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Mediation's evolution in Southern California

If 1995 was the Stone Age, where are we today?

Mediation today is being done very differently than it was just five or ten years ago, and it has changed dramatically since 1995 when it was first introduced into California's general civil litigation world.

This means that in order to successfully represent clients in mediation, advocates have to adapt, too. What worked just a few years ago doesn't necessarily work today.

Volume and repetition have fueled evolution

Looking at just the Los Angeles Superior Court mediation program, not counting any of the private mediation providers, this program has funneled about 25,000 cases a year to mediation for over 17 years. So, there have been over 400,000 mediations just in this one county, and just through the court program.

That means that most mediators who have been mediating full time for that long have mediated well in excess of 1,000 cases, so they have seen over 2,000 lawyers argue their cases, advocate for their clients and negotiate – successfully or unsuccessfully – in that time.

Talking with the litigators for whom I mediate, I find that the average seasoned advocate has represented clients in 100 to 500 mediations, and of course, some have been in many more than that, giving them the advantage of having seen many dozen different mediators' approaches to settling cases.

Given that mediation is most often framed as a competitive model, lawyers have had to raise the level of their game – from advocacy to negotiation to client counseling – to get cases settled with the most advantageous outcome. Attorneys who are still negotiating by using the same tricks they used 10 years ago are going to be about as effective today as the secretary who mastered the IBM Selectric typewriter and never took to word processing.

Evolution in the approach to mediation

Suggesting mediation to opposing counsel doesn't make one appear weak.

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It was perceived as such 10 years ago, but today, because mediation has a foothold in the legal process and is accepted as "something we're going to do sooner or later" – one doesn't look weak to opposing counsel by the mere suggestion that the parties consider mediation.

California courts no longer need to order cases to mediate. By now, with some 400,000 court-annexed mediations under our collective belt in Los Angeles County, every lawyer in the state knows what mediation is and how to access it. Given the court's current budget challenges, counsel should be trusted by the court to make their own determination about which cases would benefit by going to mediation, when the appropriate timing is on a case-by-case basis, who their mediator should be for that case, and where it should take place to be convenient to all parties.

With budgets being cut throughout the courts, we probably can't afford to have the courts operating a mediation provider entity because the lawyers no longer need the "cover" of being ordered, when they can now pick up the phone and ask opposing counsel, "What would you think about mediating this one?" An even better approach might be, "It's my standard practice to recommend to my client an early mediation in every case; would you be willing to do the same in this case?"

Ultimately, the lawyers, in consultation with their clients, are best qualified to decide when to bring a case to mediation in today's environment, and should be trusted to do so.

Mediator selection era by era

Mediator selection has evolved perhaps as much as any facet of the ADR process. When private mediation first made its impact, advocates took to a familiar selection process borrowed from arbitration: the strike list. Each side sent three names to the other, each struck two, and they would arm wrestle over the final two, usually yielding to whoever objected most strenuously to the other's remaining selection. During this early period, counsel suffered from what psychologists call reactive devaluation, where one dismisses any suggestion made by the other simply because it came from the other, and without regard for the quality of the suggestion. While this process was efficient and final, the result was often the lowest common denominator neutral, rather than the most skilled. Or it resulted in the one most unknown to both sides.

Soon, counsel realized that because mediation isn't binding, the mediator had no power over them, so mediators, for a short while, became somewhat fungible. The common feeling in this second era of mediator selection sounded like, "I can sell my case to anyone, so if the mediator has some relationship and traction with the other side, that's what matters to me." While correct in recognizing that the mediator's relationship with the other attorney can be persuasive, many soon realized that by abdicating their vote, they could end up with a mediator who was less skilled, and perhaps wasted an opportunity to settle the case. In fact, few days can be more frustrating, disappointing and harder on the all-important attorney-client relationship than a day spent mediating without much progress.

In the third generation of the selection process, counsel began to realize that mediators can have vastly different styles and approaches. Who the mediator was became an important variable in settlement, so counsel started to pay much more careful attention to selecting their mediators. Counsel, with increasing experience and exposure to different mediators, fast learned that there was no sure formula for success – no black robe or specific litigation experience meant that one would be an effective and efficient neutral or the right fit for a particular case.

Soon, the trade-offs in styles became clear. The efficient mediator could often alienate the lawyer's clients. The touchy-feely mediator could frustrate counsel with their seeming lack of progress. The most highly experienced expert litigator or judge-turned-mediator could seem arrogant up close, didn't work very hard, or simply didn't care as much as counsel expected. And too often, the most popular flavor-of-the-day mediator really wasn't very good, leaving one to wonder how they became popular in the first place.

Lawyers in Southern California began to look to the Daily Journal's annual "Top Neutrals" list and organizations like the International Academy of Mediators to filter the good mediators from the rest, and while this remains a fairly good filter, it is by no means a guarantee of quality or skill.

During this third era of enlightenment, mediator skill, range and repertoire quickly outdistanced neutrality as the most important quality in mediator selection. Mediator experience (or "time in the chair"), training and study, and subject-matter expertise became of paramount importance. Finally, counsel grew weary of the "9-5" mediator, whose focus seemed to be on billing for a full day, and quitting at 5:00 p.m. without regard for the progress or proximity to settlement, conjuring an image of Fred Flintstone when the quitting time whistle went off. It only took one experience with this phenomenon for counsel to add to their checklist redeeming qualities like stamina, energy, tenacity and relentlessness.

As we stand today, seasoned counsel in a mature mediation market such as Southern California recognize the need for a mediator who is wise, personable, prepared, a quick study, empathetic to their clients, approachable, strong, good at reading people, who understands insurance claims and coverage, knows his or her way around the specific area of the law or business industry, is articulate, persuasive and, above all, a closer.

The latest trend in mediator selection, perhaps the fourth wave, is the move toward purchasing neutral services through provider organizations. At the risk of offending my colleagues by omission, it is probably safe to say that Southern California generally has two national ADR providers (AAA and JAMS), and three well-established regional providers (ADR Services, ARC and Judicate West). As the market for mediation services has grown, perhaps exponentially, these providers have come

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to dominate market share over the last decade and their rosters grew from dozens to hundreds of neutrals, and the buying patterns became clear.

Legal professionals were as comfortable with these brand names as home sellers were with Coldwell Banker, Century 21 and RE/Max. Today, entrepreneurs are successfully entering the mediation provider marketplace to compete alongside the established giants, including (the author's firm) PMA Dispute Resolution, a boutique with fewer than 20 highly successful neutrals, and the Agency for Dispute Resolution, a start-up whose panel is a mix of ambitious up-and-comers and seasoned veterans. Finally, we are seeing the advent of the field-specific provider with organizations like the Entertainment Mediation Institute, mostly an assemblage of entertainment-law veterans turned neutral.

The market share owned by provider organizations, in comparison to independent ADR professionals, in my own estimation, has reversed from 10-90 to 90-10, a trend that I only see continuing. While it may result in slightly higher neutral billing rates as the providers take their share, it offers the benefit of more professional case management, from scheduling to billing, and the impression of a filter for quality, all of which is important to counsel in a mature market.

Structure of the mediation process

In 1995, mediation took its format from one of two places – either from the settlement conference model, where the neutral leaned on counsel for movement and rarely engaged with the real parties in interest, or from the community mediation model where the mediator's hands were tied and all they could do was facilitate until it came time to hold hands and sing Kumbaya.

What has happened to the structure is interesting. In an organic way, most of the top mediators in Southern California have gravitated, by trial and error, to roughly the same kind of process. Agreeing that most commercial cases move most efficiently in a separate caucus model, and acknowledging that it makes no sense at all to have litigants walk through the mediator's door and immediately sit in the same room, but also recognizing that it's important for them to lay eyes on each other, especially if they are a plaintiff and an insurance adjuster who has never seen the plaintiff before and needs to assess how that person will present at trial, most mediators moved to a process where the parties and their lawyers will each be given a room where they will spend most of the day, but by mid-morning, after a series of individual check-in meetings with just the mediator, the mediator will often bring them together for a short face-to-face meeting where the mediator can cover ground rules, confidentiality and manage the parties' expectations for the day. On an unspoken level, the parties get to see and know that the other one is there and equally miserable and going to spend the entire day in the same frustration as they are. Unless a case is relatively new or counsel don't yet know each other's theories of the case, usually not much cross-talk occurs.

What is nice, is the number of cases where the defendant asks to make a conciliatory opening, apologizing that the dispute has escalated to this level and reassuring the plaintiff of their sincere desire to work in good faith toward a settlement to bring about closure on this day. Those kinds of overtures, when sincere, can go a long way. There is also a lot that the mediator can do in that moment to remind parties that the people across the table aren't their enemies for today's purposes, rather, they are the ones who hold what each of them came there for that day. This is a pinnacle moment where the mediator can change the paradigm within which the parties and their counsel operate. This opportunity is increasingly being seized by enlightened mediators, making these early joint sessions impactful, if done right.

As we continue along this timeline of mediation, we will continue to see unorthodox meeting formations, especially later in the day when the mediator has a good feel for where they can build a bridge between the separated rooms. This evolution requires a skilled mediator who has his or her finger on the pulse, and also flexible and trusting counsel, who have familiarity with the mediator from prior cases or who have watched the mediator work and have come to a conclusion that the mediator has their clients' best interests in mind.

More sophisticated negotiations

It is said that Americans are culturally deprived when it comes to negotiation. It's true if you think about it – we only really negotiate when buying houses and cars, and occasionally our salary, if that is negotiable. In some other countries, everything is negotiable. Can you imagine walking into your local supermarket and when the clerk rings up a total of $121.10, saying, "I'll give you $50 for it!" Not here, where everything has a price tag, and we complain if it's missing one. I often joke that the little nine-year-old dragging a case full of jewelry up a Mexican beach has done more mediation by the time s/he is 13 than most Americans do in a lifetime.

While attorneys have negotiated settlements to lawsuits for eons, studies show that most don't have the stomach for negotiations that go more than three to four steps on each side.

What mediation has done is offer counsel the opportunity to negotiate more effectively, using the mediator in a role somewhere between sounding board and negotiation coach, combined with the mediator working to keep the parties at the table during the difficult stretches when they might otherwise walk away, counsel are fast becoming more sophisticated negotiators. What the explosion of mediation in Southern California has done is cause lawyers and clients, especially the institutional ones, to learn more about, and become much more comfortable with, the art and science of negotiation.

Part of the more sophisticated negotiation trend includes learning how to game the mediator. The most common game I'm seeing these days is the set-up for the predictable mediator's proposal. Too many of my colleagues have come to rely on the mediator's proposal. To be fair, that is in part because too many

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advocates have become dependent on it, even insisting on one at times. But, like any other negotiation technique, it can become predictable. That is where the problems begin.

More cases used to settle on the day of the mediation. And at the risk of creating a self-fulfilling prophecy here, today, more cases do not settle that day and require the mediator to follow up, as more counsel understand that they might have an additional advantage if they walk away without a deal at the end of that day. This leads to the next new trend of mediator follow-up. Ten or more years ago, we mediators felt as though we had to be invited into a case, and that it had to be mutual by both counsel. Today, mediators are expected to seize the role of protagonist and advocate for the settlement, understanding that counsel appreciate us following up and drawing everyone back into further settlement discussions. Anything less is viewed as lazy or ineffective. This is a pendulum that has swung completely in the opposite direction over the years and one that I expect will correct itself over time to become less predictable and more in balance between counsel and the mediator.

The mediator's position relative to the parties

In mediation's early days, attorneys approached mediators a lot like they would a trial judge holding a settlement conference – tell them nothing, admit to no weaknesses, and never, ever tell them your bottom line. Today, after a decade or more of trust has been built through experience, counsel and clients have begun to trust mediators more. Likewise, mediators have begun to act less like stuffy, distant neutrals sitting in judgment, and more like coaches, partners and confidants of counsel and parties alike.

What used to be, "Why don't you step out and let me talk with my client" has now become, "What do you think we should do?" The latter actually shows seasoning, as that lawyer recognizes that the mediator who should be a negotiation expert, has had the unique benefit of having spent much of the day in the other room, seeing what counsel has not, and that mediator knows more about what kind of response various offers will bring. In order for this to work, though, it requires a mediator who doesn't have the mindset that says, "I must get a settlement at all cost and would sell my mother to do it." In this kind of relationship, the mediator metaphorically sits on the same side of the table as counsel, rather than across it where opposing counsel would normally sit.

Counsel will only allow the mediator to credibly position his or her self along the side of the parties once they have built that trust. After that, the mediator can bring all of his or her training and experience to bear in helping the parties negotiate most effectively.

The evolving process of mediation

One last evolution is that in 1995, mediation was an event. It was one day, no matter how long it took. Respecting the momentum of the process, notoriously determined mediators and counsel plowed until the wee hours of the morning to get a case settled. Back in those days, I mediated several cases that stretched until two, three, four o'clock in the morning, to settle a complex or highly emotional case. I prided myself on my personal record of 19½ hours straight to settle a wage-and-hour claim. But we've all gotten smarter, mediators and advocates alike, recognizing that sometimes taking time to reflect and talk to other people isn't such a bad idea.

We now recognize that mediation is a process, rather than a day in time. And that a good mediator is part case manager, part discovery referee, part early neutral evaluator, part client counselor, part negotiation coach, part persuasive closer, and part settlement-documenting consultant.

What is also changing is the blending of neutral roles that counsel are asking their mediators to play. Combining this flexibility with counsel's increasing experience with the process is yielding more and more creative and customized processes and the market is rewarding mediators who are flexible and creative.

We have also spawned some new hybrids – some creative and others downright scary – including Jury Mediation, where a mock jury is empaneled, delivers a mock verdict, and then the parties mediate, guided by this mock outcome; ENE-Mediation, where the neutral first does an early neutral evaluation and then, somehow, regains neutrality and serves as mediator; and Bottom Line Mediation, which is essentially a settlement conference by telephone that cuts to the chase and doesn't include the parties at all.

Perhaps the most creative (and fun) process I have co-created with counsel was in a trade secrets case where Big Company had filed a motion to compel Small Company's bank records, including copies of deposited customer checks, in order to support its claims that Small Company had been stealing their customers. Small Company argued that if those records were produced, Big Company could put them out of business by selling to those customers at a loss in order to win them all back. But without those records, Big Company could not conclusively prove its case. We had to get creative to move this issue along, so to protect Small Company's privacy enough for them to agree to produce the records, we agreed that the bank would produce the records to me, the mediator, in camera. Both companies would supply me with their confidential customer lists, I would identify the overlapping customers only, and I would disclose to both sides the exact amount of the deposits in the last calendar year for each of those companies. After doing that, we reconvened for a mediation, using those amounts as evidence of damages and settled the case in one day.

As we become more comfortable with mediation and other ADR processes, we can stretch the bounds and customize it to meet the needs of the parties in any given case.

Disclaimer

Every bold article needs a disclaimer. In case it's not already obvious, clearly what is above does not apply to all lawyers, all mediators or all cases. Each

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must be managed based on its own individual circumstances. Rather, what is above is intended to call out the trends, the fashions, and the evolution of the mediation process as it is practiced in this unique market that has matured and bulked up on steroids, due to the number of cases being mediated annually in Southern California over these 17 years.

Where is mediation going from here?

Mediation is here to stay. There is no doubt about this fact. The real question is: where is it going from here? What I predict we will see is that continued budget cuts in government will limit courts' ability to dispose of conflict as efficiently as it has been. These cuts will also reduce the court's ability to fund mediation programs. Once they are convinced that a significant portion of their civil dockets will continue to disappear because parties are mediating in the private sector, we will see a hand-off of the administration of mediations from the public to private marketplace, with the latter being dominated by well-branded provider organizations.

To the extent that courts continue to back up due to funding cuts, and time to trial grows, we may see cases becoming significantly more difficult to settle because of a lack of incentive on the defense side. Without the pressure of an imminent trial date, plaintiffs may have a tougher time getting settlement dollars out of institutional defendants. Should that happen, mediation will lose some of the effectiveness it has enjoyed over the last decade and a half. Having said that, mediation is still growing and thriving in India, where the average time to trial was 35 years when I was last there.

We will continue to see a greater diversity of mediators in the market, too. Not just diversity of race, gender and age (as the younger ones start coming out of grad school with advanced degrees in dispute resolution and 10 years' experience, having mediated since peer mediations in middle-school, not unlike the little boy on the beach in Mexico), but also in work and life experience. As the market continues to embrace specialization, construction cases will continue to see mediators who come from construction and design professions, health-care cases will increasingly demand mediators who have run hospitals or who understand medicine firsthand, and so on. Not to the exclusion of lawyers and retired judges, never to that extreme, but we will see a continued balancing of the variety of experiences people bring to mediation until we begin to see those with no prior work experience, but who come to mediation as their first career out of school. That day is not as far away as we might think – in large part because it has been building here in Southern California for two decades.

We will see mediation move earlier and earlier in the process, from early mediation programs in courts to legislation and court rules requiring mediation prior to filing, much like the increase we have seen in pre-dispute mediation provisions in commercial contracts and employee manuals. We will begin to see attorneys getting involved sooner in these processes in order to assist their clients with those early mediations.

Last, the private marketplace will continue to become more discerning in its procurement of mediation services. With increased competition, there will be a Darwinian effect leaving only mediators who can demonstrate the skill set at the highest levels. And we will see more and more educated and sophisticated advocates in the mediation process, who recognize when mediators have the ability, and are able to step in and salvage an otherwise doomed day, in the event that the mediator does not.

In closing, please go wisely, use an abundance of caution, but feel free to be guided by the roadmap laid out above. And if you are from another jurisdiction, it is probably a safe bet that eventually these trends will seep their way into your marketplace, too, so forewarned is forearmed. I'd like to encourage you to enjoy the ride. Not every mediation you experience is going to be amazing and magical, but an increasing number will be. Enjoy, notice, learn, appreciate and reward those experiences, and continue to sharpen your tool to get good results for your clients.

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