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Mediation

Maximizing the Opportunities in a Time of Crowded Dockets

MOST ATTORNEYS ARE WELL AWARE OF THE numerous ADR options available for litigated disputes in Los Angeles County, including private services and Superior Court of California, County of Los Angeles mediation and settlement conferences programs. Given the extraordinary volume of cases filed annually, the court has strategically emphasized alternative dispute resolution to fulfill its mission. The Court's ADR programs play a vital part in fulfilling its mission: "The Court serves our community by providing equal access to justice through the fair, timely and effective resolution of all cases.[1]"

But the mathematics for achieving the mission are challenging. Los Angeles County's case volume makes it impossible for every matter to reach trial within the five-year limitation rule. In the past year, it has expanded its range of extensive free and low-cost ADR resources and partners, which now include settlement conference programs (such as Resolve Law LA, the SFVBA Probate Settlement Conferences, and Family Law Daily Settlement Officers), and mediation programs like the Mediation Volunteer Panel (MVP), the Mediation Center of Los Angeles (MCLA) Referral Program, and the Civil Mediation Vendor Resource List.[2] These options provide a comprehensive range of excellent resources tailored to different case types, all expertly overseen by the Court's highly capable ADR staff. This is in addition to mediation programs offered by other courts located within Los Angeles, namely the Court of Appeal and the U.S. District Court.

But it is one thing for the court to provide the infrastructure for ADR. It is another for litigators to make the most of it. This article focuses on three areas where there are sometimes missed opportunities and misunderstandings among lawyers—early ADR, confidentiality, and preparation.

The Case for Going Early

Litigants face a choice—utilize settlement processes early in litigation or wait until closer to trial. Many attorneys and mediators rightfully observe that cases are sometimes assigned to mediation prematurely, before parties are ready for meaningful settlement negotiations. While this criticism holds merit, it can overlook valuable opportunities for early dispute resolution.

Even when early mediation doesn't result in settlement, it can establish critical groundwork for future negotiations—whether directly between parties or through subsequent mediator-assisted processes. Early engagement often clarifies issues, identifies areas of agreement, and creates momentum toward eventual resolution. And whereas the absence of discovery can provide barriers to settlement, it

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can also provide incentives. Parties may be less entrenched in their positions. And with less money spent on litigation, more can be put toward settlement.

Sometimes when a case settles later in the case, it is clear the timing would not have been ripe earlier on. But there are other times when mediators wish for the parties' sake that they had been brought in much sooner.

Avoiding Confidentiality Pitfalls

No matter when a mediation takes place, the confidentiality rules are critical in the process. Most lawyers understand that communications during and in preparation for a mediation are confidential and privileged. But behind a general understanding about confidentiality, there are often misunderstandings about the details and a lawyer's duties. Here are four important points that many litigators forget (or maybe never even knew):

(1) The settlement conference pitfall: Many lawyers assume that mediation confidentiality also applies to settlement conferences. But it does not. Evidence Code section 1117, subdivision (b)(2), states that the mediation confidentiality provisions contained in that chapter of the code do not apply to "[a] settlement conference with pursuant to Rule 3.1380 of the California Rules of Court."

The Advisory Committee comment to Rule 3.1380 states: "This provision is not intended to discourage settlement conferences or mediations. However, problems have arisen in several cases… when distinctions between different ADR processes have been blurred. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. The special confidentiality requirements for mediations established by Evidence Code sections 1115-1128 expressly do not apply to settlement conferences under this rule."

It is important to be aware of the distinction, as it can impact settlement communications and strategies. But there can be gray areas as to whether an event is a mediation or a settlement conference. That could be the subject of an article in its own right. For now, you may want to bookmark a case that discusses the hallmarks of a settlement conference as distinct from a mediation: *Raygoza v. Betteravia Farms* (1987) 193 Cal.App.3d 1592.

(2) Confusion about confidentiality agreements: Almost all mediators require written confidentiality agreements. These put participants on notice about the rules, but it's important to understand that mediation confidentiality exists *regardless* of the existence of an agreement. There is no statute requiring confidentiality agreements.

(3) Lack of knowledge about attorney duties: There is, however, a statute that requires lawyers to advise their clients about mediation confidentiality. Evidence Code section 1129 requires attorneys to provide clients with a written disclosure about the confidentiality of mediation before the client agrees to participate, and to get a signed acknowledgment from the client that they understand it. This rule is designed to ensure clients are informed about mediation confidentiality, which prevents their communications from being used in later non-criminal legal proceedings, *even if* the mediation involves a dispute against the attorney themselves. Many lawyers skip the section 1129 step, not knowing or forgetting that the rule exists. But it is not the mediator's duty to remind them. The onus is on the lawyers.

(4) Magic language: Lastly on confidentiality, you need to make sure that certain magic language is included in a settlement agreement signed during a mediation in order for it to be enforceable. Otherwise, the settlement itself will be subject to mediation confidentiality, which means that you won't be able to go to court to enforce it. The magic language has to say something like this: "The parties intend this settlement to be binding and enforceable and this agreement may be introduced into evidence in any proceeding to enforce its terms."

The Preparation Deficit

Next, the all-important topic of preparation. Through our experience at the Mediation Center of Los Angeles, we have observed a troubling pattern: many attorneys fail to invest adequate time and attention in mediation preparation. Too often, counsel submit mediation briefs—frequently exceeding 50 pages with voluminous exhibits—as late as the night before a scheduled session. This practice is counterproductive.

Consider the mediator's perspective. Most neutrals cannot meaningfully review extensive materials accumulated over two or three years of discovery when those materials arrive the evening before or morning of mediation. Effective mediation requires the mediator to understand not just the legal issues, but the practical dynamics, key evidence, and parties' interests. Last-minute document dumps prevent this essential preparation.

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A Different Standard: Mediation Readiness

The most effective attorneys and mediators approach preparation with the seriousness it deserves. Consider the parallel to judicial requirements for trial readiness conferences. Judges require parties to identify all participants, specify disputed issues, list evidence and exhibits, name witnesses, and estimate time requirements. This careful management ensures efficient, fair, and productive trials.

Why shouldn't parties provide comparable information for mediation? Forward-thinking attorneys recognize that mediation can deliver greater value to clients than trial. Unlike litigation's binary outcomes, mediation allows parties to control the process and craft customized solutions that may transcend what "the law" provides. The voluntary and confidential nature of ADR creates unique opportunities for achieving outcomes that are fair, efficient, and cost-effective—often superior to adjudicated results.

The Pre-Mediation Readiness Conference

In a recent article titled *Mediation Before the Mediation*[3], Myer Sankary—one of the authors of this piece—outlined the substantial benefits of pre-mediation readiness conferences. In his probate mediation practice, he requires attorneys to participate in a complimentary 30-minute online readiness conference two to four weeks before the scheduled mediation. That approach can also work in mediations dealing with other types of complex issues where simply showing up cold for the mediation—or just relying on short pre-mediation calls with each side in the days leading up to it—is not enough to ensure optimum preparation.

Pre-mediation conferences provide numerous strategic advantages. Here's a checklist of what can be involved and the benefits:

Process Control and Efficiency:

- Establish initial contact between mediator and counsel in an informal setting.
- Allow the mediator to assess party dynamics and anticipated behaviors.
- Enable attorneys and mediators to avoid surprises and conduct cost-effective sessions.
- Increase the likelihood of successful outcomes through better preparation.

Substantive Preparation:

- Confirm parties' settlement authority and identify necessary third-party participants.
- Verify completion of essential discovery and identify key documents.
- Help parties prioritize issues while maintaining flexibility to adjust during mediation.
- Ensure the mediator is appropriate for the specific dispute.

Logistical Planning:

- Estimate time required for effective mediation, ensuring adequate scheduling.
- Identify the most critical documents for mediator review.
- Determine whether briefs will be confidential or shared.
- Discuss the optimal balance between joint sessions and confidential caucuses.

Establishing Foundation:

- Build rapport between mediator and counsel—a key factor in successful mediation.
- Address parties' questions about the process.
- Check for potential conflicts of interest.
- Shift focus from problem causation toward solution development.

There are additional things the mediator can do during this conference to help ensure optimum results and efficiency. For example, the mediator can request that one attorney prepare a proposed settlement agreement template containing standard provisions, with final terms to be completed once parties reach an agreement. The mediator can also preview the opening session framework, confirming that parties understand: (1) mediation is voluntary; (2) the process is confidential; (3) the neutral is an experienced attorney but does not provide legal advice or impose outcomes; and (4) any final agreement requires genuine consent from all parties, free from compulsion or coercion.

In Myer's practice, he provides a customized pre-mediation checklist addressing these points and tailored to the specific case type. Some of the agenda will depend on the nature of the case. In probate matters, for example, the mediator can address specific requirements such as accountings, asset disclosures, financial statements, and *Breslin* notices (which require 30 days' advance notice).

Conclusion

Effective mediation doesn't begin when parties enter the break-out rooms—it begins weeks earlier with thorough preparation and a full understanding of the process, including confidentiality. By embracing pre-mediation readiness conferences in appropriate cases, submitting materials with adequate lead time, and approaching ADR with the same rigor as trial preparation, attorneys can dramatically improve outcomes for their clients. In an overburdened court system, this preparation isn't merely beneficial—it's essential to fulfilling our professional obligations and the court's mission of providing fair, timely, and efficient justice.

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[1] Court website: https://www.lacourt.ca.gov/pages/cp/mission-and-core-values/cp/mission-vision-and-core-values

[2] See https://www.lacourt.ca.gov/adr/

[3] https://www.mediationla.org/2024/09/24/pre-mediation-what-every-attorney-mediator-needs-to-know-how-it-enhances-settling-at-mediation/