Mediation Is Not For Sissies

by Jeff Kichaven

Last month, a reporter from the Los Angeles Daily Journal asked me a question about mediation which gave me quite a chuckle.

The topic was the exciting mediation program which Judge Robert Letteau has pioneered in the Probate Departments of the Los Angeles Superior Court. The question concerned whether contested probate matters might benefit from mediation, because, as the reporter saw it, mediation is a "non-adversarial" process.

The chuckle came because, as most anyone who has been through more than a couple of mediations can tell you from first-hand experience, it is hardly a non-adversarial process. In the mediation room, particularly at the early stages of a mediation, the parties, and their lawyers, too, are often as adversarial, as confrontational, as overtly hostile to each other, as they are in any other forum.

When mediators shmooze, the conversation often turns to the roughest, toughest, wildest, wooliest, brass knuckles, no-holds-barred mediation moments when lawyers and clients have shown that the vigor of their advocacy has been honed, we might say, to excess. Mediators at times must step between participants who are about to come to blows; must pry hands free from documents seized from the other side of the table; must prevent participants from destroying physical evidence which finds its way into the mediation room; and otherwise fling their bodies on the grenades of the participants' passions.

While this does not happen all the time, passions erupt and tempers flare in mediation with enough intensity, and with enough frequency, that whatever else mediation may be, it does not deserve to be considered a "non-adversarial" process.

On deeper reflection, this false, but common, perception of mediation as "non-adversarial" may deter litigating lawyers from using the process. Some lawyers avoid mediation because they perceive it as being only for the faint of heart; for those who are afraid to test their wits and their clients' fortunes in the adversary crucible of litigation; a cop-out process. They think that mediation is for sissies.

My message to litigators who think that mediators make you burn incense and go barefoot is to reconsider your aversion to this form of ADR. In actuality, if you are a litigator because some part of you resonates to the gladiator role, then the opportunities for your most brilliant portrayals will, I guarantee it, take place on the proscenium of the mediation.

If your past experience with mediation has not lived up to this billing, perhaps you

were just linked up with the wrong mediator. There are some mediators who have made litigators uncomfortable with what was perceived as inappropriate pressure to compromise for the sake of compromise, to make concessions which were out of proportion to the merits of the claims and defenses, or otherwise to "make nice" when the participants simply saw no reason to do so. If this has been your experience, you may have vowed never to subject yourself to mediation again, and gone on to share your scorn for the process with your partners, peers and clients.

Even if you have suffered this way, though, you still might find yourself being instructed by your clients, or invited by the other side, to give mediation one more chance. Tread cautiously in doing so. This time, to make the experience pay off, choose your mediator as carefully as you would choose any other expert. The mediator who provoked your disdain may have been the one whose name your partner recalled from a chance introduction; the last one from whom you received a professional announcement in the mail; or the one you were randomly assigned from a volunteer panel. Just as you wouldn't engage an economist, a handwriting analyst or any other expert based on such flimsy due diligence, you should apply more rigorous criteria to the selection of a mediator. Get resumes. Check references. Talk to the mediator. Then make your choice.

The mediator you select should have the experience, training and temperament necessary to be effective in your particular case. The attributes which add up to effectiveness, however, will vary from case to case, and may be challenging to distinguish. The unique features of individual parties, lawyers and cases will lead you to different mediators at different times. The key overall inquiry is whether the proposed mediator is someone who you feel will understand the reasons why the case has not yet settled, and who will be well-equipped to help the participants overcome whatever those barriers happen to be.

Many litigating lawyers focus exclusively on whether the mediator has expertise in the substantive law of the dispute. In some highly technical or complex cases, whether the mediator is an expert in the applicable law may indeed be the most important question. But in most cases, skilled litigators bring enough substantive knowledge to the room to allow the mediator to get up to speed quickly and facilitate the negotiations. After all, if you can't explain it to the mediator, how will you ever explain it to the judge or jury?

So, even in highly technical or complex cases, mediators who are not experts in the substantive law may be highly effective. Regardless of the degree of complexity which the legal issues present, a mediator who is expert in dealing with difficult personalities or who has extensive experience with the overall burdens of protracted litigation may be the most effective if, in your opinion, the key barrier to settlement is a personality clash or an inability of one side or the other to appreciate the full costs and delays that full-scale litigation may entail. The litigator has the responsibility to diagnose why the case has not yet settled, and

then select the mediator best equipped to dispense the appropriate prescription. With the right mediator selected, the process can proceed to a resolution with which all parties will feel satisfied, if not downright enthusiastic.

Consider the contrasts between in-court litigation and mediation in the hands a mediator in whom all parties have confidence. In court, the litigator is shackled. The concept of relevance limits the subjects on which the litigator can question. The pace of litigation is slow; depositions take weeks to schedule and trials take years to reach. Judges frustrate some of the best questioning on the grounds that it is argumentative, cumulative or assumes facts not in evidence. The decorum of the courtroom and even the deposition room -- especially with an increasing number being recorded on videotape -- is enforced by the legal equivalent of the Marquis of Queensberry Rules! And so even the most victorious clients rarely come away from litigation with the degree of emotional satisfaction which they expected their victories to yield. Victories often come only after significant cost and delay. Frustration of even disappointment with you, the "victorious" lawyer, is a frequent byproduct of your client's frustration and disappointment with the litigation process. This is hardly likely to generate repeat business.

Mediation is as different from this as different can be. As a lawyer in the mediation room, you live, you survive, you succeed, by your wits and your wits alone. The Marquis is gone. Mediation can be the equivalent of guerilla warfare. Generally, after brief opening statements during which the mediator asks the sides to take notes and not to interrupt each other, the gloves are off. The shackles of civil procedure and evidence law no longer limit the bounds of effective advocacy. No question which the participants find important enough to ask is "irrelevant." With all parties present, the interplay is instantaneous, not protracted over weeks or months. And many of the best mediators, in an effort to help the parties surface the true conflict and then work through it to a constructive result, actually encourage the participants to ask (and answer) questions which cut to the heart of the emotional as well as the financial reasons the parties are at each other's throats.

A client comes to a litigator with a story about what has happened to him in his businesses or his life. The litigator wedges that story into a template of legally cognizable claims and defenses. In court, the discussion is forever after limited to the aspects of the story which is visible through that template. Mediation reverses the process, and allows the story to be probed, examined, argued and -- hopefully -- reconciled, more quickly and at lower cost, and sometimes more completely.

Litigators, especially those who pride themselves on an "aggressive" style, should flock to this forum. If you have confidence in yourself, your client and your case, then you should welcome this opportunity to have at it. Mediation often allows you to take dispute to levels far beyond those which the court system may allow. Yes, in mediation, the legal issues as set forth in the pleadings can and will be discussed in depth; but you can also discuss a lot more.

Plumbing the depths of the conflict, though, is not an end in itself. Mediations sometimes end with collaborative, forward-looking, mutually beneficial agreements. Many more times, mediation serves the clients' interests simply by bringing the lawsuit to its end faster and at lower cost than continued litigation would permit. The ability of participants to reach these highly utile agreements is directly proportional to the extent to which the underlying conflicts are first explored.

Generally, the parties are in litigation in the first place because they have not been able to work the dispute out on their own. There is anger, or something else highly-charged between them, which prevents the rational negotiations which can lead to settlement. Mediation offers participants the opportunity to vent their anger and dissipate that charge. Then rational negotiations can get back on track.

The mediator's job is to manage the environment so that participants feel free to vent; feel that they will be protected from excessive venting from the other side; and feel confident that the mediator will be able to steer them back to rational negotiations when that auspicious opportunity presents itself. In the hands of a competent mediator, venting does eventually give way to more rational negotiation; and settlement generally is not far behind.

When the venting starts to run its course and the mood of the mediation begins to turn, even the most aggressive litigators will have to downshift the gears of aggressive behavior in order to serve their clients' interests, knowing they can always shift back up if the need arises, always with the mediator's assistance and support, as needed. The best litigators will understand completely both when and how to do so. Their clients will benefit greatly from the exhibition of this skill. All this generally takes place over the course of but a single day. Client satisfaction with this process, and with you, is likely to be high.

Mediation also provides aggressive litigators with a significant advantage over what is generally called a "settlement conference." The difference is control. In mediation, litigators get more of it.

In a "settlement conference," as progenited in the court system and as now practiced chiefly by retired judicial officers, the goal is settlement above all else. In its archetypical form, the settlement conference proceeds almost exclusively through sequential private caucuses between the neutral and the respective sides. The neutral's chief job in each private caucus is to raise dissonance about that party's perception of the strengths of his or her legal positions. The increasingly-chastened parties surrender their demands and offers accordingly. The neutral drags the plaintiff's demands down, and drags the defendant's offers up, until there is a deal. The side which the neutral perceives to be more malleable gets dragged farther from its original position. The deal is the sine qua non of the neutral's success.

Many retired judicial officers are highly skilled in this model, and it has its place, perhaps most especially in the court system. Through the three-strikes initiative and otherwise, the people have instructed the court system to give criminal matters the highest priority, to insure public safety. With every passing year, our underfunded court system has less and less time, money, and even physical space, for civil matters. If the court system does not dispose of at least as many civil matters as it takes in, the burdens will crush it. As a matter of allocating scarce resources, therefore, the court system rightly does all it can to prevent civil parties from relying on the public fisc to finance a system to resolve their essentially private conflicts. So arms are twisted, heads are banged and bones are jawed, sometimes to an exquisitely extreme degree, to get a deal.

In a private mediation system, however, participants demand, and often get, a somewhat different service. Private mediators are in business. Participants (parties and lawyers) must feel satisfied, must want to come back, and must want to refer their colleagues and friends. So it generally does not behoove private mediators to go overboard on the muscle. It too often backfires. Participants who are hammered into a grudging settlement often later express extreme dissatisfaction with the process, and with the mediator. As time passes, many of these participants come to report that the neutral forced them to compromise just to get the lawsuit over with, and come to resent the neutral for having deprived them of control, of the ability to say "no" and have that decision be respected. As the resentment grows, the participants are less and less likely to be sources of repeat business or referrals. And mediation is a business, too. So the deal is not all there is to it.

For a mediator's practice to succeed, participants must leave the process with the perception that it has been fair, non-coercive, and under their own control. Although mediators do plenty, short of bald coercion, to help participants reach their choices, most mediators encourage participants to choose their courses of action based on their own analyses of the options open to them, rather than based on abdication to the neutral. Participants who believe that their decisions are their own are more likely to be pleased with the process, and the results. And pleased participants are more likely to come back and to refer their friends. And that's what the mediator wants to happen. In order for that to happen, a well-considered "no" must become a decision which is entitled to the mediator's respect.

Often enough, the parties will get to "yes" under their own volition. Even where the parties do not get to "yes" during the actual mediation, cases often settle shortly thereafter, mediation having served as the catalyst. But either way, when cases settle through decisions which are the participants' own, those participants' satisfaction translates into increased mediation business.

Think of the power and control in the hands of the litigating lawyer! You and your clients, not the neutral, determine the ultimate outcome, whether resolution or impasse. If litigating lawyers believe that they best serve their clients by using

their talents to help control the outcomes of disputes, then mediation provides you an unparalleled opportunity to furnish your clients with the benefits that your education and training uniquely suit you to provide.

So mediation is not for sissies. Mediation is for litigators who are well-prepared; who fully understand their cases and their clients; who have the skills to work with their clients to reach the best possible outcomes; and who have the courage to let the chips fall where they may.