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THE MULTI FACETED ROLES OF A MEDIATION SERVICE PROVIDER

By *Joel H. Schavrien*

President Abraham Lincoln said it best, "Discourage litigation. Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time."

It has long been recognized that litigation is a poor way to settle many disputes. Going to court has become synonymous with great expense, long delays, stress on the participants, and uncertainty. The litigation explosion of the 1970's and 80's brought on by expanding laws, more complex lawsuits, and a greater willingness to use the courts has prompted an aggressive search for effective and practical alternatives to the traditional judicial process. One such alternative that has been employed to reduce the costs and delays of litigation is facilitative mediation. Alternative Dispute Resolution (ADR) is no longer the wave of the future but part of the mainstream now of our legal practice. ADR has changed the methods that attorneys are using to meet client needs. No longer is litigation the only forum for the resolution of disputes as dispute resolution is now a matter of choice. The use and applicability of ADR, particularly Mediation, is universally beneficial in all areas of our civil law. Effective as of August 1, 2000, MCR

2.410 allows our trial courts the opportunity to consider and order the use of ADR, particularly, under MCR 2.411, mediation of all civil cases. This article discusses and illustrates the role of the mediation service provider (MSP) during in the original intake of a case into an ADR process. In addition, the manner in which obstacles to its use are overcome is also addressed.

Once parties choose to utilize ADR, whether in an attempt to divert a case prior to its filing, voluntarily during the litigation process, or upon order of the court, it is then the role of the MSP to intake the case. The initial intake of a case requires a mere identification of the parties, the nature of the case, and the present status of the settlement negotiations. It is not necessary, at that time, to obtain a factual recitation or discussion of the case.

The MSP corresponds with all necessary parties to discuss the proposal to participate in a facilitative mediation, or the court order, and the process and procedures to be used. When acceptance of mediation occurs, the MSP will prepare and obtain execution of a written agreement, and arrange the date, time and location for the mediation session.

Parties often voice various obstacles, objections, and concerns about mediation. One of the major roles of the MSP is to address those concerns so that all necessary parties consent to participate. Some of those concerns include:

- Cost. The cost to a party, in a rather routine case, is usually less than the cost of completing discovery, and when settlement occurs, it is achieved far more economically.
- Some attorneys worry that participation in mediation will be viewed as a sign of weakness in their case. As mediation has become more routine, there is less of a concern now. The court's authority to order mediation on its own initiative further neutralizes this concern. Nonetheless, attorneys and their client maintain control over the choice to settle. A decision to mediate is not a decision to settle, but merely a decision to attempt to obtain a resolution of the dispute on a "win-win" basis for all concerned. From this standpoint, settlements are process driven, and therefore mediation is relatively risk free.
- Another objection might be that the other party's position is unreasonable, and settlement therefore appears unlikely. You never know. It is much easier to maintain an extreme position on the telephone or by letter, than in a face to face mediation session. Thus mediation can be another tool for developing a more reasonable approach to resolving the dispute.
- Some attorneys may believe that their abilities to negotiate their client's case on their own, without outside facilitation is sufficient to resolve the case. That may be so. However, the other side may need to be educated as to the risks and realities of the positions that they have taken. In mediation, that party has a safe place to evaluate the underlying legal and factual basis of their case, and explore other options for resolution without being committed and/or vulnerable.
- Attorneys that are candid will sometimes tell us that their client will not accept a reasonable settlement. Clients are sometimes unre-

alistic as to the worth of their own particular case, and it may be helpful to have an outsider act as a catalyst for appropriate risk analysis and reality testing. In this way, the mediator can assist the parties in looking at both the best and the worst case scenarios, and then use the risk-reality technique to arrive at a reasonable resolution for all sides.

- Sometimes it may appear as if not enough information is available to adequately evaluate the case. The mediator can facilitate informal discovery, production of documents, or a medical exam before the case is scheduled. Thus a much more efficient process is employed for discovery which can result in reduced costs for the client.
- Sometimes attorneys object to mediating too early because the lawsuit has not yet been filed. Pre-suit mediation maximizes the effectiveness of the mediation process, as it usually occurs before positions become hardened. It also has the significant advantage of resolving a matter before discovery adds another layer of cost to achieving a reasonable resolution.
- Sometimes attorneys will object that it is too late to mediate because trial is coming up. It is never too late. Cases have settled in judge's jury room on the day of trial. Sometimes parties have a stronger incentive to settle when trial is looming.
- Multiple parties, complex issues, and intervening claims are sometimes cited as reasons not to mediate. It is not necessary to resolve every issue of a case or to determine each party's percentage of responsibility to settle cases. This is particularly illustrative where there is a significant issue of comparative negligence or of contribution of multiple tortfeasors. In essence, the issue need not be resolved to the party's satisfaction in order to fully resolve the case.
- Although usually cited as a reason to mediate, some may object because the parties have an ongoing relationship. In a dispute between parties who may be involved in a business relationship (Landlord-tenant, con-

tractor-sub-contractor, vendor-vendee, etc.) and preservation of that relationship may have future benefits to one or more of the parties, mediation may provide a much less contentious or confrontational forum for resolving the dispute, and certainly a far less costly one with less disruption to ongoing business opportunities than traditional litigation. It will also provide for far more creative approaches and opportunities for resolution than a monetary award or verdict.

The intake process is usually the initial contact between the parties and the mediator. Information that a mediator must obtain as part of the intake process includes:

1. That all necessary parties are invited to participate, including lienholders such as workers compensation carriers, blue cross reimbursement claimants, and any other party that may have a derivative claim. The involvement of a worker's compensation carrier is sometimes crucial to the global resolution of personal injury cases.
2. Determine that all parties and their counsel, together with a party representative that has actual authority to resolve the case in its entirety, physically attend the mediation session. It is extremely frustrating, and non-productive to negotiate with an empty chair.
3. Ascertain whether the case has been through the MCR 2.403 case evaluation process, and the positions of the parties relative to their acceptance or rejection of that award. The case evaluation award may create artificial barriers in some cases. By encouraging the parties to look past that award, and the actual reality of the case, and its potential at trial, they may open themselves up to settlement possibilities that had been previously been unrecognized.
4. Obtain a commitment from the parties that they will be flexible and will consider moving from their prior disclosed negotiating position. If a party is not going to be flexible, then it may not be an appropriate case for mediation.

The following reflects a brief summary of the requirements of the MSP during the intake process:

1. Screening: Assess the appropriateness of the case for the mediation process and the inclusion of necessary parties.
2. Inform: Provide information about the process, offer options, and availability of neutrals.
3. Match: Determine the selection of the neutral to meet the needs of the parties.
4. Coordinate: Schedule the session and determine its location, and the materials to be provided to the mediator for preparation.

It is for the legal professionals to lead the way in providing ADR services to their clients. Our involvement in ADR is best emphasized by the words of Associate Justice of the United States Supreme Court, Sandra Day O'Connor.

"The courts of this country should not be the place where disputes begin. They should be the place where they end — after alternative means of dispute resolution have been considered and tried."

In representing a client, an attorney's duty requires effective and expedient service. ADR applies to all areas of practice and may best serve the client interests. By selecting an ADR process for resolving client disputes, attorneys will maintain happy and loyal clients, indebted to them for their wisdom, and most assuredly reliant upon them in the future. The choice is the attorneys' before it goes to the court. Make it your choice.

Joel H. Schavrien is a 1969 graduate of Wayne State University Law School, has been in private practice since 1969 and a trained facilitative mediator since 1986. He is a past chairperson of the State Bar's Alternative Dispute Resolution Section (1992-1993), a member of the National Mediation Panel of the National Association of Securities Dealers, and a Certified Public Accountant. ■

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*For comments,
contributions or
letters, please contact
Laurence D. Connor
at (313) 568-6573,
fax (313) 568-6658;
or
Deborah L. Berez
at (616) 428-0838,
fax (616) 428-0825.*

MEDIATION TRAINING PROGRAMS

The following mediation training programs have been scheduled:

The Mediation Training and Consultation Institute announces two forty-hour divorce and custody mediation training programs. The first will be held in Ann Arbor on August 6 through 10, 2001, and the second in Ann Arbor on November 12 through 16, 2001. These programs have been approved by the State Court Administrative Office as a domestic relations mediation training program under Michigan Court Rule 3.216. Interested parties should contact Zena Zumeta at 330 East Liberty, Suite 3A, Ann Arbor, Michigan 48104-2238.

The **Oakland Mediation Center** will offer an enhanced mediation training course approved by the State Court Administrative Office pursuant to MCR 2.411. The trainers are Harvey Burdick, Ph.D., and Nancy Klein, J.D. The training will take place at the Oakland Mediation Center in Bloomfield Hills beginning July 18, 2001. For a complete schedule and registration information, contact the Oakland Mediation Center, 2267 South Telegraph Rd., Bloomfield Hills, Michigan 48302, telephone number (248) 338-4280. ■

The **ADR NEWSLETTER**

c/o Laurence D. Connor
Dykema Gossett PLLC
400 Renaissance Center
Detroit, Michigan 48243-1668