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Of course we can reach a fast settlement. How much are you willing to leave on the table?

Mediation plus: Don't leave money on the table

Two approaches to modifying mediation in difficult-to-settle cases

Mediation is the most widely used ADR approach today and has been for the past generation. In the course of becoming widespread it has also become predictable. It has become predictable that last month one party told me a young associate would attend the first several hours of the all-day mediation, and the client and partner would not show up until after lunch because nothing ever happens in mediation until the afternoon.

Does mediation need revitalizing?

How can mediation become more effective? Mediation is a valuable settlement tool, in large part because we in California are fortunate to have a large cadre of skilled mediators. But even the best mediator has stories of cases he or she could not settle. Most often, the mediator and lawyers blame the failure to settle on the divergent valuations that counsel and clients place on their case.

This article focuses on two approaches to modifying mediation in difficult-to-settle cases. Both involve the presentation of key parts of the case by counsel. The first, mediation preceded by neutral evaluation, begins with a presentation to the mediator who then provides an objective, neutral evaluation to both parties. The second, mediation preceded by a mini-trial, incorporates a presentation by counsel and key witnesses, especially experts, to the clients and the mediator.

The ability of the lawyers to accurately predict the likelihood of various outcomes in a case is of paramount importance in determining whether a case can resolve prior to trial. Lawyers are called upon throughout litigation, and during a mediation, to advise their clients on the basis of their predictions of the outcome. Clients' choices in deciding whether to offer or accept a particular settlement depend upon the abilities of their counsel to make accurate predictions concerning case outcomes.

There is academic research showing that lawyers' forecasts were routinely overconfident in their predictions of outcomes in their cases, and that they did not get any better with years of experience. (Goodman-Delahunty, et al., "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," *Psychology, Public Policy and Law,* 2010, Vol. 16, 133-157.) Every mediator can attest to that conclusion: in every mediation, when we ask counsel for their estimate of their likelihood of achieving the result for which they are arguing, the combined percentages greatly exceed 100 percent. If plaintiff's counsel estimates that her client has a 70 percent chance of prevailing, defense counsel estimates his client's likelihood of success at 70 percent, and if, as is usually the case, their respective clients hold even stronger opinions as to the strength of their case; it is no wonder that the parties have trouble reaching settlement.

Objective benchmarks

What can mediators do when confronted with such optimism and wishful thinking? Incorporate objective benchmarks. As a preliminary note, before commencing these procedures, and as with all mediations, the parties should ensure that everyone understands and agrees that the entire process is a compromise negotiation, protected by the relevant mediation privilege. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceeding by any of the

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parties, their agents, employees, experts and attorneys, and by the mediator are confidential. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its presentation or use at the mediation.

Mediation preceded by neutral evaluation

"Neutral evaluation" is a term that is used in different ways, to describe different dispute resolution processes. In this article, neutral evaluation refers to a procedure in which all parties are present and participate in presenting their case to the mediator/evaluator and receiving an evaluation of the case.

Let's say that defense counsel has a novel theory that will defeat plaintiff's claim for punitive damages and penalties, the bulk of the relief being sought. Plaintiff gives the argument zero likelihood of success. A ruling on this issue will move the parties from their inability to settle into a range in which settlement is highly likely. Inasmuch as the trial judge is not likely to give a quick advisory ruling, the defendant's option is to tee-up a motion for summary adjudication, at significant expense, and wait for the hearing.

Mediation plus neutral evaluation provides a shortcut. The parties select a mediator with legal expertise in the relevant area or law, and present their case. This process combines the benefits of a neutral mediation with the expertise and experience of a mediator who is knowledgeable about the legal and factual issues of a particular case. This technique is especially useful when dealing with a novel or complicated case where the parties are far apart in their views of what the case is worth, and the input of an experienced neutral with expertise can help the parties and counsel reevaluate their positions.

Here is how it works. The parties agree that in the course of their mediation they would like to receive a written evaluation of the dispute that identifies best and worst case alternatives so that their mediation is more informed as they then proceed to reach a negotiated agreement. (Some court-annexed settlement programs used a similar neutral evaluation procedure that incorporates an oral evaluation following the presentation by counsel.)

The parties agree on a mediator/evaluator who initially holds a joint conference, usually telephonic, with the parties and establishes a schedule for exchanging initial written statements. Generally, an initial statement describes the substance of the dispute, the parties' views of the critical liability and damage issues, important evidence and any other information that may be useful to the evaluator. These written statements, or briefs, are exchanged between the parties as well as with the mediator.

At the evaluation session, the parties and the mediator/evaluator begin with a joint session, during which each party presents its claims or defenses and describes the principal evidence on which its claims or defenses are based. The evaluation session is informal and the rules of evidence do not apply. There is no formal examination or cross-examination of witnesses. This session may last for as short as one hour or as long as one day, depending upon the complexity of the case and how the parties want to structure it.

At the conclusion of the presentation, there are various options:

(1) The mediator can present his/her evaluation orally or in writing, the parties can discuss options to move the case forward, they can commence mediation, or they may agree to participate in follow-up mediation sessions. This option is best suited to cases with a limited number of issues.

(2) The mediator and the parties can agree to adjourn for the day to allow the mediator to prepare a more extensive written evaluation, after which;

(a) Counsel will transmit the written evaluation to the client, and (b) They may reconvene for mediation now that all parties have had the opportunity to digest the evaluation.

A good evaluation will be in writing and designed to be sent by the mediator to counsel who in turn will send it to and discuss it with their clients. This is especially valuable where there are people whose input is required or persuasive in reaching the final settlement, such as a board of directors or family members. The contents of the written evaluation usually include a candid evaluation of the strengths and weaknesses of the evidence presented and the legal positions of the parties' claims and defenses, including a discussion of likely outcomes and the dollar range of potential damages and other remedies. In addition, the evaluation can cover ways to reduce the scope of the dispute by identifying areas of agreement that can be built upon for a partial or complete resolution. In appropriate cases, the evaluation identifies areas in which additional information would be helpful to aid the parties in reaching resolution, and proposes a plan for expeditious discovery to obtain or exchange that information.

This step, when the mediator delivers a neutral evaluation, can be of great value to the parties, providing the mediator takes the time to explain the evaluation carefully, documenting it with evidence such as exhibits and supporting it with legal authority, as well as explaining where there are areas of uncertainty and why. The evaluation is drafted and delivered in a manner designed not to insult any counsel or party or witness, but it is nonetheless objective. Clients have this opportunity to hear a neutral evaluation of their case at a time when they can still incorporate it into their settlement analysis.

Neutral evaluation is well suited for cases in which a party refuses to confront the weaknesses in its case and has unrealistic expectations; cases in which there are multiple parties with diverse interests and cross claims; cases with complex legal issues; or cases involving a novel legal issue.

Mediation preceded by mini-trial

In the mediation plus mini-trial, the mediation commences with a mini-trial in which the lawyers present their key witnesses and evidence to an audience consisting of the mediator and also the key decision-makers, the clients. The

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clients, who have the best understanding of their underlying interests, play a central role in the process. It is a voluntary, flexible process that encourages counsel and the parties to develop and implement procedures for their particular case.

So, let's say that the plaintiffs allege large damages as the result of theft of their trade secrets, taken when two former employees left and started their own competing company. Defendants claim that the information at issue was commonly known and already in use in the industry. The parties are each committed to their positions: plaintiffs feel that they have had their trade secrets, which they spent years developing, ripped off; defendants assert that they were the brains that developed those technologies and which in any event are now well known in the industry and are merely improving upon them.

Prior to the mini-trial, the parties exchange information, in the nature of informal discovery. On the day of the mini-trial, each party presents its information in whatever format the parties agree upon: as a presentation by counsel, with or without witnesses, including expert witnesses, who may testify in response to questions or in a narrative, and who may or may not be subject to cross-examination. The parties agree upon the order and length of their presentations, with the aid of the mediator in the event of disagreement.

The mediator moderates the mini-trial. One especially effective technique is to have the expert witnesses present their reports one after the other, in each other's presence, and then discuss their reports with each other to see if they can clarify areas of potential agreement or modification. This practice is often referred to as "hot-tubbing," a name that breaks the ice between the experts.

The client representatives are encouraged to ask questions during the presentation, and to talk with each other at any point and during breaks to revisit their positions. These discussions, with the mediator, are confidential, protected by the mediation privilege.

Following such presentation, the client representatives may ask clarifying questions of counsel or witnesses, for the purpose of contributing to their understanding rather than in the nature of cross examination. The rules of evidence do not apply (unless the parties so desire) except for the rules pertaining to privilege and attorney work product.

At the conclusion of the mini-trial presentation, the clients, their counsel and the mediator, meet and engage in the traditional form of mediation. At the request of either party, or on the mediator's own initiative, the mediator may give an oral opinion or evaluation as to the issues raised during the mini-trial and as to the likely outcome at trial of each issue.

The mini-trial is especially well-suited for cases involving parties with strong wills who are accustomed to issuing orders and making decisions, and who need to have the impact of the weaknesses in their case placed squarely in front of them.

Mediation with a side of single-issue arbitration

Plaintiff's counsel thinks that they have six years of damages and claims that include underpaid Medicare payments covering thousands of patients. Defendants think the bulk of plaintiff's damages are barred by the statute of limitations or administrative preemption. The mediator cannot convince either side to compromise or capitulate. What now?

Ideally, the mediator would "channel" the judge and inform the parties of how the judge will rule, so let's incorporate that into the settlement calculus and resolve the case. For those mediators who aren't into "channeling" or pretending to know what another judge will do months from now after considering the matter, refer the matter to a one-issue arbitration in front of a neutral with the expertise in the relevant legal issue or industry, submit the issue on papers and/or with a brief evidentiary hearing, and get a ruling. That ruling can be binding or non-binding, as the parties wish, but even if non-binding it will inform the mediation and push the parties closer to resolution.

Summary

Why is there a benefit in incorporating a neutral evaluation, mini-trial or single-issue arbitration into the mediation? Because lawyers overestimate their likelihood of success in litigation. They need the benefit of objective input in their evaluation of their settlement positions.

When a case can support the expense, lawyers spend the time and money for mock trials, mock juries, jury consultants and even mock judicial panels, all in an effort to improve their prediction of success and their decisions as to whether to enter into settlement negotiations and whether to accept a settlement offer or proceed to trial. The attorney's estimate of probability of success is a crucial variable in accepting or rejecting a settlement offer.

With these procedures, attorneys and clients can more thoroughly and efficiently appreciate and evaluate litigation risk against settlement offers. Buyers and sellers of real estate would not consider entering into negotiations until they had researched the comps; patients seek out second and third opinions before undergoing serious medical procedures. Mediation that incorporates objective evaluations, whether by a mediator, or by a combination of mediator and client decision-makers who have experienced the presentation of both parties' best cases, results in settlements that are better informed.

Barbara Reeves is an arbitrator, mediator and special master with JAMS. She is also a Certified Electronic Discovery Specialist. She has handled more than 1000 mediations and arbitration proceedings since becoming a full-time neutral in 2006. A graduate of Harvard Law School, she was a prosecutor with the United States Department of Justice Antitrust Division, a partner in major international law firms, and associate general counsel with a Fortune 500 company in California before joining JAMS in 2006.