MEDIATION CROSS-EXAMINED

By Steve Brutsche'[1]

On June 20, 1987, the Texas legislature approved the 1987 Texas Alternative Dispute Resolution Procedures Act.[2] Any case pending in Texas courts may now be referred for mandatory "ADR" procedures, including mediation, upon the motion of any party or the court's own motion.[3] The purpose of this article is to answer basic questions about mediation for litigation attorneys.

What is Mediation?

"Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them."[4]

Mediation is "fundamentally a process of assisted negotiation."[5] What distinguishes mediation from other forms of dispute resolution is that mediation is non-adjudicatory. There is no fact finding, decision or opinion by the third party (nonbinding or otherwise).

"The mediator may not impose his judgment on the issues or that of the parties."[6] In mediation, the parties maintain responsibility for and control over their own dispute. Principles of negotiation and problem solving which emphasize the long term interests of the parties are the primary ingredients of the process. The mediator acts as a catalyst and advocate for resolution of the dispute by: (1) assisting in the definition of the issues; (2) dissolving obstacles to communication; (3) exploring alternatives; and (4) facilitating the negotiators reaching an agreement.

Why Should Trial Lawyers Be Concerned With Mediation?

It's here; it works. Mediation serves the client and the court system and clients favor it. More than 200 public corporations have subscribed to corporate statements of principle committing to explore ADR before full scale litigation. The settlement rate for cases mediated with qualified mediators is 80%-90% or more.[7]

At least 25 states have adopted ADR statutes (federal legislation is pending), 111 of the 175 ABA accredited law schools now offer ADR courses, and at least 38 federal cases since 1983 discuss ADR in published opinions.[8] "When mediation works, it typically leads to greater party satisfaction than the win-lose results of litigation. When mediation . . . fails, litigation will . . . still be available."[9]

What Are The Mechanics Of Mediation?

The parties and their attorneys commit to a good faith effort to settle the case. All persons necessary for a decision to settle the case must be present during the entire mediation session. The mediator lays the ground rules, describes the process and answers questions in an introductory joint session. The session is private. No tape recordings are allowed and no court reporters are present. The proceedings are confidential and privileged as settlement negotiations under the Texas ADR statute[10] and Rule 604 of the Texas Rules of Evidence. After the mediator's introductory remarks, the attorneys will outline the legal and factual issues in the case. Their clients may also speak, but are not required to do so. The mediator will ask clarifying questions to narrow the issues and to determine areas of agreement and disagreement. The parties will typically be asked to state their opening settlement positions. There are no rules of evidence in mediation, only rules of common courtesy.

After the plaintiff and defendants have stated their respective cases and areas of agreement and disagreement are delineated, the parties will be separated into different meeting areas for private meetings with the mediator called "caucuses." Anything said to the mediator during a caucus cannot be repeated by the mediator to the other side to the negotiation without the express consent of the parties so communicating.[11] One of the main "purposes of individual caucusing is to allow a party to ventilate views he or she is not comfortable in disclosing directly to the other party."[12] The mediator gets a greater sense of the true bottom lines of the parties and the interests they seek to protect as he or she engages in "shuttle diplomacy" between the parties. "The mediator encourages the parties to examine what their interests are - legal, business, political, economic, personal - and to explore settlement terms to satisfy those interests. . .."[13]

What Are The Respective Roles Of The Trial Attorney, The Client, And The Mediator In The Process?

The trial attorney's function is to participate in the process in good faith and support his client's intention to resolve the dispute. At the same time, it is the lawyer's job to protect the client's legal interests. The lawyer still provides analysis of the legal issues for the client and advises the client as to

the advisability of accepting, declining or making particular settlement offers. The lawyer is the field general who designs and implements the negotiating strategy.

The client must pay the price of good faith participation.[14] This requires time and focused attention.

"The mediator's major functions include: chairing the discussion; clarifying communications; educating the parties; translating proposals and discussions into non-polarizing terms; expanding resources available for settlement; testing the reality of proposed solutions; ensuring the proposed solutions are capable of being complied with; serving as a scapegoat for the parties' vehemence or frustration; and protecting the integrity of the mediation process."[15]

When And How Can Mediation Be Effectively Utilized?

Mediation is appropriate before litigation has commenced or ". . . at any time in the trial or appellate process. The trial court retains authority to refer a case . . . as long as it retains plenary jurisdiction."[16]

Factors to be considered in assessing whether to refer a case for mediation include the status of the case on the court's docket, ". . . the nature of the dispute, the complexity of the issues, the number of parties, the extent of past settlement discussions, the postures of the parties and whether there has been sufficient discovery to permit an accurate case evaluation."[17]

Sufficient information can usually be exchanged on an information basis during the mediation process for the mediation to be successfully conducted. Limited discovery can be conducted on specific issues, if necessary for the parties to formulate settlement positions.

If Mediation Is Voluntary, How Can It Be Compelled?

Any party can request the court to order mediation. The court can also do so without prior conference or hearing.[18] Thus, even though the parties cannot be compelled to reach a settlement, they can be ordered to mediate.[19] Some federal judges have ruled that diversity cases pending in Texas courts are subject to the Texas ADR statute and that mediation may be ordered in non-diversity cases under Federal Rule 16. Some judges will not order mediation unless all parties agree to it as a matter of personal policy. In short, the particular judge's discretion[20] and predisposition toward ADR will determine the chances of compelling or being compelled to participate in a mediation process.

What Are The Risks Of Mediation And How Can They Be Managed?

There is the risk that it will not work. If it does not work, the parties are free to pursue the litigation process. There is the possibility that facts will be disclosed that might not be discovered in the process of preparing for litigation or that some strategic advantage will be compromised. However, use of the caucuses for communicating sensitive matters will minimize that risk, as the mediator "may not disclose to either party information give in confidence."[21] Mediation proceedings are privileged and confidential and neither the mediator nor the mediator's records can be subpoenaed as a witness in the case.[22] Most mediators' general practice is to destroy all notes of the mediation session following the completion of the mediation process. The mediator can report to the court only that the mediation process resulted in settlement or did not result in settlement, stating no reasons or details.[23]

What Does Mediation Cost?

The economic cost of mediation relative to that of litigation is inconsequential. Most disputes can be mediated in one or two full day sessions, at a cost of $250 to $1,000 per day per party.[24] The amount of mediation fees and expenses will vary depending on the service provider, the number of parties and the amount in controversy. Certain mediation services charge an administrative fee plus a daily or hourly fee for the mediator. Private attorneys and former judges serving as mediators typically charge an hourly fee or a fixed daily fee. Mediation costs are generally split equally between the parties, and are taxed as costs of pending lawsuits.[25]

Who And Where Are "Qualified" Mediators?

"A mediator must be neutral, impartial, objective, flexible, intelligent, patient, persistent, empathetic, effective as a listener, imaginative, respected in the community, honest, reliable, non-defensive, persevering, persuasive, forceful, and optimistic."[26] As there is no certification process for mediators, references and good old fashioned inquiry are the best available tools for selecting effective mediators. The court with jurisdiction over the dispute may recommend a mediator or provide a list of competent mediators. This list can be narrowed further based upon observations from attorneys, judges and parties who have had actual experience with the proposed mediators coupled with interviews with the proposed mediators about the extent of their training, experience and success ratios.

Conclusion

"Clients will, and should demand that their attorneys explore [mediation]. Just as doctors do not always recommend surgery, lawyers should not always recommend litigation. As in medicine the least intrusive method often produces the most effective solution."[27] "Certainly ADR cannot replace our adversarial system of law. That system has provided us with an irreplaceable heritage of legal precedent upon which to make considered judgments. . .. [However], our present system of jurisprudence is for the average person, remote, incomprehensible and often unaffordable."[28] "Scientific, social and economic pressures on finite resources force society to adopt more cooperative methods for dealing with conflict. . .."[29] The wide range of . . . processes that make up our legal and social systems, do not pose a threat to the status of the lawyer as the pre-eminent professional conflict manager, unless, of course, lawyers choose to ignore some of these . . . processes."[30]

Mediation is an idea whose time has come. It is here, it works, and it serves our clients. It is incumbent upon attorneys as the "pre-eminent professional conflict managers" to utilize this effective method of dispute resolution.

Pass the witness. ■

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2 Texas Civil Practice & Remedies Code. Title 7, Ch. 154.

3 Id. § 154.021 Note: Some Dallas federal courts apply the Texas ADR statute to diversity cases.

4 Id. § 154.023(a).

5 Marcel, "Why We Teach Law Students to Mediate"; Journal of Dispute Resolution, Volume 1987, page 77 et seq.

6 Supra Note 1 § 154.023(b).

7 Coulson, Robert, Business Mediation, pg. 7; Judge Gary Hall, 68th District Court, Dallas County, Texas reports that his best mediators settle 90 to 100% of the cases he refers to them. U.S. District Judge Joe Fish's federal referral program achieved a settlement rate of about 86% of all cases referred for mediation procedures. During three "Settlement Weeks" in Dallas and Tarrant Counties, attorney volunteers with minimal training served as mediators and about 52% of the cases mediated settled.

8 Raven, Robert D., "Alternate Dispute Resolution: Expanding Opportunities," The Arbitration Journal, June 1988, Vol. 43, No. 2, pg. 47.

9 Marcel supra Note 5 at 86.

10 Supra Note 1 § 154.053(c) and § 154.073.

11 Id. § 154.053(b).

12 See Marcel supra Note 5 at 83.

13 Stulberg, James B. and Montgomery, B. Ruth, "Design Requirement For Mediator Development Program," Vol. 15; 499 Hofstra Law Review at 504.

14 Raven, supra Note 8 at 47.

15 Stulberg Note 13 supra at 505.

16 Downey v. Gregory, 757 S.W.2d 524 at 525 (Tex. Civ. App. – Houston [1st Dist.] 1988), no writ history.

17 Id.

18 Id.

19 Id. and Supra Note 1 at § 154.053(a).

20 Supra Note 16.

21 Id. at § 154.053(b).

22 Supra Note 10.

23 Id. § 154.053(c).

24 Pro bono services are also available through some agencies and mediators in appropriate cases. Also, during Settlement Week attorney volunteers mediate at no cost to the parties.

25 Id. § 154.054(b).

26 Stuhlberg Note 13 supra at 505.

27 Raven supra at Note 7 at 47.

28 Gilkey, Roderick "Alternate Dispute Resolution: Hazardous or Helpful?" Vol. 36 Emory Law Journal at 574.6.

29 Stuhlberg and Montgomery supra Note 13 at 575.

30 Marcel supra Note 5 at 87.