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ARBITRATION AND MEDIATION SERVICES

Never agree to a full-day mediation session!

MEDIATOR FEES CAN BE SUBSTANTIALLY REDUCED WHEN NEGOTIATIONS ARE CONFINED TO A FOUR-HOUR *MORNING* SESSION

Using a qualified mediator to help resolve a case is nearly a daily venture for today's trial attorney. Mediation expenses can range from nominal, as explained in the MCLA article published in this Advocate issue, to stratospheric levels charged by some ADR providers. Parties, insurance carriers, and business entities can save considerable time and expense by following the suggestions and explanations within this article.

Why do mediations have to be a slow process and cost so much?

In the early '90s, this author served on a Los Angeles County Bar Association Litigation Section committee during discussions of the proposed Evidence Code sections establishing mediation rules. Those rules were finalized in Evidence Code sections 1115-1128.

During one discussion session, sitting judges on the committee wanted to include a requirement that mediations should be an entire-day process. My voice said no, in that I knew, as a trial lawyer who attended many court settlement conferences, that a few hours is all that is required to settle most cases. Many of the judges on the committee had limited civil trial experience as attorneys, and those with corporate experience were accustomed to negotiating contract terms over extended periods. Fortunately, the full-day mediation requirement did not become a statutory recommendation or requirement.

Another item discussed during the committee meeting was a requirement for *joint party sessions* before negotiations commenced. Many committee members thought the parties needed to vent to each other and to the mediator before negotiations commenced. The belief was that the parties needed to confront before they conquer. Fortunately, mutual-party venting did not make it into the Evidence Code.

Mediation time limits

The time required for a mediation session does not determine the value of a case. The shorter the session, the greater the opportunity for a reasonable settlement without the expense of a full-day mediation.

This author enrolled in an advanced mediation program at a prestigious university on a hill. The school has a national reputation for training mediators. Unfortunately, I left the program believing that the school's curriculum was designed to maximize mediator income rather than to provide ways to reduce mediation time and costs.

In my first class, a film showed a *joint* first-day mediation morning session for a mediation scheduled for more than a single day. The parties had to communicate (vent) their feelings and thoughts to each other. It was obvious that the parties grew angrier as the film went on; it was also clear why the mediation would take several days to resolve. The case settled a day or two later, with the mediator earning a large fee and the parties probably still angry.

Perhaps attorneys retained by corporations are less concerned about the cost of mediation than personal-injury plaintiff attorneys. They get paid by the hour, and extending the time to mediate a case may be a tactic to reduce case value. But attorneys who advance costs certainly have a financial interest in keeping mediation fees to the bare minimum.

The parties know the case facts before the mediation session starts

Most cases that go to mediation have had many months, and perhaps years, of formal discovery, motions, depositions, etc. The attorneys know the case facts and are likely familiar with the opposing party's case and arguments. There is no need to rehash the facts during the

mediation session. It is a waste of time and resources. Mediations should focus on negotiations, though, of course, the factual basis for mediation positions may require explanations.

Mediators seeking a full-day mediation

In a recent Daily Journal "Profile," a retired judge transitioning into mediation discussed his practice regarding "full day" mediations. Why a full day?

Mediators who seek a full-day mediation schedule may lack confidence in their ability to resolve conflicts. Although they may have attended mediator training classes, those classes do not equip their students with the skills to become mediators. Confidence is within and likely not teachable. Why should they be paid for 7-8 hours when the same conflict can be resolved in half that time?

Defense perspective: Advantage defense

Before a mediation session, insurance companies and corporations prepare to mediate the conflict. They set guidelines and limits for their retained attorneys, and their attorneys typically have the assistance of adjusters or company representatives.

So, why does the defense frequently suggest a full-day mediation? Probably because at the end of the day, the defense attorney can no longer contact their principal for additional authority – "they've gone home." The negotiations would be different if the mediation had been scheduled for a morning four-hour session, allowing the appearing defense counsel to consult with the home office during the morning. It is a rare plaintiff's attorney who has not had an "everyone has gone home" experience, necessitating a below-value settlement or an unnecessary delay.

No more free lunches

ADR providers have been generous in providing lunch for participants in full-day mediations. It has been a way to encourage a full-day meditation. But today, most meditations are held on Zoom or another platform, and disputes can be resolved within a morning session. The parties can thereafter order Instacart delivery.

Premediation briefs can limit mediation session time

Attorney-premediation briefs provide the mediator with facts and party strategies. The mediator learns the facts and negotiation postures from the briefs, so there is no need to bring forth a slew of facts or postures during the mediation session. The mediation session is not a trial or arbitration; it is a time to negotiate. Additionally, parties hearing a rehashing of the facts during the mediation session may be prompted to return to their arguments rather than proceed with negotiations.

Premediation telephone communication can limit mediation session time

Effective mediators usually call the parties' attorneys to discuss the planned mediation before the session begins. At that time, important issues and facts are identified for discussion or limited during the mediation session. This is a great way to reduce mediation session time.

The Honorable Gail A. Andler (Ret.) recently wrote an internal JAMS article entitled "Making the Most of a Half-Day Employment mediation." In the article, Judge Adler wisely states:

Pre-mediation telephone conferences between the neutral and counsel can be very helpful in making the most of the half day you will actually spend in session. Ideally, the call will take place after the mediator has had a chance to read the mediation briefs Separate calls allow for a candid and confidential conversation where the mediator can ask whether there are any client control issues or unusual party dynamics. The mediator can also find out if everyone necessary to a successful resolution will be there. . . . The mediator may also want to confirm the amount of the last offer and demand and whether non-monetary relief is being

sought.

Realistic initial settlement demands and realistic initial settlement offers will reduce mediation time and expense

No more needs to be stated!

Limiting client participation during mediation session negotiations

If a half-day mediation session is the goal, having a client present during the *negotiation* sessions is probably unwise. The client has an emotional connection to the case facts, and those emotions can crimp or harpoon the flow of negotiations.

An American Arbitration Association article written by JAMS mediators concerning *detrimental party participation* during mediation negotiations states in part:

[A] direct conversation [by a party] can become performative. Instead of exploring a resolution, each side may use the exchange to restate its position or demonstrate resolve to its own team. Even when the tone remains professional, *the conversation can leave the parties more entrenched than before.* [Italics added.] (*Why the Right Conversation at the Wrong Time Can Derail Mediation*, Giuseppe De Palo and Tim Hardy, JAMS mediators, May 12, 2026.)

Clients retain attorneys to prepare, present, and resolve their cases. So, it is up to the client's attorney to negotiate the matter, privately provide updates to the client, and facilitate an agreement.

Shuttle communication

In most cases, the mediator should not communicate with a party to obtain settlement approval. To do otherwise empowers the client to control and, most likely, prolong the negotiations.

The mediator's job is to guide the parties to a resolution, and the parties' attorneys' job is to discuss the negotiations and settlement terms with their clients. Of course, at the proper time, a caucus with the mediator, the client, and the client's attorney can be effective in moving the case to settlement.

ADR providers will provide half-day mediations

Most ADR providers will accommo-

date half-day mediations. Some, such as JAMS, state in its literature: "We offer affordable hearing formats, including half-day options, for every dispute. JAMS mediators have demonstrated their ability to resolve cases promptly and efficiently, providing significant savings, time and expense." ARC offers a three-hour mediation session at a reduced rate for cases valued at \$50,000 or less. Judicate West and the American Arbitration Association offer half-day rates. MCLA has a three-hour mediation rate at \$300 per hour.

Conclusion

With few exceptions, an effective mediator can achieve a mediation result with cost-conscious parties in less than four hours. And, certainly, that should be the goal of personal-injury attorneys who advance litigation costs.

A four-hour mediation session, with the attorneys' intentions to resolve the case rather than argue facts, will expedite settlement. Parties with new facts should relay those facts to the opposition through premediation briefs or other communications.

The mediation session is not a time for surprises or arguments. It is not a time to present facts. It is a time for case resolution. ♦

Michael Fields has been a licensed attorney for nearly five decades. For nearly 35 years during his active personal injury trial practice, he also served as a mediator and arbitrator. Mr. Fields has been an active author and contributor to numerous publications on ADR issues. His first Advocate magazine ADR article was published in 1992, explaining the use of party arbitrators. He was the primary contributor and editor for the California Contract Arbitration section (over 300 pages) of Matthew Bender's practice book entitled "California Alternative Dispute Resolution Practice." In 1999, the practice book became a standalone publication with Mr. Fields' name on the spine. He has been the Advocate magazine ADR editor for nearly 10 years. In 2003, Mr. Fields served as CAALA's president. He currently has a private ADR practice and recently joined the Mediation Center of Los Angeles' (MCLA) low-cost mediator program. Mr. Fields can be retained as a mediator, arbitrator, or discovery referee by contacting him at 562-597-5399 or msflb@aol.com.