Mediation and Judicial Settlement Conferences Different Rides on the Road to Resolution
by Charles R. Pyle

In recent years, Arizona courts have committed greater resources to judicial settlement conferences. At the same time, there has been a slow, but gradual increase in the use of mediation to resolve civil disputes. Both processes seek to get the parties to voluntarily agree to resolve their dispute. Both processes frequently succeed in cases in which settlement seemed impossible. But there are significant differences between mediation and judicial settlement conferences. Understanding those differences will help you to choose the most effective process for your client's dispute and better represent your client no matter which process is chosen.

Most civil litigators have a great deal of experience with judicial settlement conferences, but little experience with mediation. Judges, understandably, have little or no direct experience with mediation. As a result, the advantages of mediation are not well known to most of the bench and bar. Some of these advantages can and have been adopted for judicial settlement conferences. The principal advantages of judicial settlement conferences are that there is no mediator fee and there is the continual presence of a credible evaluator. These advantages are well known. In describing the differences between mediation and settlement conferences, I will be focusing on the advantages of mediation, the lesser understood of the two processes.

Cost

You do not have to pay the judge who presides over a judicial settlement conference. Usually you will have to pay a mediator a fee. In cases where the amount in dispute is less than $50,000, this can be a very significant factor. The fees for a lawyer mediator in civil litigation can range from about $100 per hour to $8,000 a day. Experienced and talented mediators for civil disputes are readily available at fees from $100 per hour to $250 per hour. Family law mediators may charge less. A fairly comprehensive mediator referral guide is published by the Arizona Dispute Resolution Association.[1]

Facilitator or Evaluator

At a training seminar I once attended on mediation, Professor Charles B. Wiggins, a law professor and mediator from Southern California, generally described the difference between settlement conference judges and mediators by saying that the judges are "evaluators" while the mediators are "facilitators." He was not saying that one process is better than the other, just that they are very different. Both processes force the parties to face up to the reality of the dispute. My personal experience leads me to guess that the percentage of cases in which an agreement is reached is about the same in both processes. The way the parties get to that resolution is somewhat different, as I discuss below.

Judges make great evaluators. They have tried hundreds of cases, settled hundreds of cases, heard thousands of motions, and discussed hundreds more cases with their colleagues. Judges have an incredibly broad understanding of the law, because of the tremendous variety of legal issues they encounter each day. Trial judges have a great, though fallible, sense of how juries will react to a set of facts. Routinely, judges act in a evaluative role, resolving disputes by making decisions that bind the parties. Judges are rightly cloaked with great respect and authority. Judges have a great background for being evaluators, and that is how people expect them to be.

ediators are supposed to work as facilitators, acting in a completely neutral way to help parties to a dispute communicate more effectively and explore mutually beneficial outcomes. Good mediators are trained not to evaluate. Mediators have no authority to impose a decision and will not suggest what decision they would impose, if they could. Mediators are trained in techniques and communication skills designed to facilitate the parties coming to a voluntary resolution to the dispute.

In addition to background, training and circumstance, there are motivational differences between judges and mediators. Judges need fewer cases, not more cases. They are not dependant on repeat business for income. Judges want cases to settle to relieve dockets. Mediators want repeat business from both sides and their lawyers. Mediators are motivated to show that they can get resolutions to problems that are satisfactory to the parties and their lawyers and that will cause the parties to think about mediation in a future dispute. Mediators are paid by the people whose disputes they are trying to resolve, and therefore they tend to be less confrontational than settlement judges.

In settlement conferences, both sides think the judge is against them. In mediation, both sides think the mediator is on their side. In most cases, both parties are wrong.

Mediators tend to be detailed note takers, particularly early in the mediation. They want to accurately and completely present your position to the other side and be as prepared as possible to act as the "devil's advocate." Judges tend to take fewer notes and communicate less information from the other side. This is probably due to time pressures, the evaluative nature of their role, and the volume of similar cases they encounter. Because of their wide range of experience and their traditionally authoritative role, judges are very powerful in the role of "devil's advocate."

Judges are not pure evaluators, and mediators, though they may protest otherwise, are not pure facilitators. There is a facilitator-evaluator continuum. Judges tend to be towards the evaluator end of the continuum and mediators towards the facilitator end. Each judge and each mediator will fall at a different place on the continuum. Judges and mediators tend to be more facilitative at the beginning of the process and more evaluative at the end of the process. Some "mediators" are more evaluative than almost any judge. At least one judge is more facilitative than most mediators.

Aside from cost, the biggest factor in deciding whether a judge or mediator settles the case is whether an evaluator or a facilitator is needed. The conventional wisdom is that if the other side has a completely unreasonable evaluation of the case, an evaluator is prefered. Focused on one side of the case, too frequently the other side is seen as completely unreasonable. And the other side has the same view. Those cases are usually perfect for mediation. When it is decided that the other side will only respond to the stern evaluation of a settlement judge, the shoe may be on the other foot during that settlement conference. Before concluding that the other side is being completely unreasonable, try to look at the case from each point of view. This will help in preparation of the case, in addition to helping decide if mediation is appropriate.

Scheduling

n eight-hour settlement conference may cost $2,000 for the mediator's fee. While the large fee is a detriment to the client, a mediator's desire to earn that fee allows an attorney to quickly and easily schedule eight or more uninterrupted hours of work with a private mediator. The scheduling flexibility of private mediators can be a major advantage. Scheduling a settlement conference on short notice is usually very difficult because the judges have so many conferences and other matters scheduled. Judicial settlement conferences are usually scheduled in periods of hours or half days. Mediators will usually clear their whole day or multiple days for a mediation. In a settlement conference, parties may have to contend with another conference that went over its allotted time, or, in rare instances, an emergency from another case before that judge.

Mediators also have the flexibility to work after business hours and on weekends. This can be important if the parties are making progress, but cannot resolve the dispute in the time allotted. If progress is being made, the ability to keep the process going or resuming the negotiations within a few days can be critical to ultimately obtaining an agreement. While judges will do anything to keep the momentum toward compromise going, it is not possible for them to have that kind of scheduling flexibility because they are responsible for so many cases and can only operate, for the most part, during normal courthouse hours. Most mediators will go very late in the evening if it looks like a deal can be accomplished, and they will not hesitate to schedule initial or resumed negotiations on a holiday or weekend if necessary.

This also means that the parties are under less time pressure in a mediation. The pace of a mediation usually is much slower than a judicial settlement conference, particularly in the beginning. As the process continues, the pace of negotiations in a mediation quickens considerably, if for no other reason than because there is less and less to talk about. I believe the greater patience early in the negotiations ultimately leads to less remorse about a settlement by both parties and their lawyers.

The slower pace and non-evaluative nature of mediation gives the parties greater opportunities to brainstorm solutions to the dispute. Mediators will focus on the interests of the parties and attempt to determine if there are other interests that may be significant, but not obvious. By focusing on the interests of the parties, the mediator tries to "make the pie bigger" before cutting it up, allowing both sides to be winners in the negotiation.[2]

Mediators have much greater scheduling flexibility than the court, which can be a very important advantage, particularly in complex or highly emotional cases.

Logistics

In mediation the parties control the logistics, but in the courthouse they do not. Attention to logistical details is particularly important in cases that need more than half a day to mediate. The ability to set up private caucus rooms for the parties is the most important logistical consideration. In Maricopa County Superior Court and U.S.District Court, there is frequently a jury room or other room that can help keep the

parties separated, and the judge can go back and forth between the parties. Until recently, in Pima County Superior Court the parties were usually shuttled in and out of the judge's chambers. Fortunately, in this past year, the Pima County Superior Court Center for Dispute Resolution opened. The Center is presided over by Judge Lawrence Fleischman and is located in a private office building with space for separate caucus rooms, a large conference room to accommodate a large group of parties and lawyers in a non-courtroom setting, and excellent speaker phone capability to tie in out-of-state parties or lawyers. It also helps that the Center is in a private office building where access to the building itself and amenities is much easier.

When the judge or mediator is caucusing with another party, you and your client need to be working. This is difficult to do in a courtroom or courthouse hallway, where people are continuously coming and going. If you have separate caucus rooms, you have a confidential environment where you can keep your work spread out and you and your client can stay focused on the task at hand, settling the case.

In setting up a mediation, check out the size of the caucus room, the availability of flip charts, white boards, VCR and TV, fax machines, copying arrangements and phones. Also get all of your files for the case to that room prior to the mediation. Finally, check to see what the availability of refreshments will be, and what the after-hours access to the office is. Flip charts can be particularly helpful to not only keep track of the negotiations, but to brainstorm different ways to resolve the dispute. Caucus rooms need to be a productive and confidential work environment for you and your client. As a practical matter, you should almost always be able to provide a better caucus room environment than the court can.

The courthouse does have certain advantages. The courtroom is a great place for the parties to make opening presentations. Ironically, these opening presentations of the parties are rarely done in judicial settlement conferences. The courthouse is a neutral setting. If a mediation is held at one party's lawyer's office, that attorney may have resources, particularly for an opening statement, of which you were unaware. The courthouse is also a more intimidating environment, which many judges and lawyers think is very important. If you are looking for an evaluator to resolve your dispute, the formality of the courthouse is a big advantage. If you are looking for a facilitator to resolve your dispute, the formal environment is a disadvantage. Overall the courthouse is a great place to try cases, but a cumbersome place to negotiate non-routine cases.

Opening Presentations by the Parties

ost mediators request that the parties do a short opening statement prior to starting the private caucuses. Settlement judges rarely ask the parties to do this. Do these opening statements help?

The purpose of opening statements in the mediation process is to provide each side an opportunity to present their side of the case directly to the other *party*, unfiltered by that party's lawyer. It is an important part of the "reality therapy" the process is designed to administer.

The opening statement gives each party an opportunity to hear their attorney persuasively stand up for their position, a kind of momentary vindication. In most cases you never get to make that pitch and your client never hears it because the case settles before trial. Clients appreciate hearing their side of the story forcefully told, even if they are going to settle a few hours later. It makes the settlement terms, which are never completely satisfactory, more palatable.

At the same time, the opening statement gives the opportunity to express empathy for the other side's situation without accepting any fault. A cardinal rule of mediation is that no personal attacks are made on the other party. Such attacks invariably move parties' positions further apart. By acknowledging that the opponent's position is sympathetic or partially legitimate, the opposing party becomes more motivated to resolve the dispute and less inclined to display your entrails in the courthouse. The opening statement is a unique opportunity to do this. If you are sincere, you can effectively make the other side feel a little better about you and your client, creating a positive environment for compromise. Importantly, this is a statement made directly to the other party with the opposing parties usually only a few feet from each other. Mediation recognizes that this is a dispute between parties, not lawyers. The most effective mediation opening statements are often delivered by the parties, not their highly paid attorneys. The opportunity for parties to confront and acknowledge each other can be an important step to a resolution all parties believe is fair.

The opening statement can be an important part of the process. These statements can be as short as five minutes, and could be incorporated into a settlement conference format. If settlement judges do allow or encourage the parties to make opening statements, it is critical that they emphasize that the statements should be short and that there be *no* personal attacks on the opposing party. Most trial lawyers are at least

as good arguing as negotiating. The opening statement is a part of the process attorneys should really look forward to, rather than avoid.

Client Involvement

Attorneys may express doubt that their clients will agree to mediation. Attorneys should be confident and try mediation, because the mediator will make their clients feel like the most important person on earth. Mediators may be neutral, but they know how they make money. Avaricious motives aside, keeping clients involved is very important to achieving a mutually satisfactory agreement. There is not as much client involvement and deference to clients in judicial settlement conferences. Time is shorter. Judges are used to dealing directly with the lawyers as opposed to the parties. It seems more efficient, and perhaps more diplomatic, to speak to the lawyers without the clients on sensitive issues. Decreased client involvement in the process increases the potential for a party to feel they were unfairly pressured into settling, potentially setting up problems for this agreement or future disputes.

Client involvement begins with the introductory phase of a mediation. Two prominent Arizona mediators follow strikingly similar introductory formats. The mediator has everyone introduce themselves. Usually a sign-in sheet is passed around for everyone to sign, not just the lawyers. From the beginning the mediator has everyone addressing each other using first names. Then the mediator explains a little about himself and how he got involved in mediation. This sets up the mediator saying to *the clients*, "I'm really glad Jim and Jane have made the commitment to come here today and try to work this out. I know we have a very difficult problem, but hopefully we can find a solution today that everyone benefits from." Then the mediator asks all the participants to acknowledge they are there in good faith. The mediator explains how the process will operate: opening statements, individual caucuses, he is neutral and cannot impose a result, and the confidentiality of the process. Finally, he asks if anyone has any questions or concerns about the process. This introductory phase takes between eight and twenty minutes. It is primarily directed at the clients, who the mediator assumes know less than the lawyers about him and the process.

The client has dressed sharp and comes with his expensive legal team and a zillion file boxes to a fancy office to watch his lawyers face the dreaded enemy in a battle royal. In the first 20 minutes, the mediator has taken off his coat, served the clients coffee, called everyone by their first name at least twice, insisted that everyone call him by his first name, expressed concerns about some of the problems of traditional litigation (which presumably the client shares, since his is there), has expressed confidence that the parties can resolve this impossible mess, and has talked *with* each client on a couple of occasions. In judicial settlement conferences, it is all but unavoidable that the judge and the lawyers have a different status than the parties in the process. In mediation, the mediators and lawyers usually still run the show, but the clients are treated as equal and involved participants.

The parties participate in the caucuses in both judicial settlement conferences and mediation. In judicial settlement conferences, the urgency of time, the formality of the setting and the evaluative nature of the process influence the nature of that participation. In a mediation, there is time to let a client go down the "wrong road" for a while. Occasionally, that wrong road can lead to a new shortcut to resolving the dispute. Clients tend to be more relaxed, open and frank with a mediator than a judge. While this is not always comforting to the lawyer, it does keep the client more involved in the process, and detrimental comments are protected by the confidentiality of the process.

Mediators tend to listen more than they talk, particularly early in the mediation. This opens up more opportunities for clients and lawyers to present their positions and negotiation strategies. Trial judges are professional listeners. However, if the judge's questions are more directive than open-ended, and their comments more evaluative than rhetorical, the parties and their lawyers will likely have shorter dialogues with the judge than they would with the mediator.

Finally, the logistical considerations discussed earlier allow the clients to be more involved. By having a separate caucus room, the lawyer can continue working with the client on the case while the mediator is caucusing with the other side. By having phone, fax and copying machines available, the client can continue to work on developing objective evidence to encourage resolution of the dispute. The phone and fax also allow the client representative to keep his superiors fully informed about the negotiations and get appropriate instructions. This reduces the client's concern about being second-guessed if he settles. Flip charts, white boards, copies of notes of negotiation progress all help keep the client advised and involved.

The dispute belongs to the client. Increased client involvement in negotiations means that the client is more responsible for the outcome of those negotiations. The pressure on the client to settle becomes self-induced. There is little or no room for the client to blame his lawyer, the judge or the mediator for the outcome. If an agreement is reached, the more the clients are involved, the more satisfactory the experience

should be for all involved.

Conclusion

here are significant differences between judicial settlement conferences and mediation that are important to understand. The mediation process allows more flexible scheduling, a slower pace to negotiations, greater flexibility in logistical arrangements, more opportunities to present objective criteria in an opening statement or otherwise, and greater client involvement. Some cases, particularly complex or highly emotional cases, would benefit from these advantages. While some of these advantages cannot be easily incorporated into a judicial settlement conference, judges and lawyers should consider them when preparing for and participating in judicial settlement conferences, incorporating as many of these advantages as the circumstances allow and dictate.

The increased use of judicial settlement conferences and mediation in the last few years has dramatically improved the quickness and fairness of civil dispute resolution in our courts. Continued improvement is assured as more is learned about how these processes work.

Charles R. Pyle *is an Assistant Attorney General who has represented the State in many complex mediations over the past few years.*

ENDNOTES

1. The *Arizona Directory of Dispute Resolution Providers*, is available for $2.00 from the Arizona Dispute Resolution Association, P.O. Box 7638, Phoenix, Arizona 85011-7638.
2. The "win-win" philosophy of negotiation is explained exceptionally well in the following two books: Fisher and Ury, *Getting To Yes*, (1981); Ury, *Getting Past No*, (1991).