

Getting in the flow of mediation

A look at the mediation disclosure on confidentiality, the value of joint sessions, and how decision trees can be used in evaluating settlement offers

By Kevin C. Coleman

What do we mean by "getting in the flow? Mediation, being an "alternative" form of resolution from litigation must have a different flow than litigation. Certainly, it is often, usually, tied part and parcel to a litigation. And certainly, the mediation process and substance flow differently than litigation.

Mediation can take place before litigation, during litigation, or after litigation (during an appeal).

Mediation obviously takes preparation. Even before the mediation, as soon as you know you will be mediating the case, contact your client. In your pre-mediation conversation with your client, you must discuss the confidentiality provisions regarding mediation found in Evidence Code sections 1115-1129. You probably already cover the obvious reasons with your clients – the purpose of the confidentiality provisions are to promote openness and settlement. There is another important reason to discuss the confidentiality provisions with your client, that perhaps not all practitioners do.

The mediation provisions of the Evidence Code have been written about in these pages, but, pay attention to two newer provisions, sections 1122 and 1129, both added January 2019. If you already have your clients sign a Mediation Disclosure, then you can skip the next three paragraphs. These Evidence Code sections are the outcome of *Cassel v. Superior Court* (2011) 51 Cal.4th 113. As a reminder and without going into detail, in *Cassel*, the California Supreme Court held that evidence of a client's and attorney's private conversations, in a later malpractice suit by the client against the attorney, is inadmissible, ruling that Evidence rules of confidentiality during the course of mediation apply even to conversations between client and attorney.

Following *Cassel*, the California Law Revision Commission (CLRC), was tasked by our legislature to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct" and to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."

CLRC proposed a new exception, which is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

However, after receiving comments from lawyers, mediators, industry groups and others overwhelmingly opposing the new exception, the legislature in SB 954 proposed and eventually passed sections 1122 and 1129 of the Evidence Code Chapter 2 on Mediation.

Section 1129 is important in counsels' first mediation conversations with their client. It requires that *even before your client agrees to mediation*, you have to provide them a copy of the statutory "Mediation Disclosure Notification and Acknowledgement" ("…as soon as reasonably possible before the client agrees to participate in the mediation…" Evid. Code, § 1129, subd. (a).)

The Disclosure informs the client that they cannot use anything said in mediation in any later lawsuit, even in a malpractice action against their own attorney. Client and attorney must both sign and date the form. There is a Judicial Counsel Form of Disclosure, form ADR-200. Some attorneys will have their clients sign the disclosure at the initial client meeting when they sign-up the client.

Now that we have the Mediation Disclosure out of the way, we can focus on preparing your clients, your case and yourself for mediation.

Approach to mediation

What is your frame of mind for mediation? Are you approaching mediation the same way you approach a court hearing, MSJ or trial? Of course, you want to have all your ducks in a row – your case prepared and your client prepared with your negotiating strategy. What is your mediation style? Are you going to come in very aggressively, or with a softer approach? Are you going to come in with the facts in a straightforward manner, or are you going to argue each fact vociferously? What is your client's mindset? Will she pick up on yours?

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Mediation is not the battle of litigation. You still zealously represent your clients, but plan on leaving your litigation toolbox back at your desk and approach the mediation with a "kinder, gentler" approach. Mediation is a break from litigation and can be a respite for attorneys too. Here's a chance to work out a resolution rather than fight for one. It's a chance for you and your client to catch your breath from the fight of litigation and take a breather, a pause that refreshes.

Many attorneys have a difficult time getting out of the "win" mindset – how can we work it out for our clients, rather than how can we win. Perhaps in a money case the outcome will be defined by money, but the purpose of mediation is to work out a resolution, not win.

To joint session or not

In commercial mediation (cases resolved by money, not family law or other non-monetary actions), very rarely does either counsel have a desire for a joint session (at least in California. I understand that back east, joint sessions are usually held.)

Why is a joint session helpful, even if only to cover housekeeping and say hello? Civility is important. At least among the attorneys. Being professional and civil does not show to your client that you're weak against opposing counsel. It models courtesy, professionalism and civility. Your future reputation always rests on your current behavior. And, your reputation always proceeds you. More importantly, a straightforward approach, even with aggressive positions, is always better accepted.

I'd like to add that in the opening, whether a joint session or in private caucus with each side, I do not think small talk is unimportant. A little small talk can set a more casual tone and remind us all that there are other things in the world outside this dispute. The brief conversation can also set a more leisurely pace to the mediation. The pace can lead to time to think and reflect when the mediator is caucusing with the other side.

You may not want a mediation that is anything other than "all business." If you have a particular process you would like the mediation to take, discuss it with the mediator in your pre-mediation phone conversation. I consider the mediation to be the attorneys' and parties' mediation, so I'm happy to follow whatever process they are interested in.

You don't have a pre-mediation phone call with your mediator calendared, you say? If you don't have a pre-mediation call already calendared with the mediator, don't leave it up to the mediator; call and calendar one. If no one has calendared one, call the mediator after they have had a chance to read yours and opposing counsel's briefs.

Don't hesitate to contact the mediator earlier than briefs are due as well if there is something you think the mediator needs to know. Remember, there is no prohibition against ex parte communication with the mediator as there would be with a judge or arbitrator.

The mediator is there to help you settle your client's case; don't be afraid to ask the mediator for help, and don't be afraid to give the mediator help. You may have client control issues or not so great a relationship with the client when it comes to valuing her case. Let the mediator know, they can help your client understand why her case has the value you place on it.

On the other side, help the mediator understand the nuances of your case early, so that they can clearly communicate it to the other side.

Settlement value

While the purpose is to settle the case, how do we know what to settle for?

When I was in law school, mediation courses were not offered. Nowadays, they are offered, so younger attorneys may know of terms like BATNA and WATNA, terminology I had never heard until I took a mediation course. BATNA is Best Alternative to a Negotiated Agreement. Simply, what's the best outcome you may have if we don't settle the case through negotiations. WATNA is, of course, Worst Alternative to a Negotiated Agreement.

We usually base these BATNA and WATNA estimates on trial value. The usual sources of trial value drawn from jury verdicts and our own experience with the type of case, the venue, facts, law strength of witnesses and likability of the client. These are all factored into a trial outcome, what a jury would award. There are also other methods to value your decision making.

Introduction to decision trees

What about using a more data-driven method? Decision trees, while relying on estimates, can help you calculate the true value of the case as of the current date, and dates moving forward. You can also easily see the change in value of the case as you change your assumptions about it. Decision trees are also nice in that you can present a visual representation of the effect that probability of success will have on case value, to the mediator and your client. Don't get scared off by math words like probabilities, there won't be any Greek symbols; we're only going to be doing arithmetic.

When you take the probabilities into account the result is not the number you will get at trial, but an average of the overall expected gain if you tried the case many times.

Decision trees alone can be the subject of an entire article, as they can become complex. We will keep our introduction to a simple decision tree that may be useful in case evaluation at mediation.

To create a decision tree, first think of all the hurdles or events you will have in your case. This is ideal if you do it at the beginning upon your first case evaluation. For instance, what are the chances you will face a demurrer? What are the chances you'll overcome it. Very high, you think, you don't need to worry about a demurrer. But it will cost you money (time) to overcome, and there is a

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risk, however small, of losing (at least without prejudice to amend). If you're going to properly evaluate your case, you need to take into account all risks.

For each hurdle or variable you have to overcome, there is both a probability, however high or low, that'll you overcome it, and a cost.

Think of the same process prior to mediation. Are you facing an MSJ? What other obstacles are you facing – exclusion of some evidence or witness via motion in limine?

For each obstacle, estimate your realistic chance of success, and your cost to oppose that hurdle. When it comes to trial, list not only the odds of winning at trial, but also the odds of a low, medium or high verdict.

Multiply the odds of each stage to get a weighted value to apply to any verdict.

Following mediation you will face an MSJ, one that you determine you'll definitely win, assigning only a 10% chance of losing, but it will still cost $15,000 to oppose in fees and costs (even on a contingency fee case, your time has to be accounted for). It will cost you the same amount whether you win or lose the MSJ.

At trial you also have high confidence, assigning 85% to prevailing on economic damages, and a 15% chance of low verdict on non-economic damages, totaling $100,000, and a 15% chance of high verdict of $500,000, and a 70% chance of a mid-range $300,000 verdict.

Your decision tree might look like the chart on the right. And for the calculations, see the chart below. For simplicity, I am not carrying out the decision tree to an appeal from either MSJ or trial. I'm leaving out other occurrences such as a motion in limine that will weaken (or strengthen) your case.

The tree doesn't show you what will occur in one instance of the case, but what the weighted average would be if the case was tried many times.

What you can see is that if you get the low verdict of $100,000, the expected value of your case, after taking probabilities and costs into account is less than zero, $25.00! As you can also see, what is easy to do is change your assumptions and see how that will affect weighted outcomes.

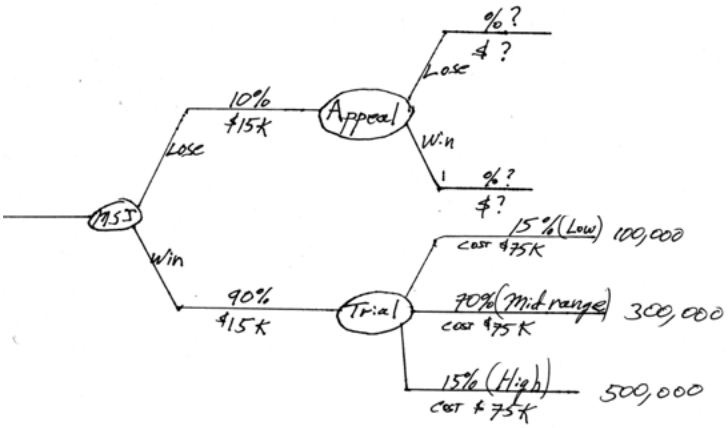
Conclusion

Mediation should have a different, less stressful environment than the rest of the litigation. It gives the parties a chance to catch their breath, and set aside the bare-knuckled brawl that contentious litigation can involve.

Hopefully, you've picked up a worthwhile idea or two. Ensure that you have a copy of the Mediation Acknowledgement and Disclosure form in your mediation packet to be signed by the client before agreeing to mediation. I would also suggest practicing decision trees before trying to complete one with your client.


Coleman

Prior to turning to mediation full time in 2006, Kevin spent 18 years as a civil litigator. His mediation practice benefits from his litigation experiences to help him work well with both plaintiff and defense sides. Kevin settles cases in many fields but most often handles Employment, Personal Injury, Real Estate (including boundary/easement and construction defect), Landlord-Tenant, Consumer and Business matters. Kevin also serves as a Chairperson on FINRA's (Financial Industry Regulatory Authority's) panel of Public Arbitrators. Kevin@KColemanMediation.com.



	Plaintiff's Lit. Fees & Costs	Plaintiff's Recovery	Total to Reach Outcome	Probability	Total Probabilities	Weighted Value of Positive Outcome (of winning!)	Weighted Value of costs	Weighted wins less weighted costs
MSJ for def.	$15K	0	15	0.1			1,500	
MSJ for Pltff	$15K	0	15	0.9			Included in Trial Costs	
Def. Verdict	75K	0	90	0.15	(.15 x .1) = .015		13,500	
Low Plaintif Verdict	75K	100	90	0.15	(.9 x .85 x .15) = .115	$100K x .115 = 11,500	90K x .85 x .15 = 11,475	$25.00
Medium Plaintiff	75K	250	90	0.6	(.9 x .85 x .70)= .53	$300K x .53 = 159,000	90K x .85 x.6 = 45,900	$113,100
High Plaintiff Verdict	75K	500	90	0.25	(.9 x .85 x. 15) = .15	$500K x .15 = 75,000	90K x .85 x .15 = 11, 475	$63,525

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