MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

Mediation Notes

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Talking Turkey About Mediation

As we approach the holidays and the end of the fiscal year for some companies, the topic of "next year" brings to mind a number of questions. What are we doing to make the legal system better? How do we get better at mediation? What is better? What if litigators become purveyors of a remodeled form of conflict resolution that is appreciated by the general public and eliminates negative litigator stereotypes? What if we settled cases faster to reduce the volume of cases and burden on the judiciary? All of this is possible within the existing rules with only a minor judicial involvement.

Suppose we just stop litigating as we have done for decades and rethink the process. If only two to three percent of the filed cases go to trial (yes, this is true everywhere in the U.S.) and the overwhelming majority of cases settle, why does the system begin every dispute by effectively kickstarting "the two percent problem" by inviting formal discovery and motion practice for weeks and months before getting the parties to talk turkey? One problem with litigation is that it is disenfranchising for the litigants. Our clients are admonished not to talk to one another. They have to wait for things to happen. Information comes in pieces and slowly. Yet, when we come to mediation, the client-to-client conversation (facilitated by a mediator) is *precisely* what we use to reveal the needs and interests that are key to the deal that ends the dispute.

The big reveal: Talk is the only currency in mediation. But we don't really *talk* to each other in litigation after suit is filed because the rules of discovery and civil procedure don't facilitate *talking*, and lawyers need to safeguard their clients

Brought to you by
David W. Henry, Esq.

Should you have additional inquiries, please contact:

David W. Henry, Esq.
Shareholder
Professional Liability Department

Florida Supreme Court Certified
Civil & Appellate Mediator

Member, National Association
of Distinguished Neutrals

Landmark Center One
315 E. Robinson Street, Suite 550
Orlando, FL 32801
407.420.4418
dwhenry@mdwcg.com

and privileges. Litigation requires we communicate in a very scripted, artificial and rule-oriented manner. But, if there is a privilege or veil governing the "talk" between the parties, the information comes more quickly and the need to silence your clients largely dissipates. We need to know what happened and get information. Sounds obvious, but the discovery rules make it hard to get information quickly. We are letting the slow and inefficient formal discovery process (invented in the 1930s) govern in large measure the pace and manner of information gathering necessary to negotiation and settlement communication. Why are we using old "modern rules" of discovery developed almost 100 years ago to govern, in part, the pace of dispute resolution? Weird, right?

What we need is a new form of mediation that has a short, fast, informal and confidential fact-gathering process that leads up to mediation. The parties will be allowed a handful of short unsworn statements (three-hour cap?), written questions and access to key witnesses. Non-parties can be invited by subpoena to answer questions, but not under oath. All of the information will be within the mediation privilege and will happen quickly. Statements in this mediation process are inadmissible in subsequent litigation. We give up "under oath," but we get a large volume of information swiftly. Depending on the complexity of the case, this process may be 60 to 120 days. It will be apparent if the damages are not yet crystallized . If there is some obviously wrong information, it can be identified. If we do not have the right parties, this will become apparent sooner. Because we can keep the information within the ambit of a mediation privilege, documents and testimony disclosed will not be prejudicial in later litigation. The rules of civil procedure were not designed for quick dispute resolution through mediation but for a longer judicially-governed, evidence-gathering adjudicative process. So why do we suffer the delay caused by the use of inapposite rules, particularly when we know (statistically speaking) that the very thing the rules were designed for—trial—is not likely to happen?

The role of the mediator may evolve to manage this informal process. Lawyers can be shepherds of a client-focused, but

not rule-driven process that is highly malleable. It may, at times, resemble the collaborative process found in family law. Imagine if disputes are filed, go through the extended mediation process and are resolved fifty percent sooner at half the cost? Why isn't that a huge win for clients and a stated goal for the judiciary and governments straining to fund court systems? This is a new model. Extended mediation or optimized mediation first, and litigate later. It can be implemented within the existing mediation framework. We need to engineer faster dispute resolution timeframes because this serves public and private interests and reduces the cost of maintaining crowded dockets. In this way the public's perception of the role of lawyers and the legal system will be greatly enhanced, and we will have fulfilled Abraham Lincoln's altruistic admonition to serve as the peacemakers for society.

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http://www.marshalldennehey.com

MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN
ATTORNEYS-AT-LAW
PA NJ DE OH FL NY