

A case for early mediation

Less can be more when a faster settlement produces a more satisfied client

By Nancy Yeend

After reading a recent article that points out 10 things judges need to do to make the courts more efficient and less costly, it occurred to me that long before a case is filed, attorneys can accomplish the same goals.[1] An attorney is in a unique position to guide a client right from the first interviewing and counseling session. (The operative word is "counsel." Providing wise counsel is the first step in representation.)

Some say that attorneys get so involved in process, discovery, motions and briefing that they lose sight of the client needs, which may include closure, financial or confidentiality issues. In an employment case the client may have pressing economic needs, due to termination. Balancing meeting the client's needs and a lawyer's need to effectively represent the client may be at odds with one another. In personal injury or wrongful death cases, the client may need closure, so the healing process can begin, and compensation, not only for medical expenses, but also for damages. For contract and other business-related matters, the client may desire closure, and in addition, want terms of the settlement confidential to prevent copycat cases or to avoid negative publicity, which could impact investor confidence.

Since only a fraction of the cases filed actually go to trial, it seems prudent to explore settlement sooner rather than later. It is not rocket science, and statistics support the claim that the earlier a case settles, the lower the expense to achieve that settlement. Lower litigation expense makes for more satisfied clients; and as the old business equation goes, a satisfied client equals referrals.

If this is not enough to encourage someone to consider direct negotiation or mediation sooner rather than later, then perhaps recent court statistics will.[2] Although the trend over the past few years has shown a decline in the total number of filings, the cost and length of time to resolution has increased. Whether the cases are more complex, e-discovery is running costs up or other factors are at play, it is more expensive and it does take longer to get a resolution. Even if there is a *"win"* at trial, the appeal process in the First, Third and Sixth Districts averages some two to three years – so much for meeting the client's goals of reducing costs and achieving finality.

While mediating in Florida for some three years, this author personally experienced early settlements on a grand scale. The state has mandatory mediation, which means that essentially every civil case must try mediation and very early in the process. Mediation is so ingrained that pre-suit mediation is now the norm. Mediation held prior to filing produces settlement rates of over 90 percent. Even when cases were filed, and mediation takes place within 120 days, the results were greater than 80 percent.



Even with all the evidence, some still not only resist mediation, but also avoid even mentioning it to the other side. The primary reason given for not suggesting mediation is that "It is a sign of weakness." Providing guidance to a client is not a sign of weakness – not to mention the ethical obligation of informing one's client of alternatives to litigation. Suffice it to say that those attorneys, who advise their clients to try mediation, demonstrate the highest standards of professionalism and wise counsel.

Seriously exploring settlement and participating in mediating early in the process improves settlement rates; litigation costs are controlled and even reduced; terms of the settlements are more likely to be fulfilled; and client satisfaction rates improve.

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Endnotes:

[1] Lamb, Patrick J., *10 Things Judges Can Do to Help Business Litigation be More Efficient and Less Expensive*, ABA Journal, posted April 24, 2014.
[2] *2013 Court Statistics Report, Statewide Caseload Trends, 2002-2003 through 2011-2012*, Judicial Council of California, 2013.

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