MEDIATING FROM THE INSIDE-OUT

Creating Stronger Client Outcomes and Participation Strategies in Mediation

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FIRST THINGS FIRST

FUNDAMENTALS OF MEDIATION IN CIVIL LITIGATION:

Why the Ethical Mediator Should be an Expert in the Mediation Process

“Conflict management” can be defined both in terms of its meaning and techniques. If a conflict is to be resolved, that resolution arises from a settlement process. Conflict management can include systems or mechanisms to avoid the need for a negotiated settlement process – however, such a system effectively becomes a settlement process.

For example: (1) an “authoritative” process allows a person “in control” to determine if and how parties in conflict may plead their issues, or seek mutual resolution, yet the person in control may ultimately decide the outcome or revise the terms of mutual resolution (a parent, a school principal, a boss); (2) an “adjudicated” outcome allows parties in dispute to plead their issues in conflict in a structured process, such as a “court trial,” where a third-party (jury) determines what the terms of settlement are – still subject to additional settlement modifications by a judge and appeals process, and; (3) “physical battle” or “war” where the negotiated outcome arises out of the a declared “victor” who will determine the terms of settlement.

To the extent there is a difference between “conflict management” and “settlement,” the following discussion treats the terms, more or less, as synonymous.¹

¹ Some academics distinguish between “dispute” (a short term disagreement) versus “conflict” (longer lasting, often with patterns). Both concepts fundamentally deal with a competition of values, goals, power and similar objectives.
So, how does a mediation process facilitate settlement outcomes? Who should mediate? What mediation concepts “fit” the dispute as opposed to a default, or, one-size fits all, process? What expertise in conflict management/dispute resolution, should a mediator bring to the table? When is a mediator taking control of the outcome as opposed to self-determination of the parties – e.g., a facilitated, non-binding, arbitration?

Analogy: Presumably, most people with an infection would not go to a doctor who said, “Based on my years of training and experience, I think you have some sort of infection. I don’t really know what causes an infection, but what I do is give you this medicine called an antibiotic. I even went to a seminar on how to prescribe this medicine. I don’t know how this medicine works, but I know if you take it, the infection often goes away, or, you can lie in bed for a week or two and it will either go away or get worse. There may be other medicine or treatment, but that’s not how I do it.”

Yet, law professors, attorneys, judges – and “approved” mediators (the conflict experts) have no concern about professionals resolving conflict without understanding the nature of conflict, the inherent nature of available settlement options, how settlement processes work, or what might cause one process to work over another. If “self-determination” is a cornerstone of mediation, and a mediator’s evaluation is supplanting this concept, is this a mediation process, or something else? Do the attorneys and the mediator know – it’s something else?

Once our scientific knowledge included an understanding of bacteria, our expectations for medical professionals grew. As researchers, government, businesses and the general public gain a growing awareness of conflict resolution options, the expectations for the legal profession will continue to grow.
Simply understanding that legal problems may go to trial or be negotiated is not a viable, professional understanding of conflict, anymore than understanding that a person should wash a cut to avoid an infection is a professional understanding of bacteria.

Settlement:

- There is a “conflict”, (real or perceived), arising from a “competition” of ideas, goals, expectations and economic values (or various combinations), subject to a resolution
- There is a need or desire to develop or cause a “resolution”
- Settlement processes include, avoiding, acquiescing, conceding, negotiating, mediating, arbitrating, litigating (trial), or physical elimination of the object or opposing party (riots, murder, war)
- The settlement process can change… *begin in negotiation and end in war... or, begin in war and end in negotiation*
- Parties must agree *(directly or by actions)* that a resolution or conclusion has been reached
- The “durability” of the settlement resolution is determined by the parties… *(“whatever”, a handshake, a written agreement)*

Negotiation:

- A conflict exists where one (or more) party can no longer avoid the problem
- Development of a relationship between parties for the purpose of exchanging positions, interests, views and values
- A process where the “goal” is to reach an agreed upon resolution to the conflict
- Each party (or agent) has a direct interest in the negotiated outcome or lack of a negotiated outcome
- Each party has the ability to control the outcome by methods of gains, concessions and agreements
- Negotiation does *not* presume there is an “even playing field”
Mediation:

- A negotiation facilitated by a neutral, third-party (mediator)
- The mediator does not have an interest in a negotiated outcome
- The mediator has no decision-making authority
- Party “self-determination” controls the outcome

Rules of Thumb in Conflict Management

1. All conflicts will reach a point of resolution
   a. the durability of the resolution may be uncertain
   b. the method of reaching resolution will vary
   c. the real or perceived “fairness” of the resolution will vary

2. Resolution by negotiation is not always fair
   a. negotiators are allowed to build leverage to gain a superior bargaining position
   b. there may be unequal resources or power
   c. the resolution is the result of avoiding the alternatives to not resolving the dispute
   d. one party may have superior information or knowledge
   e. parties may hide information or be dishonest
   f. the available sources or resources for bargaining may be insufficient in relation to the actual value exchanged
   g. outside factors may intervene, e.g. time, health, emergency

3. Good trial attorneys promote resolution through advocacy and winning

4. Good negotiators promote resolution by forming agreements - (you can be both)

Reasons “Party” Negotiations Fail in Civil Litigation

- Unrealistic expectations of a party or attorney
- Desire to win (being the bulldog, or, a matter of public policy)
- Lack of relevant information or existence of hidden information
- Inability or lack of desire to see options
- Removal or distancing party from the dispute (let my attorney deal with it)
- Failure to identify or separate a party’s interests from their positions
- Full authority to reach settlement not made available
• Person with full settlement authority not participating in the negotiation
• Desire to cause harm
• Belief that there’s still time or a significant change will occur
• Emotional Blocks, fear, insecurity, ego/pride, anger, or being the protector
• Values-based issue, religious belief, moral or cultural issue
• Manufactured Blocks, need more time, not right, have a flight to catch
• ISOLATION OF THE NEGOTIATORS AND NEGOTIATED INFORMATION

Why Mediation?

• The conflict can be re-engineered
• The points of resolution can be filtered out from points of perpetual controversy
• Mediator brings negotiators together with the parties
• Mediator can identify missing data and bring it to the table
• Interests can be identified and discussed without a sense of weakness
• Communications are not delayed – a time-warp
• Parties experience empowerment and self-determination
• The advocate can lower the gun without becoming vulnerable
• Common interests can be identified
• Immediate return on emotional or decision-making options, proposals, positions or expectations
• Partial agreements (including time limitations or contingencies) can be reached to lay the groundwork for comprehensive agreements
• Provides a participatory forum to reach a settlement (settlement being inevitable)
• Opportunity for a “reality check”
• Parties can deal with broader issues of the dispute as opposed to narrow legal issues or predictions of trial outcomes
• Parties can explore their BATNA and WATNA in a safe environment, or, parties can face their worst demons in a safe environment

The Mediator

Mediator #1: “Parties need to be told what their cases are really worth.”

It is easy to force parties to settle; however, it is much more difficult and meaningful to provide a process where the parties find and develop the resolution.

A mediator who takes this approach is violating the professional code of conduct by improperly giving legal advice. If the mediator wants to give his or her opinion about the facts or the outcome, then the mediator should be retained as the attorney, not a neutral mediator. If the attorney wants to remain neutral, he should say, “I will be your arbitrator, but not your mediator.”
Mediator #2: “I don’t believe it helps resolve anything to have the parties try to negotiate in the same room, so it’s best just to keep the parties separate.”

What the mediator is really saying is that s/he is uncomfortable or unable to facilitate a face-to-face negotiation. In fact, face-to-face negotiations are the most common, most durable and most efficient form of negotiation, even in a mediation setting.

Parties are more than capable of negotiating face-to-face. The traditions of litigation are the only thing that infer such a process is taboo.

As a child, or as an authority figure, you were taught, and teach, that if there is a dispute, **YOU MUST LEARN TO WORK IT OUT BETWEEN YOURSELVES. . .** or else…..

It’s okay for mediators and attorneys to take this position, but understand it is taken to satisfy your own comfort level and it is not necessarily the best method for the best resolution.

Mediator #3: “I believe I was asked to be the mediator because of my expertise in this area of law.” or, **alternatively,** “. . . because I’ve tried over 200 such cases.”

First, you immediately know that the mediator does not understand the fundamentals of conflict, negotiation, mediation or dispute resolution.

Second, you know the mediator will continuously filter most or all communications as, “thank goodness I know what’s best for these people.”

Third, if that was the basis for the selection then you have attorneys who do not understand the fundamentals of conflict, negotiation, mediation or dispute resolution. Further, the selection was made, because **they** feel more comfortable and they don’t know any better.

Fourth, if you have two good, opposing, attorneys who are experts in the field of law being litigated, a third expert is either unnecessary or the mediator is really acting as an arbitrator.

Fifth, if one of the attorneys is not competent in the area of law and wanted the input of a mediator who is an expert, then the attorney should probably not be handling the case.

Good mediators, who understand this is one of the most common selection criteria, take the compliment, ignore their expertise, and focus on bringing the mediation process to the parties with a strong dose of self-determination.
Mediators can test themselves:

#1 Mediate a case in an area of law outside your expertise. If you feel incompetent or uncomfortable, you are not mediating, rather you are providing a neutral evaluation relying upon your opinion of how the parties should see the conflict. You are likely strong-arming parties or using intimidation (even though you don’t see it).

#2 Mediate a conflict where there is not a litigation outcome. If you find it much more difficult or frustrating to assist the parties to reach agreement, then you are wanting to “decide”, “judge”, or “control the outcome” of the issues in conflict, not “mediate.”

Frequently judges, and almost always jurors, are not experts on the area of law being argued.

The Mediation Process:

- Parties agree or acquiesce to mediation
- Mediator is selected
- Mediation agreement (including terms, limitations or scope)
- Confidential mediation submissions (if needed)
- Convene mediation
- Mediator’s Introduction
  - Ground rules of mediation
  - Identification of parties
  - Agreement to mediation (signed)
  - Mediator fees (if any)
  - Mediator is a neutral, no conflicts, no interest in outcome
  - Mediator cannot make any decisions or render any judgments about the facts and issues in dispute
  - Mediator is present to facilitate the negotiation with the goal of reaching an agreed upon resolution
  - The parties determine whether there is a resolution and what it is
  - The mediation is confidential
  - *Ex parte* communications, including private meetings or caucuses
  - Resolutions arise from satisfying interests
- Engage in fact finding
- Allow for positions and release of angst or emotions
- Assist parties to find the interests that underlie their positions
- Explore and build options to satisfy those interests
- Assist in capturing interim or final agreements
- Assist parties to close the negotiations (agreement or memorandum of understanding)

**The Multi-Tiered Process to Joint Sessions:**

There are hundreds of ‘expert’ papers published on the benefits of joint sessions in mediation. The thrust of the majority of articles arise out of court-annexed, civil mediations (*i.e.* mediations arising out of litigation – *primarily civil litigation as opposed to domestic cases*).

Mediation entered the litigation system as a formal process in the early 1990’s. By 2000, the concept of the joint session being only a ‘meet-and-greet’ formality, or, completely eliminated, began to dominate certain jurisdictions.

Regardless of your opinion on the virtue of joint sessions in mediation, extracting the joint session negotiating process inherently alters the dispute resolution process and is fundamentally no longer a mediation. In most instances, the process has evolved (*or devolved*) into one of several types of a *settlement-conference*.

There is nothing wrong with a settlement-conference process. The question is whether the ‘mediator’, the attorneys, and most importantly the parties, know what process they are engaged in?

The number one reason mediators do not pursue joint session negotiations is the “comfort level,” of the mediator. The mediator is not suited to facilitate an interactive negotiation with the parties present.
The number two reason joint sessions are not used is pressure from the litigating attorneys.

Often mediators and litigators simply do not develop the knowledge and skill sets for joint session negotiations – *e.g.* “it’s the way we’ve always done it.”

In other cases, the litigator believes there is negotiating leverage to be gained with shuttle diplomacy – *(the excuse is, “I have not found that joint sessions are productive.”)*.

A great example of failing to recognize the benefit of joint sessions is a multi-party or public policy mediation. In such a case, separating the multiple, competing parties, into private negotiating meetings (caucuses) is the death knell to reaching a mutual settlement resolution.

Unfortunately, even formal court rules have evolved to include mediator, “evaluation,” “case assessment,” and even “predicting court outcomes,” in the lexicon of “the mediation process.”

In many cases, this has developed a “default” process where private meetings are the rule and joint sessions are the exception.

The cornerstone of mediation is the “self-determination” of the parties in conflict. Fundamentally, any process that bleeds that axiom out of the process converts it to something else.

The missing link to use joint sessions can be seen as a failure to recognize the multiple tiers of the joint session process and to use the most effective tiers that “fit” the needs of the parties and avoid defaulting to private meetings.
**Introductions and Knowing the Stakeholders:** A joint session allows those who are negotiating to know who is the table. Parties do not negotiate as effectively if they do not know with whom they are negotiating. It is not unusual for individuals to be meeting for the first time at the mediation. A common example is the out of town insurance representative – where even the defense attorney has not met the representative before. If a party does not have a decision-maker at the table, this dynamic is also exposed and the logistics can be openly discussed. A party who is not comfortable with that openness is typically employing a negotiation tactic, or has not prepared for negotiation.

**The mediator’s introduction:** The parties need to understand the mediation process and the role of the mediator. Unfortunately, attorneys often fail to explain the mediation process to their clients. Attorneys also benefit from learning how the mediator sees the mediation process.

**Creating a dialogue:** Establishing a ‘dialogue’ between the negotiators is critical to an efficient negotiation – many mediators by-pass this golden opportunity. The mediation is a “negotiation”. While there are adversarial components to negotiating, it is not an evidentiary hearing or oral argument. Seldom do parties benefit from providing “court-style” opening statements. Trial attorneys are programmed to advocate their client’s positions and interests through opening statements followed by presentation of the supporting evidence and adversarial arguments. However, the Mediation becomes the opportunity to create a “dialogue” between the parties - educate the mediator on issues, find common facts and interests, and to make sure the opposing parties are on the same page regarding what is and is not being negotiated.
**Saving time, money and being accurate:** An open dialogue discussing relevant facts, the key legal issues, conflict background, negotiation history, and many other facets of negotiation is extremely efficient. As a rule of thumb, for every 15 minutes engage in a joint session dialogue, it would take approximately an hour or more to have the same information on the table using private meetings. Additionally, the information being directly exchanged avoids misinterpretation when a mediator independently is used to exchange the same information.

**Integrating private meetings:** The joint session format does not eliminate the use of private meetings - (1) It prevents the private meeting from being the default format; (2) it makes the private meeting more meaningful – task specific, and (3) the private meetings tend to be shorter and goal oriented. Isolating the parties and decision makers from direct communications is simply ‘unnatural’ to a negotiation process and significantly disturbs any goal of self-determination. Missed opportunities to form a more meaningful settlement agreement often occur by isolating the parties.

**Forms of joint sessions:** Plenary joint sessions are important to develop better negotiations. At the same time, the mediator can have a joint session by meeting just with the attorneys. In some situations, mediators can have a meeting with just the parties, without the attorneys. The different types of decision makers present in a mediation can create different configurations of participants in a joint session.

**Exchanging offers:** Parties are best suited for exchanging settlement offers, especially when the structure of the settlement has largely been agreed upon. It also avoids ethical type issues for the mediator when there are overlapping offers.

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2 For science-fiction fans, read Orson Scott Card’s, *Ender’s Game* (it’s also a movie).
**Closing the deal:** Joint sessions to finalize a settlement agreement is an important part of any mediation or negotiation process. Directly communicating the terms of the settlement adds durability to the deal, curtails lingering negative emotions, and provides accuracy regarding the final settlement terms. Loose end issues can also be easily sorted out, *(e.g. – who is writing the final draft, when should the agreement be signed, developing a memorandum of understanding)*.

**Observations On Joint Sessions in Civil Litigation Mediation:**

- A limited number of cases may not benefit from joint session negotiation. This usually arises where the parties have a preliminary structure for settlement and the mediation is used to engage in real-time communications to hammer out the details. Arguably, this is a settlement conference and not a mediation to begin with.

- Mediators are famous for providing an “opening statement,” primarily to explain the meditation process and housekeeping issues. Again, in a limited number of cases, the parties and attorneys are experienced with the mediation process and the soliloquy of the mediator can be abbreviated or eliminated. The mediator then assists the parties to define the issues to be discussed in joint session.

- More relevant information will be exchanged in significantly less time in a joint session, as opposed to bouncing *back n’ forth* from private meetings. Additionally, the mediator eliminates miscommunications *(lost in interpretation)* and is less likely to “posture” the exchange of information due to a bias or personal desire for a particular outcome.
- Litigators often dislike joint sessions, because they have not adequately prepared their client for joint negotiations. This is surprising (yet overly common) as:
  - Over 95% of civil cases never go to trial and are often settled in mediation
  - A litigator would not likely fail to prepare the client for deposition or trial, where the opposing party is actively present
- Mediators and litigators make numerous “excuses” to avoid joint session negotiations. However, seldom have they engaged in such a process.
- Mediators and litigators find a sense of “safe harbor” by not directly negotiating the dispute.
- Some Mediators simply believe their role is to assess and evaluate – easy to do in private meetings – difficult to do in joint session without killing the negotiation.
- Joint sessions do not eliminate the “private meeting,” it redirects the focus of how communications flow.
- There are variations of joint sessions – a plenary meeting, a meeting with just the attorneys, and in some cases just a meeting with the parties.
- In high-conflict and high-emotion cases, mediators and litigators presume joint sessions are harmful, when in fact they can be empowering.

The challenge is that there are known benefits to facilitated negotiations where self-determination is the cornerstone and fundamentally requires joint sessions as the “default”, not private meetings – Can mediators, litigators, and parties educated to participate in the mediation process, shed the bad habits developed over the past 25 years in court annexed civil litigation?