves and client for mediation. There is no manual, procedural rule, or established premediation schedule. To fix this, one solution is to borrow from the trial process and create what is in effect a "pretrial" order for mediation or what this author would title a "mediation optimization order."

A mediation optimization order would require the parties and counsel to communicate with one another and the opposing side(s) frequently and meaningfully before mediation. The order itself serves a purpose. A detailed mediation optimization order works psychologically on a litigator, insurance carrier, or corporate counsel by elevating the mediation process because it has the look and feel of a trial order. By making the requirements for "premediation" outwardly and superficially more akin to the trial preparation process, this necessarily garners the attention of a lawyer and client.

A mediation optimization order works to identify and eliminate commonly occurring impediments to settlement that a court, mediating parties, and a mediator can fix when possible before the mediation session, and jump starts the settlement thought process before the formal mediation session. The mediation optimization order is aimed at creating a fertile environment for deal-making. A busy and task-saturated litigator often treats mediation as a relief, considering it on one level a respite from the litigation, a break. This is because a litigator assumes that during a mediation he or she will not need to do a lot of "lawyering," at least in the conventional sense. But viewing mediation as a break is an unproductive and self-defeating mindset—a mindset that may lead to inadequate preparation and focus, which may adversely impact the likelihood of settlement. A mediation optimization order aims to prevent attorneys and mediating parties from treating mediation as a "holiday" from the rigors of a case. And a lawyer's skill and preparation can significantly impact the likelihood of resolution at mediation.

Mediation was never intended as a vacation from litigation. It is an entirely different process that rotates on a different axis. If we treated a mediation impasse as the emotional and legal equivalent of a mistrial, wouldn't lawyers work a lot harder to avoid that result? Surely they would. Once we start thinking in these terms we begin to appreciate that we need to prepare more than superficially for a mediation session. Perhaps we do not prepare with a consis-

tent level of effort. The want of rules and the comparative informality of the mediation process indirectly work against a lawyer and a client by making it easier not to prepare. Neither courts nor the rules of civil procedure impose premediation requirements on litigating parties, and no one suffers an immediate penalty if a mediator declares an impasse.

So what can we do? We might start by "case managing" the mediation process to elevate its importance in the eyes of a litigator and a client. This would include establishing dates and deadlines that involve the client directly in the process. The parties would engage the mediator early in the process before any formal session took place through a mediation optimization order. The mediation optimization order would address the following 12 points.

First, a mediation order would identify suitable and experienced mediators and reach consensus that the mediator may use facilitative, evaluative, and collaborative techniques during the process.

Second, it would establish a date for disclosing the name, address of each attendee, and their relationship to each party.

Third, it would set a date by which attorneys would provide written certification that high-level decision makers will attend the mediation and include a short statement explaining the reasons why the particular representative was chosen.

Fourth, a mediation optimization order would require the mediating parties and their attorneys to hold a conference call to discuss whether all of the necessary parties are joined and if there are non-joined parties whose presence might be necessary for a comprehensive and effective settlement. Additionally the lawyers could be asked to at least cursorily explain the mediation process to the parties.

This may seem pedantic on one level but not all litigants share the same level of litigation savvy. It is a very useful exercise because it begins to teach the mediating parties that achieving a settlement is a collaborative not adversarial process. If all lawyers contribute to the explanation of the process for all they begin to psychologically move from advocate to teacher or collaborator—which is a very small but helpful transformative step anticipating the kind of discussion that often unfolds in the mediation session. The conversation in part would aim to humanize the process by sharing limited personal information about the participants such as where they live, where they were educated, their interests, and their roles in their companies when a case involves corporate clients. The conversation might also frame the non-monetary issues relevant to a comprehensive settlement. One side may wish to elicit a premediation demand. Each side should assure the other once again that key decision-makers will attend the mediation. If someone has to "appear" by phone, which is undesirable on many levels, then that side's attorney should explain that in advance and make arrangements for telephonic communication at the mediation site.

Fifth, a mediation optimization order would require each attorney to supply a statement that the pleadings, motions, and material court orders, factual discovery, and testimony have been substantially disclosed to each attorney's client or made available for reading.

Sixth, the order would require the attorneys to confer to discuss the timing of mediation and whether there is additional information that any other party needs informally or via discovery before the mediation session.

Seventh, a mediation optimization order would oblige the parties to disclose all nonparties that may attend the mediation as experts, advisors, or consultants. As long as these participants formally consent to confidentiality terms, attorneys and courts should permit them to appear, although mediation rules differ in jurisdictions regarding participation by nonparties. If an opposing party challenges the appearance of a non-party, there would be time to bring that issue to the attention of the court. There are few things more disruptive than disputes over attendees that only become known once the parties and attorneys are assembled. This is to be avoided.

Eighth, a mediation optimization order should require each attorney and his or her client to meet both 90 days and 10–14 days before the mediation session, and the lawyer to explain fully in writing the mediation process, role of the mediator, the confidentiality rules, and in the broadest terms possible all the nonjudicial business interests and judicial issues that a mediation framework could encompass. In short, a mediation optimization order would require an attorney and his or her client to brainstorm before the mediation session to identify the interests that they need to address in the framework of a settlement.

Ninth, a mediation optimization order would require a lawyer to confer with his or her client to determine if any personal, emotional, financial, religious, or other factors might impede the ability of that participant to meaningfully engage, listen, and resolve the case. We want to liberate a client from any disabilities, sources of duress, or extraordinary stressors. If third parties such as board members or senior managers must approve a deal, they should physically attend the mediation. If they will not, then an attorney must make every effort to have real-time access to them during the mediation and make it clear to the other side that any deal is subject to some other level of approval. This is often the case for governmental bodies, utilities and associations.

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Tenth, a mediation optimization order would require attorneys for the defendants in multiparty cases to meet and confer with the clients, and insurers if applicable, before the formal mediation session to consider litigation funding arrangements and pro rata contributions that the defendants may require to resolve the case.

Eleventh, a mediation optimization order would require each attorney to sub-

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mit a premediation statement to the mediator approved by the client that addresses the client's needs and concerns. The attorneys would be permitted to confer with the mediator before the mediation after the mediator had received all of the position statements. Because mediators are not decision-makers, there is nothing wrong with allowing communication with the mediator before the formal mediation session and it should be encouraged.

Twelfth, a mediation optimization order would require each attorney to provide his or her client with an update of any material developments and to review the existing budget and disclosure of anticipated litigation costs going forward no less than ten days before the formal mediation session.

The particularities of each case will necessarily shape the premediation work and the dates and scope of a mediation optimization order. As our mediation practices evolve and experience with premediation practice matures, we will continue to refine the elements of mediation optimization orders. A mediation optimization order intends to engage the mediating parties in the preparation process, to require them to think about resolution, and to oblige them to communicate with each other and their attorneys before a formal mediation session happens. In essence, a mediation optimization order helps a lawyer evolve from a litigator to settlement facilitator by promoting the necessary intellectual and emotional transition from litigation-mode to settlement-mode. This process starts a mediation dialogue before the formal session takes place so that the valuable hours during the mediation session are saved by avoiding the necessity of educating the parties about the process or educating the mediator about the facts and legal issues.

The timing of the activities suggested above will change according to the complexity of a case, geography, the number of parties, and the interests at stake in the litigation. Sometimes a mediator or a court will prudently schedule two mediation dates—one early and one later in the litigation process. Sometimes an early mediation is useful before significant litigation costs are incurred.

Conclusion

Mediation advocacy as a dark art is not something easily learned. Settlements at mediation do not happen by accident. A well-designed mediation with parties receptive to the process will increase the likelihood of settlement. Thoughtful and timely preparation can more often than not avoid poorly planned mediations and the common pitfalls that lead to settlement impasses. Mediation has the power to resolve complicated disputes expeditiously and efficiently. Cases that might take years to resolve by litigation can end in a day. A mediation optimization order supplies a busy litigator with a game plan that he or she can execute, prepares a client, and elevates the process to its rightfully important state. Litigators who embrace mediation as a useful and flexible tool for dispute resolution and who can perform well in that arena will engender client confidence and afford clients the best possible opportunities to resolve cases in ways that comport with economic and business goals and objectives. FD