

“The Case for Mediated Case Management”

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“Mediated Case Management” is a process specifically designed to cost effectively and rationally deal with the complex, multi-party, multi-issue, or high-end litigation.

The underlying premise supporting a Mediated Case Management Program is simple. It is an unfortunate (but seemingly inevitable) aspect of resolving disputes through litigation that time and money will be spent in what might be called “process debates”. “Process debates” are procedural arguments involving a wide range of issues focused on the *litigation process* (how we are going to argue) rather than the *subject of the lawsuit* (what we are arguing about).

“Process debates”, for example, may involve subtle and academic arguments over such things as; venue, jurisdiction, sufficiency of pleadings, applicable law, discovery protocols, qualification of witnesses, conflicts of interest, scheduling, and cost sharing. In particularly contentious cases, charges of lawyer or party misconduct within the context of litigation rules will often become a dominant theme of process arguments as well. Process debates seem to thrive in complex, multi-party, high end disputes, but can erupt to unnecessarily complicate relatively simple two party actions as well.

In some instances, the outcome of these disputes can be very important to the ultimate outcome of the lawsuit. Ostensibly, the purpose of the procedural rules controlling “how we argue” in court (which are usually at the heart of process debates) is to protect the integrity and validity of the end product of the litigation - the final judgment or verdict rendered. Theoretically, if all the procedural rules are followed, when we finally get

around to the trial on the merits we will be presenting our arguments on a level playing field, with fully discovered and valid evidence, in an orderly and controlled manner to best allow a fair measurement of the parties' conduct against appropriate legal standards. Indeed, a good trial lawyer would often be remiss in not bringing some of these "process issues" to the clients' attention and vigorously engaging in certain "process debates" when it is appropriate to do so.

The fact of the matter is, however, a substantial number of the process disputes we see in litigation today are monumentally inconsequential to the outcome of the lawsuit and a regrettable waste of time, money, and judicial focus. Rarely does the outcome of most process debates alter the controlling facts of the case. Rarely do process issues have anything to do with whether or not a contract was breached, a patent infringed, a construction procedure correctly followed, or professional standards properly met. More often than not, time and money spent arguing over how we are going to argue, doesn't get the ultimate argument resolved.

To make matters worse, process debates tend to take on a life of their own. As a result, the cost of litigation can, and often will, exceed the value of the matter in dispute. In lawsuits where more money is spent arguing than fixing the problem, efforts to recover the "cost of the argument" (legal fees and costs) become a principal factor driving the lawsuit - an economic reality that has legal clients running from the courthouse in a mass abandonment of the litigation process or, worse, running to the statehouse to secure overly reactive legislative reforms.

A Mediated Case Management program affords parties to a litigated matter the opportunity to defer process debates and accelerate consideration of a fact based reconciliation of the ultimate issues in the dispute. Without necessarily abandoning the right to argue significant process issues, Mediated Case Management blends the benefits of facilitated reconciliation processes with the benefits of adjudicatory processes to get the case settled quickly, or tried more efficiently. The program features a facilitated, cooperative implementation of dual tracks toward resolution of the case - a *reconciliation track* that parallels and supports concurrent advancement of an *adjudicatory track*. In simple terms, Mediated Case Management involves mediating the conduct of the litigation to expand and include meaningful and timely reconciliation processes.

The program begins with an agreement. Counsel and clients involved in a multi-party, multi-issue complex lawsuit begin by agreeing to jointly retain and meet with a mediator immediately after the filing of the complaint. Their purpose is to negotiate accords on how they will conduct the litigation of the case. A *Charter* for the lawsuit is thus established.

The Stipulation for a Mediated Case Management Program

While the nature and extent of the initial agreement between counsel and the parties may vary from case to case, there are basic elements to the program that should be addressed in every instance. A Stipulation for a Mediated Case Management Program should, therefore, include;

1. An Agreed Mutual Intent

The initial agreement should record a stated intent and desire to conduct the litigation and prepare for ultimate trial in a cost effective, timely and efficient manner without resorting to unnecessary or unproductive disputes over procedures and processes. As part of the work in the lawsuit itself, the parties agree to develop and implement alternative dispute resolution options that seek to reach settlement on as many issues as possible as quickly as possible. To carry out that intent, the parties and counsel agree to enter a Mediated Case Management program in which the conduct of the litigation would be mediated through a series of regularly scheduled facilitated case management meetings convened for that purpose. All procedures and processes for advancing the litigation would be reached through facilitated agreements utilizing the third party neutral mediator working with counsel, the parties and the Court. Issues thus dealing with *how* we are going to argue will be resolved through negotiated case management agreements. The priority for completing events necessary to advance the lawsuit will be established by what needs to be done to get the parties into a position to intelligently settle the case. Throughout the case planning, an overriding focus is maintained on creating options to settle any and all substantive disputes that can be settled as quickly as possible.

2. A Commitment To the Program

Counsel and each party entering into the stipulation would agree to attend and participate in all case management meetings called, to comply

with agreed schedules, activities and undertakings established at those meetings, and to use best efforts to minimize the expenditure of time and money in the conduct of the litigation. Each party would agree, in principal, to refrain from initiating or continuing frivolous or unproductive disputes concerning the process.

3. Lead and Alternative Counsel Designated

Each party would designate Lead and Alternative counsel who, collectively or independently, are responsible for attending and participating in all scheduled case management meetings. All counsel attending a case management meeting will come with full and complete authority to commit to the terms of any case management agreements reached. Party representatives are welcomed, encouraged, and on occasion expected, to attend case management meetings.

4. The Parties' Role in the Process

Each party shall designate a lead and alternative representative who *may* attend all case management meetings, and who *shall* attend those case management meetings in which the mediator appointed deems it appropriate and necessary for the parties to be in attendance. It is anticipated that client representatives will be expected to attend far more meetings than not.

5. Appointment of the Mediator

A mutually agreeable mediator is appointed to facilitate the course of the case management program. An Alternative or Co-mediator may also be appointed to provide back-up relief or to handle discrete sub-parts of the case. Fees and costs of the neutral would be borne equally by all parties unless otherwise agreed (i.e., in cases where services are rendered to resolve sub-issues involving only a sub-set of parties).

6. Duties of mediator

The mediator is responsible for organizing and conducting case management meetings, facilitating periodic agreements concerning the procedural conduct of the litigation, and helping structure concurrent alternative resolution processes to handle some or all of the issues in the case. The Mediator shall have no authority to adjudicate or decide any

issue.¹ The mediator shall, with prior notification and authority of the parties, serve as a neutral spokesperson to inform the Court of the progress of the program and convey suggestions and requests from counsel and the parties for support for agreed case management procedures.

7. Confidentiality and inadmissibility of proceedings

All concessions, admissions, representations, communications, and discussions arising out of the Mediated Case Management Program shall be deemed “under the umbrella of mediation” – confidential and inadmissible. The sole exceptions to the rule are:

- Commitments regarding the case management proceedings that are reduced to writing and submitted to the Court as stipulations of record; and
- Discovery taken under oath.

8. Case Management Agreements to become Supplemental Case Management Orders

Following each case management meeting, any agreements reached on discovery or joint investigative processes, special hearings, or on other cooperative procedures shall be recorded by the mediator and submitted to the Court as Stipulated Case Management Orders. Thereafter, any deviations from stipulated orders shall be upon the agreement of all parties or at the discretion of the Court.

9. Termination of Participation in the Process

Any party may terminate participation in the process upon ten days written notice to all other parties. All stipulations reduced to case management orders and all sworn discovery shall remain in full force and effect.

¹ It has been suggested by those participating in Mediated Case Management Programs that the mediator be given some limited decision making authority. While it might be convenient to have a mediator vested with adjudicatory power in certain instances, giving the mediator decision-making authority must be done very carefully. By definition, any final decision a mediator makes is going to disappoint someone and, more importantly, impact his or her neutrality. As a general rule, mediators should mediate, judges should judge.

Operating the Program

Once a Charter is established, a series of periodic facilitated case management meetings – usually on a monthly basis – are scheduled. Regular meetings of counsel, the parties, and the mediator are essential to the case management process. While specific or more refined agendas can be developed as the case management process unfolds, regularly held case management meetings must immediately become part of the culture of the case. In addition to maintaining planned progress on both resolution tracks, regularly scheduled case management meetings serve as a relief valve for any process debates that might otherwise freeze progress in the case. Simply knowing a date has been set and process established for resolving such conflicts is in place often serves to stop problems before they arise.

The first meeting or series of meetings should be dedicated to issue refinement; defining, isolating, and agreeing to the ultimate issues of the case. This can be done in a classic mediation format with the mediator facilitating the process. The parties would thus use first meeting(s) to make initial presentations of their side of the argument based on what is known at the time. These initial presentations should not be made as formalized legalese or generalized legal complaints, but down to earth positional assertions in plain English (much like the opening presentations in conventional mediations). Wherever possible, clients should become part of these presentations – not only to provide an opportunity for them to “buy into” the process, but to get past the typical venting that serves to unblock subjective obstructions to productive negotiations.

Based on these presentations and the mediator’s skills in issue refinement, the parties should agree on what they are really arguing about as quickly as possible. A stipulated, “working statement of issues” is thus developed to isolate and define key issues of ultimate fact making up the actual substance of the parties’ dispute. To the extent it is appropriate, a comparable list of key procedural issues (which would be determinative in nature) is also assembled. Any collateral issues or non-determinative process issues are noted, but set aside and preserved for another day. Responsibility for drafting and maintaining the working statement of issues should fall to the mediator.

Based upon the agreed issues of key issues of ultimate fact, the parties then utilize the mediator’s facilitative skills to define and schedule a

mutually agreeable discovery or joint investigative program aimed at answering one simple question; *What do we really need to know – to look at, test, explore or develop - in order to resolve the fundamental issues of this case? What do we really need to do to get to a position to be able to settle this case?*

If there are key issues of law or procedure, the parties and the mediator can define and agree upon a mutually acceptable means of resolving those preliminary matters as well. Again, the program should be focused on one basic inquiry; *What determinative preliminary issues really need to be resolved before the substantive issues of the case can be settled?*

A wide range of options is available to develop and resolve these issue-oriented case management programs. If key facts need confirmation, joint discovery or investigative programs may be defined and implemented to develop achieve that goal. If key legal issues loom large in the case, the mediator can be used as spokesperson with the Court to secure a prompt hearing to get an early judicial determination on those issues. Alternatively, an agreed special master might be utilized for this purpose, or a non-binding adjudicatory process might be formulated.

Whatever course of action is chosen after the key issues are delineated, the plan reached should be focused on two principal goals. First, whatever is done should be ultimately calculated to achieve both trial preparation objectives as well as settlement objectives. In this respect, the Mediated Case Management Program should be a “win-win” effort. Secondly, strong efforts should be made in every case to bypass and defer consideration of non-determinative “process disputes” and focus on the ultimate factual disputes as quickly as possible. While steps might be taken to fully protect and preserve those issues for later determination, the immediate objective is to prioritize what needs to be done to settle or try the case. If the issue is not controlling, set it aside for later.

As litigation oriented processes are developed to either gather data or generate adjudicatory input on the determinative issues of the case, plans to conduct separate mediations on discrete issues can also be instituted. On a construction case, for example, we might see a period of negotiated discovery or testing followed by a “Windows, Balconies & Doors” Day, or a “Subsurface Conditions” Day scheduled to attempt to reach a settlement – or a mutually agreeable holding point – on one sub-set of issues in the case.

With the overall direction of the Mediated Case Management Program thus established, let's now take a moment to flesh out certain components of the program a bit further. Once the overall stipulation is adopted, the exact procedures utilized in a given case should be custom shaped to fit the specific issues, personalities and characteristics of the specific dispute at hand. In general terms, however, the following thoughts about the range of facilitated case management processes available may prove useful.

Cooperative Discovery and Joint Investigation Programs

Regardless of what issues evolve, getting information necessary to intelligently deal with those issues as quickly as possible is a primary concern of everyone involved. Moving toward this goal in a facilitated, mutually cooperative, concurrent discovery program that is supervised, to a limited extent, by a mediator can be far superior to customary adversarial approaches to litigated fact finding.

Based on the agreed issues, therefore, a Mediated Case Management discovery program might typically call for:

- a) A voluntary exchange of documents.
- b) A defined "rifle shot" deposition program using "Rule 30(b)(6)" format depositions in which the parties identify and present for examination their corporate representatives having the most knowledge about the subject at hand. (The idea here is to quickly and cost effectively share information – not to randomly search for information, practice cross-examination, impeach or test interrogation skills).
- c) A joint interview session with key non-party witnesses, a site visit, a product inspection or testing.

Any mutually agreed discovery program should be backed up with appropriate discovery pleadings and responses. The purpose here is not to create the basis for an argument, but to give all parties the comfort of knowing complete disclosure has been certified on the record. An alternative might be to simply have counsel certify in an open letter to the mediator that full compliance with the agreed request has been met.

Since one major goal of the Program is to obtain a “win-win” position with respect to both trial preparation and settlement efforts, any discovery materials generated through cooperative agreements should be considered admissible. The “rifle shot” Rule 30(b) (6) depositions should proceed with the understanding that, while limited in scope to the subject at hand, a second round with the deponent on other matters bypassed will be allowed if the case doesn’t settle.

Depending on the recognized issues in the case, a joint investigation or testing program might be negotiated using key party representatives or even one neutral “joint expert”. Given the chance, the parties in many disputes are quite capable of straightening out the numbers in account balances, work in progress, the value of work and materials installed, and can often coming to a preliminary understanding on damages without admission as to liability. In instances where this process presents a problem, however, an audit of each party’s books and records by a mutually agreed neutral financial expert can be helpful.

Where simple “yes-no” factual issues exist as to existing conditions (work in place, physical condition of inventory or facilities, etc.) a joint investigative plan conducted by the parties and counsel, or by a mutually agreed neutral expert can help get those facts established quickly and efficiently.

If a “joint expert” is selected and designated to conduct agreed investigative or testing programs, it is important to agree to both a testing protocol and to define the use of that expert’s final report in advance. While some parties agree to keep the joint expert’s investigative report confidential, a better idea would be to agree that no one would be bound by the outcome, and the report would become admissible at trial without objection as to form. If any party is dissatisfied with the outcome, other tests or investigations could still be introduced to present differing results and the accuracy of the joint report may be freely challenged.²

² In cases where Mediated Case Management Programs have included the services of a jointly selected and financed expert for this purpose, it is surprising how many times the parties end up agreeing to be bound by the outcome of that expert’s work.

Specific Issue “Mini-Mediations” - Case Presentations

After the issue refinement and the cooperative programs necessary to shed light on key issues are undertaken, mediated settlement negotiations can be scheduled on discrete issues. The format follows any other mediation – opening presentations setting forth “best case” scenarios are made followed by private caucuses utilizing the mediator to negotiate resolutions. In such cases, there is no real need for the full compliment of parties involved in the case to attend or participate. While everyone should be welcome to attend these sessions, only the parties directly involved in the sub-issue under consideration really need to attend.

In cases where an overall settlement is dependent on the total outcome of all sub-parts of the dispute³, a “subject to” agreement might be reached in a mini-mediation which puts a proposed sub-issue settlement on hold until the overall deal takes on a better definition.

The order in which the sub-parts to a major dispute are approached for “mini-mediation” settlements will vary in each case and should be the subject of careful thought in the Mediated Case Management Program. Mediated discovery or investigative programs can generally proceed concurrently with any other similar programs. The sequencing in holding the mini-mediations to reach complete or “subject to” settlements of sub-issues, however, requires more consideration and planning. Although there is no steadfast rule, factors to consider would include the dollar size of the claim (large dollar first, and “the rest will follow”, or small dollar first to generate momentum and “clear the table”), the relative difficulty in settlement (“easy” claims first to show progress and develop momentum) and the sequence of operative events (“We can’t settle the foundation pour problems until we get the soil condition issues resolved”).

Damage Assessments

In some disputes, mini-mediation sessions could also be held to work with experts on both sides to define and price a damage figure without regard to liability. The goal here would be to “freeze a number” on an appropriate fix for a particular problem. These decisions are then put on a

³ In cases, for example, in which claims for contribution or indemnity for discrete parts of the main claim have been asserted against third party defendants, or significant cross and counterclaims have been asserted. .

conditional “hold” until liability issues are discovered, negotiated and resolved in other parts of the case. (Often simply knowing, how much the problem will cost can make decisions on accepting partial or complete liability easier).

Non-binding Adjudicatory Presentations.

It is surprising how effective a non-binding adjudicatory proceeding can be in settling cases. Evaluative input from mutually agreed authorities on specific issues is a powerful settlement tool with litigating parties. In fact, practical experience has shown us a great number of litigation clients really want just two things: “Someone to listen to my problem” and, “Someone to tell me if I’m right or wrong”. Additionally, many parties in a lawsuit, for one reason or another, are happy not to be the one required to make a final decision on resolution – they prefer someone else to decide, one way or another. Negotiating to get that input in an expeditious, cost effective and qualified manner can serve these clients far more successfully than a lawsuit fraught with process debates.

The procedure for securing non-binding evaluative input is simple. The parties first select a neutral third person whose opinion they trust. The neutral may be formally appointed as a Special Master by the court if it would be helpful for him or her to have powers to mandate procedural matters – but an agreement by the parties to vest that power in the neutral would work just as well. The parties present their respective positions on select issues and the neutral then provides non-binding advisory input to parallel a probable outcome at court. In essence, the parties get a “free look” at what the judicial process might bring as well as a dress rehearsal of the arguments. With that information in hand, negotiations continue.

The non-binding adjudicatory procedure can be conducted in almost any manner the parties wish. As a general rule, and in order to maintain cost effectiveness and expediency, the procedure is conducted in a relatively informal atmosphere. Strict rules of evidence are suspended, but the foundational quality of the data presented may go to its credibility. Most of the facts and arguments are provided in narrative form by counsel who act as officers of the court or, if mutually agreed, are placed under oath themselves.

Exhibits and witnesses are narrowly limited to only those that are truly critical. The intent here is to give each party a sense of having the substantive essence of their “day in court” and getting a quality evaluative input however it falls. The objective is not to satisfy every nuance of a perfect procedural trial.

Using the mediator’s services, the “rules of engagement” for an agreed process for adjudicatory input should be negotiated and committed to writing in advance.

While it may be preferred to have the outcome of these proceedings serve as binding determinations, keeping the process non-binding in nature tends to promote acceptance and avoids hang-ups in procedural issues. In the final analysis, if the process is fairly structured the parties get what they want and react accordingly.

Conclusion - General observations

Simple in concept, Mediated Case Management is only as difficult in execution as the parties and their counsel chose to make it. The concepts described above are not meant to represent final and binding standards on Mediated Case Management Programs. Creativity and flexibility are the only rules. Counsel, the parties, and the mediator can work together to customize a plan particularly suited to the specific case at hand.

While some of the individual concepts embodied in a Mediated Case Management Program have been used in various jurisdictions for many years, the concept of putting them all together in a focused plan to allow the parties to cooperatively move a case to trial or settlement is new. Like any new idea, it may have unrecognized problems in execution, a learning curve is involved, and actual experience will ultimately shape its form. Clearly, the program calls for a level of cooperation from counsel that is seldom seen in hard fought adversarial proceedings. It is also clear that this program will challenge the skills of the mediator involved and will require an adjustment in classic case management approaches from the courts. In cases where the program has been implemented, however, the benefits achieved have greatly outweighed these concerns.

First and foremost, *the clients love the process*. From their perspective, it’s proactive, productive, and directly includes them in the

progress of their case. Their lawsuit becomes a shared experience with their trial counsel rather than a mysterious proceeding represented by a monthly invoice.

It's a "win-win" effort. Properly conducted, a Mediated Case Management Program doesn't contemplate costs or activities that would not otherwise be spent in trial preparation. If the case settles, fine. If not, the parties have done nothing they wouldn't otherwise need to do to prepare for trial. In some respects, the parties are better prepared for trial.

Legal fees are reduced and better spent. Eliminating wasted energy on peripheral process disputes will reduce overall legal fees. More importantly, however, the legal fees that are incurred and paid are more cost effective in moving the case to resolution. We learn more, accomplish more and progress more with the legal dollars spent. As noted, the clients understand the legal fee bills, often had a direct role in deciding upon the services they reflect, and are relatively happier about paying them.

After going through a cooperative case management program, the importance of the process debates tends to wane. By the time a case management program has settled what could be settled, focused the parties on the ultimate issues, and led a cost effective focused discovery program, the parties are generally ready to try a shorter, cleaner trial.

Finally, Mediated Case Management programs are uniquely effective in most commercial disputes. This fact can be attributed to several factors;

- The mindset of the business community, comparatively speaking, is more inclined to deal than not.
- Because of the relative certainty associated with damages claimed in commercial disputes (intangible damages do not play a large role in most commercial cases) there is usually a dollar cap on what can be generated from a typical business claim. Absent statutory or contractual provisions allocating legal costs, therefore, any claim recoveries will be net of the legal fees. The cost of winning can traumatize the victory.
- The matters in dispute in commercial cases are often filled with technical and interrelated fact issues, nomenclature is specialized, and arguments presented are often ill suited for lay juries.

- Future relationships can play a bigger role in the commercial business community. Our clients run into each other on the next project all the time. It doesn't pay to sue customers or co-workers.

The growth of reconciliation as an institutionalized dispute resolution process has changed the landscape of conflict management in this country. In the process, the roles of the trial lawyer, the court and the neutral facilitator are being redefined to meet the demands created by this growth. New skills must be learned, new ways of servicing our clients must be conceived and implemented if we are to continue in our role as major players in the future of civil dispute resolution. Mediated Case Management can and should be a part of that future.