Becoming More Effective as Mediation Counsel

BY JERRY F. WEISS

There numerous anecdotes that relate how legally represented disputants are becoming increasingly wary of traditional means of resolving their disputes: namely, through litigation and trial.

This dissatisfaction has given rise - at least in part - to the growing use of alternative resolution methods, particularly mediation.

We have all heard stories about clients who perceive that they are treated as irrelevant to a legal system that is so caught up in its own "ritual" and substructure that it has gradually lost touch with the people and institutions that really count – the parties.

Sometimes, clients feel like they are merely passengers – perhaps hostages is a better word – locked in the trunks of their own cars. They are driven around by lawyers and judges who rarely, if ever, share information about purpose, time of arrival or even what is perhaps the most important, but least discussed topic of the legal journey, destination. The clients complain that the only time they get to see where they are is when they are let out of the trunk at the time of an occasional deposition or pretrial.

Parties and their representatives, if the parties are institutions, aren't the only people who feel this way. They are in very good company.

Former Chief Justice Warren E. Burger recognized the undue burden that litigation poses for most cases when he said: "Traditional litigation is a mistake that must be corrected… For some disputes trial will be the only means, but for many claims trials by adversarial contest must in time go the way of ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for really civilized people."

Client Dissatisfaction

Clients don't need much persuading. Many have recognized – some in more subtle terms than others – exactly what Chief Justice Burger was talking about, and they have increasingly come to want a better "feel" for the legal road they are on.

Mediation, if appropriate for the dispute, provides a much better alternative for many of the 90 percent plus cases that are resolved without trial, and oftentimes with little, if any actual "litigation".

One of the compelling facts that suggests mediation is "better" from the parties' perspective is that it seems to work. Some reports put the success rate – measured by settlement – at over 85 percent, even where all prior settlements have failed and where parties feel there is little chance of success in mediation.

Furthermore, the real players in interest - the parties - don't like litigation, but instead have come to view it as a necessary evil. They think that discovery is meaningless and they are suspicious of rules and process that only we members of the "club" can understand. Many clients think we don't want them to understand and that we lawyers do little to educate them because we think the value of such indoctrination is outweighed by the additional time and financial cost.

As a neutral in many disputes, I have heard the disputants go a step further, accusing lawyers and judges as purposely perpetuating this "mythology" so that litigants will never be able to understand and so that we will never have to explain how and why so many resources at so many levels are thrown at a litigation process that accomplishes so little (at least as far as many clients can perceive) and leaves the tank of resource and emotion so seemingly empty at the end of the trip.

Since many people feel there ought to be a better way, channeling this client anxiety and frustration into the possibility of using mediation has, therefore, not been very difficult for those of us who do a lot of neutral facilitation. But it is only half of the challenge. The bigger challenge seems to lie with the legal representatives of the parties.

Combating Misapprehension

There is a general misapprehension and tentativeness in the legal community toward mediation, with judges and lawyers alike.

This is not so much the case in those jurisdictions where mediation is more heavily employed either practically or as part of the statutory or procedural scheme (for example, Florida and California).

But in states like Ohio where mediation only appears sporadically as part of the procedural landscape (*e.g.* domestic relations), there is no comprehensive employment of the process, even in court annexed programs (federal and state) which use court mediators and private counsel who are members of the panel.

In "Issues to Consider When Selecting a Mediator" in the Cleveland Bar Association Journal, July/August 2000, I addressed many of the issues pertaining to whether courts should be involved themselves as mediators. Beyond such questions, serious issues are posed by the difficulties litigators have in engaging in a process and format that necessarily diverges from the typical litigation mode of dispute resolution.

Approached from the perspective of the mediator, this problem translates into involving the lawyers on both sides in a way that may go counter to their usual litigation "instinct" and what they may perceive as their litigation "interests". The kind of "angling" and zeal typical of traditional advocatory forms of resolution (slugging it out in court) are not generally the kinds of virtues sought in the mediation setting, with its emphasis on cooperation, collaboration and flexibility.

Lawyer Aversion

Many firms in jurisdictions that are more accustomed to mediation have special "mediation counsel" to supplement litigation counsel, and to take the lead in actual mediation. Only rarely does mediation counsel in such settings defer to litigation counsel and then, usually only at the behest of the mediator who might find it useful to give each side a "taste" of what going to court might entail. This can be a very effective tool.

This is not to say that mediation lawyers require special "sensitivity training" for a process far removed from what we usually do. This is far from the truth. They do, however, require a good understanding that mediation is a different kind of resolution process where typical litigation tactics may very well lack effect.

Counsel needs to recognize that the goal of resolution may remain the same, but with the addition of a true third party neutral mediator, the methodology is entirely different.

The phrase "I have come to make peace", while familiar to mediation, is alien to traditional litigation. But in the end, isn't peace what resolution is all about?

The fact is that the usual manner and language – the tool box, if you will – of litigation a tough fit for usual mediation methodology, due in no small part to simple unfamiliarity with the process.

Litigators are generally very proprietary about litigation. In mediation, however, that can get in the way.

What I like to call "case ownership" can not be part of the mediation counsel's repertoire. What do I mean by this?

Mediation involves clients in a way that is unimaginable in litigation. To make a mediation effective, clients usually are heavily engaged by the mediator. Clients make decisions many times and some discussion might even be between the mediator and the client, without counsel. How many litigators would readily let go to that extent?

Lawyers need to understand mediation to an extent that will adequately allow them to feel comfortable in the process with such things that go counter to their usual instinct.

The adept mediator will employ mediation methods that will allow the attorney's comfort level to grow with the process and will find ways to wean reluctant counsel from such typical discomfort.

Norman Brand, a San Francisco mediator sets out three simple rules for lawyers that, when kept in mind and employed by counsel, should help counsel combat some of the negative litigator instincts that often interfere with mediation.

First, let the mediator take charge of the process. If you don't, it wastes good will and the mediator's stature, without advancing the ball. Brand suggests that if you don't permit the mediator to take charge, you might as well go home.

Second, let go a little and let the client become the center of the process. Don't interfere with the mediator's interaction with the client. Don't be so protective of the client with respect to the mediator.

Finally, "don't win an argument and lose an opportunity". Even though the mediator may be voicing the position of your opponent, he or she may be sending you a signal. Lawyers need to read between the lines in this process like never before and if you don't get it, don't hesitate to ask when you are in private caucus with the mediator. You will have plenty of opportunity. See, 47 Arbitration Journal 6 (December 1992).

Learning the Process

Lawyers are reluctant to be involved in mediation for several other reasons.

Some involve plain lack of information about the process as discussed herein and can be remedied by simply absorbing readily accessible information about mediation. Familiarity with a process goes a long way to make participants feel more at home and like it more.

First, given the circumspect, often guarded nature of what trial lawyers do, there is a concern that mediation might prejudice our clients and cases if the mediation doesn't result in settlement.

For example, unnecessarily setting a new expectation by establishing a new floor or ceiling amount in negotiations, short of accomplishing settlement or, having information leak out that we intended to be confidential. Again, the instinct not to bare all to the neutral is strong since we are perhaps accustomed to not doing so in pretrials with judges who may later be sitting in judgement of our cases.

Rest assured: given an adept mediator who is skilled at his or her art form – and it is that – confidentiality is a cornerstone of the process upon which mediation rests and the seasoned mediator knows how to handle it. It is a " no lose" proposition and if handled properly, no one is worse the wear if there is no settlement.

Second, there is the perceived threat that if mediated resolution is as simple as suggested herein, there will be little left for the lawyer to do. To some lawyers and firms this translates simply as threat to revenue, but it just isn't *that* simple a process. It still requires good lawyers doing good work toward the same goals as litigation: satisfied clients and just resolutions. The only difference is how we get there.

Skilled mediators can be of great assistance in this regard. I would suggest that the real danger here is that we lawyers may miss the mediation boat if we are too insistent on trying to resolve cases through outmoded methods that may very well be undeserving of what Chief Justice Burger called "ancient trial by battle and blood".

If we as lawyers do not pay serious attention to this widely embraced form of dispute resolution – given the popularity of mediation – those people or entities seeking mediation expertise and utilization may very well pass the legal profession by and our traditional role of problem and conflict solvers may become the domain of somebody else's profession.

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Published in Ohio Lawyers Weekly, April 23, 2001.