MORE ON THE CASE FOR MEDIATION: UNDERSTANDING THE PROCESS BETTER

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We all realize that mediation as a dispute resolution mechanism has become part of the litigation process in a big way. It should be factored into your client's Litigation Management Plan. Few cases are not mediated at some point these days. We all have much to learn about this process. The new LCA ADR Institute is an effort to promote a better understanding of the process. The program at the Fall Meeting in October is a first step in creating a forum for a dialogue among the Fellows about how we can better represent our clients in mediations, and take advantage of what it has to offer as a means of negotiating a resolution of disputes in which our clients are involved. The idea that parties can meet and discuss, in a confidential setting, alternatives for resolving a dispute – large or small – is welcome because full blown litigation, and even working up a case for trial is an expensive and time consuming process as we all know. Economics alone dictates that we explore resolution at a mediation, which provides an opportunity for a day long or more discussion with a neutral who is devoting his or her time to facilitating a settlement. This a far cry from the eve of trial settlement conferences that we used to experience in the "old days" when judges did not manage their calendars, ADR was not even in its gestational period, and sitting judges had precious little time to learn about a case until you entered the courtroom for trial.

The ADR process – particularly mediation – is consistent with the movement for a more cooperative litigation process in which collaborative efforts are being encouraged. See, e.g. "The Sedona Conference Cooperation Proclamation Process," The Sedona Conference Working Group Series, published in 2008 (www.thesedonaconference.org). As is stated in the report, "The Sedona Conference launches a coordinated effort to promote cooperation by all parties in the discovery process to achieve the goal of a just, speedy, and inexpensive determination of every action."

When I started law practice in the mid 1960's, the word “mediation” was not commonly used. I am not sure I heard the word more than a couple of times while in law school. As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that, if a case settled, it was because the attorneys did so, or the insurance adjuster jumped in and negotiated “the file” directly with the plaintiff’s lawyer. Often the first real opportunity to negotiate a case was the “Mandatory Settlement Conference,” which later became part of the court rules, and which ordinarily was held quite close to trial. Other than direct negotiations, there was little involvement by the court in settlement talks before then. At that time there were no Case Management Conferences.

Courts were ordinarily not very active in the case until a Pre-trial Conference was held, at which time the court might inquire about what settlement talks have taken place, and if the parties were interested in a judge, other than the trial judge, meeting with them to see if some settlement efforts could result in a resolution. The federal courts were required to provide for ADR procedures in civil actions in the Alternative Dispute Resolution Act of 1988 (28 U.S.C. sec. 651 et seq.). Prior to that, in 1985, California provided for Mandatory Settlement Conferences in Rule 222, California Rules of Court.
The words “alternate dispute resolution” or “ADR” were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected or appointed to the bench and stayed to retirement. They did not leave these careers until that time. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification for mediators may be around the corner. Standards have been set for mediators in the conduct of a mediation. (See, e.g., Cal. Rules Court 3.850 et seq.) While it seems that there are more

mediators than lawyers, the litigation process seems to demand this resource for dispute resolution.

We, as lawyers, must rise to the occasion. We need to do a better job of managing litigation especially in the more complex cases, so that resolution and settlement are part of the planning mechanism. This forces the parties to think about where they are going, what the results might be, and how much it will cost. That is, a “cost/benefit” analysis is part of the initial planning process and evaluation of the case.

One of the very important skills of a true trial lawyer or “litigator” is to know how to leverage a case to the point at which the parties are motivated to discuss settlement. I describe this point as a “plateau for resolution.” That is, it is a point where the parties have an opportunity to see what has occurred, evaluate their respective positions, and then look down the line at what will be done as the case progresses towards trial and a “forced resolution.” Does your client want to proceed? Does it know the risks? Is it aware of the significant costs involved? What is the potential settlement range versus the “net” that is likely to result if the case is tried? Recognition of this plateau and then communicating with the client about the case is an essential ingredient to serving the client’s needs. It is our duty to lead our clients through this process of selecting the manner in which the client wishes to reach a resolution.

Consider how it would be if in every case at the outset, a) the case must be set for a mediation no later than 6 months after filing the complaint, unless good cause is shown why this date should be extended, and b) the parties must file with the court a discovery plan that has the objective of allowing them to conduct sufficient discovery to be prepared to discuss settlement at mediation. The federal courts and some state courts have pieces for this in place, but how would our cases be processed if what I have proposed were a firm rule in the court system, which would require a motion on good cause to alter? The pressure would be on, cases would be worked up quickly, and the parties would have a much earlier dialogue than we likely experience now.

As part of the learning process, I highly recommend you obtain and read:

R. Kiser, ***"Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys, and Clients,"*** Springer Science+Business Media, www.springer.com (2010);

J. MacFarlane, ***"The New Lawyer: How Settlement is Transforming the Practice of Law,"*** UBS Press, www.ubcpress.ca.