Benefits of Mediation: High Success Rate, Low Cost

By Jeffrey Krivis

Disputes are part of our culture. They are frequently the driving force behind the decision making process, and the reason rights are often wronged. The primary mechanism that allows us to solve our disputes has been, by default, court intervention. This structure, often known as the civil justice system, is a procedural device created by government as the final option to solve our disputes.

The traditional model of court intervention is an adversary system in which lawyers are trained to vigorously pursue their clients' rights in order to win disputes. At the same time, lawyers have a vested interest in maintaining the traditions of the civil justice system. Unfortunately, the costs associated with maintaining the system have become prohibitive even for those who have had easy access to it until now.

What is clearly undisputed is that the average person cannot afford to participate in the civil justice system on the same level as corporations who frequent the system. Not surprisingly, continued reliance on the civil justice system by corporations has catapulted them into the same financial straightjacket experienced by individuals. This evolution has caused corporations and individuals involved in disputes to realize that the future requires limited dependence on traditional court intervention to solve disputes.

Consider the recent Report of the Commission on the Future of the California Courts. In its vision, the courts must dispense multidimensional justice - a broad range of dispute resolution processes, not just jury trials. Private dispute resolution providers would be available to meet the special needs of the disputants. The private and public sectors would work together to offer a wide variety of dispute resolution options.

That future is now. Corporations like DuPont Chemical recently announced that it was cutting the number of law firms to which it referred cases from 400 to 50, despite an increase in the number of cases filed against the company. The 50 primary firms will be required to completely automate their systems to avoid the huge duplication of effort which has existed in the legal industry.

While economics is certainly a major factor in the current changes to the civil justice system, it is by no means the only factor. For example, courts congested with garden variety fender benders and a backlog of criminal cases are typically overburdened, denying easy access to civil litigants. The most obvious factor contributing to these changes is the realization that only 3% of all disputes which enter the civil justice system ever actually get to trial. Incredibly, most lawyers spend their time preparing for trial but have never tried a case! Most cases are settled informally on the eve of trial or are quietly dismissed.

For those who have mourned the demise of the civil justice system, particularly those who advocate trial by jury– fear not. The system has survived. It has taken on a new complexion, focusing on achieving the objectives of disputing parties in an efficient manner. To do this, the

spotlight has been placed on the multiple options available for resolving disputes, rather than on the procedural default associated with court intervention.

This change has been predictable to those who have paid attention. A system that required one side to lose the dispute each time, coupled with winners who now realize the financial cost of winning, has created a proactive constituency. This new constituency favors a menu of creative procedures that are available to achieve the goals of the disputing parties.

Mediation v. Arbitration: The Difference

The procedures now available to achieve the goals of the disputing parties are limitless. Once considered “alternatives”, the processes available to achieve dispute resolution are accepted as mainstream. These mainstream procedures, also referred to as alternative dispute resolution (”ADR”), allows disputants and their counsel to ambitiously design processes in which the “forum matches the fuss” [Sanders and Goldberg, Harvard Negotiation Journal, January 1994].

At the core of the dispute resolution continuum is voluntary mediation, in which the disputing parties meet informally with a skilled mediator to discuss the case and explore settlement options. Unlike arbitration, the mediator does not hold an evidentiary hearing or render a decision. Instead, the mediator conducts confidential, private meetings with the parties to help clarify the issues and assess the risks. The primary distinction between arbitration and mediation is that in arbitration, the hearing is adversarial with each party presenting their case in a courtroom type setting. The objective is for the arbitrator to listen to the evidence and issue an award that is final. The value in mediation lies not in replacing adjudicatory procedures, but in efficiently assisting the parties to reach a mutually satisfactory conclusion to their dispute.

Why Mediation Works

The Mediator plays the role of a catalyst, initiating ideas and motivating the parties to achieve the common goal of settlement. At the same time, the parties maintain control over the dispute, while the mediator helps facilitate the process. Contrary to court intervention, any solution is possible in mediation, depending upon the interests of the parties. What’s more, a mediation session can be scheduled quickly and is often resolved in a short period of time.

The decision to come to the table is half the battle. A mediation will not be successful unless all disputing parties agree to participate. Once that occurs, the mediator becomes an advocate for settlement by helping the parties agree on the primary issues in dispute and exploring options to achieve their mutual goals.

Once the parties are at the table, the atmosphere created by a skilled mediator contributes heavily to the success of the session. Initially the parties are welcomed and introduced on a first name basis. Logistics are discussed such as the location of restrooms, coffee, phones and the like. In general, the parties are made to feel that they have all of the accoutrements of their own home or office so that they can concentrate their efforts on coming up with solutions to resolve the dispute.

The mediator reminds the parties that the process is confidential, and that any information discussed in a private session would not be revealed to the other party without permission. This is the first “tool” used by the mediator to allow the parties to come off their stated positions in a comfortable and supportive environment. The mediator will also serve as a sounding board so that the parties can have an opportunity to “vent,” or release thoughts and feelings that have contributed to their possession the dispute.

Since the mediator is not a judge and will not make any decisions on the matter, the parties are more inclined to share information that will help bring the case to closure. The parties maintain full control over the process, while the mediator offers insights into the issues at hand. Any party is free to withdraw from the mediation at any time.

Generally, in the joint session the parties are given an opportunity to provide an abbreviated version of their case. Once that is concluded, the mediator usually identifies the critical issues in dispute based on the parties’ comments and sets up an agenda. The parties are then asked to review the agenda and determine whether it should be modified or maintained in the format developed by the mediator. This portion of the mediation is important to a successful outcome in that it develops a rapport between the mediator and the parties, and demonstrates that the mediator is tuned in to the parties’ interests. It also serves as an anchor to refer to if the parties start to go off track during the session.

The next stage of the process is often known as a “caucus” or private session. This is the point where the mediator meets privately with the disputing parties and becomes the only person with actual knowledge of the true intentions of the parties. Up until this point, the parties may have postured into a position that caused an impasse. However, the parties are usually willing to come off their positions but need some guidance to do so in a forceful and effective manner. The Mediator is given confidential information during this phase and begins peeling away the layers that have built up between the parties up until that point. This is primarily done through shuttled diplomacy where the parties are given an opportunity to respond privately to issues brought up by the Mediator after receiving feedback from the other party.

The mediator then becomes an agent of reality, reviewing the obvious issues such as the ability of each side to meet the claim or defense of their opposition. In short, each side looks closely at their mathematical likelihood of success along with the cost of pursuing the case through Trial. In addition, the Mediator will not actually take a position contrary to any party. Instead, the Mediator carefully listens to the views of each side and offers alternatives for the parties to consider.

During this process, the mediator’s function becomes that of a interpreter, translating positions and proposals into understandable terms. Sometimes the proposals are broken down into component parts, some obtainable in whole or in part and some not. By getting each side to look at how the other side sees the problem, the mediator is able to move toward a narrowing of positions. Picture a funnel in which the smallest section of the funnel represents the narrowing of the issues and potential Agreement of the parties, with the large round section of the funnel representing the beginning of the negotiations.

The Tools In The Box

The real strength in the mediation process lies in the tools or techniques used by the mediator to help understand and solve the dispute.

1) The Negotiation Strategy

Mediation is essentially a facilitated negotiation in which the parties generally negotiate in a "competitive" or "integrative" approach. Competitive or positional negotiation involves an assumption that the value being bargained involves a relatively fixed pie. It involves a give and take type of approach which tends to limit the options available to resolve the dispute. Only after a series of concessions are the parties able to reach a settlement. Integrative or interest-based negotiations does not assume a fixed pie. It assumes that common interest exists between the parties and seeks to resolve issues by focusing on interests that lie underneath the position of the parties. The mediator attempts to go below the surface to determine what is driving the conflicting positions of the parties.

From this background, the mediator recognizes the importance to balance both approaches depending upon the issues being negotiated in the dispute.

2) Principled Negotiations

The basic template that is being universally accepted by mediators for managing the mediation session is known as Principled Negotiations [Getting To Yes, Fisher and Ury]. The foundation of this concept consists of four overall strategies that are weaved into all aspects of the mediated session:

a. Separate the people from the problem
b. Focus on interest, not positions
c. Invent options for mutual gain
d. Insist on using objective criteria when selecting options

The positions of the parties are what they decided upon, while the interests are what caused them to decide. The mediator will typically focus on the latter by asking questions to determine what motivates the person or what they would like to accomplish. The mediator would then identify various types of interests such as financial, social, relationship or whatever else is identified. Armed with that information, the mediation session is then taken to a level which allows for creating options and brainstorming alternatives. Once this is accomplished, selecting from the options becomes a simple matter of choice, with the mediator maintaining the orderly process of the session, and keeping the disputant's eye on the ball.

3) Communication Skills

Probably the most important technique used by the mediator to clarify issues and allow the parties to vent in a positive way is through "active listening." This technique involves translating, summarizing, acknowledging and paraphrasing words used by the speaker in order to create a

positive environment. The mediator will go to great lengths to avoid being judgmental and to make sure the party is heard. In so doing, the mediator helps the parties save face which usually moves them toward an acceptable agreement.

Another technique used by the mediator is known as Synectics. This involves using analogies and metaphors to analyze the problem and develop possible solutions. It is a mechanism that is designed to better understand the problem by viewing it in a new way so that creative solutions can be developed.

Many other techniques are employed by skilled mediators to help reach settlement. However, the most experienced mediators will tell you that ultimately they are prepared to do whatever works to help the parties settle.

4) Reaching Agreement

The definitive compliment that can be said about the mediation process is that over 85% of all cases are settled and the parties walk away feeling like a winner. This requires the mediator to develop an agreement that is durable, longlasting and satisfies the interests of all parties to the session. These agreements can be crafted in such a manner as to encourage creative options that would not be available in the confines of the civil justice system.

Consider the case of the rose bush. In that case, the court had watched lawyers incur over $500,000 in expenses in a condominium owner's dispute over the removal of an ugly rose bush. Disgusted with the prospect of having to try the case, the judge encouraged the parties to employ mediation. They reluctantly agreed, and were able to settle the case in one day. Why? The disputing parties felt that they finally were heard, like having their day in court. This resulted in a level of satisfaction the parties were unable to achieve during the litigation.

What A Mediation Provider Can Do For You

1) Getting the other party to the table

Half the battle is won once the other side agrees to participate in mediation. The ADR provider is usually in the best position to persuade the parties to come to the table for several reasons. First, the ADR provider is neutral. That means there is no threat or fear involved in the discussion. By being neutral, the provider is able to erase the normal posturing that goes on between counsel involved in a litigation. Second, the provider can get a sense of the parties positions in an objective or detached manner that allows for more honesty when the party responds. Third, sophisticated ADR providers have developed special skills that are designed to overcome objections to mediation which would normally be expressed between the parties.

2) Coordinating a document exchange

In order to have a meaningful mediation session, it is critical that each side have all the documents necessary to fully evaluate the position of their opponents. Recognizing this necessity, the ADR provider will often help draft stipulations to assist the parties in exchanging

documents informally, without the need for expensive discovery, so that the case can begin to focus on closure. A momentum is then created in which the parties are less inclined to play hide the ball because their mindset is on resolution, not evidentiary proof at trial.

If a dispute occurs with respect to the document exchange, the ADR provider can offer insight into how to resolve the dispute without resorting to court intervention. For example, the provider might recommend that the parties submit an abbreviated version of the problem to a private judge on their panel for an immediate and cost effective decision.

3) Providing trained mediators

While some states do not require training for a mediator to be certified, it is pivotal that the parties select a provider that supplies trained mediators with extensive hands on experience solving problems. This doesn't mean that the mediator sat on the bench for 25 years, or was formerly a senior partner in a downtown law firm. This means that the mediator is committed to the field of dispute resolution, has handled hundreds of cases, is involved in educating other people in the field of dispute resolution, and has a successful track record. Most established ADR providers will provide references for their mediators upon request.

The mediator should also be knowledgeable in the subject matter of the parties dispute. However, skilled mediators recognize that substantive knowledge should not be used to regulate the parameters of the hearing. If the parties choose to follow a path that may not be traditional or within the confines of the subject matter, the mediator will let the parties move down that path. The mediator will not judge who is right or wrong with respect to the law.

4) Providing a safe environment for the hearing

The reason mediation works so well is the insistence by the mediator on confidentiality. The parties are free to explore ideas and solutions without the concern that the other side might view them as vulnerable. In fact, as the mediation process develops, the mediator carefully manages the perceptions of each side, making certain that the parties maintain their positions to the extent they choose to. This leads to complete control by the parties of the direction of the mediation, and the ultimate outcome.

5) Your settlement advocate

Just as counsel is an advocate for winning, the mediator is an advocate for settlement. It is no surprise that the vast majority of all disputes are settled. Given that truth, the mediator acts as the proponent of solutions to reach that goal. At the same time, the parties are free to maintain their stated positions without losing face with each other.

Even if the case does not settle at the mediation session, the ADR provider is usually conscientious in their efforts to keep the discussions going, to continue in the role of catalyst toward settlement, even if the possibilities look bleak.

What If Mediation Doesn't Work?

From time to time it happens. A case that goes through the mediation process might end up in front of a jury. If so, that case has fallen into the a minor exception to the overall statistical proof that mediation works. However, it is important to consider the consequences of not settling through mediation.

To begin with, a good advocate in a mediation session will manage the information provided to the mediator and the other side so that the cards are played cautiously. In other words, it would be a mistake to commence the session with your final position on the table, all the evidence laid out conveniently for the other side to see, and nowhere to go but court. A smart advocate will work closely with the mediator in considering what critical positions will be provided to the other side, when they will be provided and what financial terms will be disclosed or preferred.

Beyond this, it does cost money to go to mediation. Most ADR providers charge by the hour and split the charges between the parties. Some might say that an unsuccessful mediation was a waste of money. This is rarely the case. Consider the value to the client who is now ready to go to battle, armed with the knowledge that every effort has been made by counsel to minimize the legal expenses necessary to win the case. The cost to create that type of goodwill between attorney and client is minimal compared to the value created.

What's more, the mediation session might have served to narrow the issues of the case so that perhaps the trial can be shortened, or the parties might even continue to negotiate privately without the mediator.

Conclusion

Mediation matters because it works to create positive results at a fraction of the cost of litigation. As a tool used by advocates to help achieve favorable outcomes, mediation brings the best of all worlds to the table, and allows the parties to control their destiny. In contrast to a jury trial where the only thing for certain is that the outcome is risky, there is no risk in mediation. The parties maintain control of every aspect of the process, and are free to walk away if they are not satisfied. What else matters?

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