Mediation in Civil and Family Cases: The Care and Feeding of Trial Counsel

by Donald B. Cripe

Mediation of civil and family law cases is becoming more popular, particularly under the cloud of overwhelmed and under-budgeted superior courts. Yet it appears that many trial lawyers avoid or thwart the process, for a number of reasons, some of which are unwise and possibly not in the best interests of their clients. This article is intended to try to encourage trial counsel to see the real benefit of the mediation process for the client and to view the mediation process as a very positive dispute resolution process.

Donald B. Cripe

Conduct of Counsel

Counsel has an absolute duty to act in the best interests of the client. "A lawyer's duty of loyalty goes beyond the scope of the CRPC requirements: 'It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.' [Citations.]" (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶ 3:187.1, italics omitted, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548; see also Bus. & Prof. Code, § 6068; Rules Prof. Conduct, rules 3-500, 3-510.)

"I never settle cases because I can get sued," one seasoned attorney recently said to me. "It is better to let a judge decide so I don't have the responsibility," said another. The most over-used comment I have heard is, "I can't let my client do that." And the most incredible example comes from a recent mediation conducted by a colleague, in which the mediator crafted a truly amazing solution that would have returned to the plaintiff far more than it would have realized at trial, without the inherent risks. The only thing the settlement did not provide was the payment of fees to the plaintiff's attorney. The attorney refused to carry the settlement offer to the client because he was not going to get paid by the defendants.

It is true that some cases have to be tried, for a variety of reasons. However, it is likewise true that the vast majority of civil and family cases should be, and many are, settled. Unfortunately, the settlement rate is far too low, forcing cases to be set for trial, thereby adding to the backlog of cases and the rush to get cases tried when they do get a courtroom. The situation puts a particular burden on those cases that need to be tried and, because of the rush to the open courtroom, probably fails the litigants.

The final analysis for counsel has to be, "Whose case is it?" Counsel absolutely must protect the client from the abuses and unscrupulous acts of the opposition, as well as from the client's unfamiliarity with the litigation process. That said, it is not an attorney's responsibility to assert his or her personal judgment over that of the client. It is the attorney's absolute responsibility to advise the client on the law and on what the possibilities, both good and bad, may be with respect to the case. But no more would we tell the client what to plant in his garden than we should tell a client whether or not to accept a deal to settle the case. Most believe that counsel must look at the long-term outcome, i.e., what is it going to cost the client compared to what the client is going to net at the end? This, in mediation terms, is called the "net to client." There is very little justification for an attorney to push a case to trial when the same case could have been settled at far less expense to the client, at mediation or at any other time. Additionally, it seems to be a very risky proposition for an attorney to advise a client to try a case unless that attorney can and will guarantee an outcome. Of course, that is an even more risky position for an attorney.

It is also true that when lawyers negotiate settlements, particularly when some client arm-twisting is necessary, the specter of malpractice looms for months or years thereafter. No practicing lawyer has been able to avoid the influence upon clients of neighbors, family and friends who know someone else who had an "identical" case, irrespective of the facts and applicable law. Consequently, counsel are all too often second-guessed when a client tells friends about a settlement. That second-guessing sometimes can lead to bar complaints and civil lawsuits. However, the California courts have fashioned relief from this fear whenever an attorney formally mediates a case with the participation of his or her client. The California courts and the statutory scheme providing for mediation have created very strong protections for the attorney and, for that matter, the client. The most significant case addressing these issues is *Wimsatt*

v. Superior Court (2007) 152 Cal.App.4th 137, discussing Evidence Code section 1115 et seq. This case was a legal malpractice action that arose out of a mediated settlement. The court held that since mediation was a confidential proceeding (e.g., the misused term "mediation privilege"), none of the matters directly involved with the mediation upon which the plaintiff sued were admissible. The court ordered a protective order in favor of the attorney, prohibiting discovery of those documents upon which the client relied. Ultimately, the case was resolved in favor of the attorney. Thus, though an attorney can always be sued by a disgruntled client, submitting a case that should be settled to the mediation process not only enhances the client's potential of obtaining a satisfactory outcome, but also protects the attorney from the phenomenon sometimes referred to as "buyer's remorse" on the part of the client.

Those of us who want the court to make a decision because we do not want to bear the responsibility for the outcome of the case are also best served by taking cases to mediation. In mediation, depending upon the approach taken by the mediator, the client ultimately makes the decision of whether or not to settle the case, with the advice of counsel and the input of the mediator. Thus, if your mediator takes an "evaluative approach" and tells the client the weaknesses of his or her lawsuit, the case is more likely to be settled, while protecting the interests of both counsel and client.

The above begs the question, "How is a mediated settlement agreement enforceable by the court if the process is confidential?" The answer is revealed in *Estate of Thottam* (2008) 165 Cal.App.4th 1331. Basically, a trained mediator should be able to craft an agreement that avoids this difficulty, rendering the agreement admissible for the purpose of enforcement while in no way removing the protections provided in *Wimsatt*. However, caution must be taken to avoid the difficulties encountered by the parties and counsel in *Davis v. Rael* (2008) 166 Cal.App.4th 1608. In that case, the individuals who crafted the settlement agreement did not incorporate the language necessary to allow it to be admissible for the purpose of enforcement. As a consequence, the enforcement action (basically, an action under Code of Civil Procedure section 664.6) was dismissed and relief was unavailable. Mediation is a safe and effective way to resolve even the most difficult cases, if the cases are presented by attorneys who are prepared to mediate, to a professional mediator who knows what he or she is required to do for the protection of all involved. The nonpublished, noncitable case, *In re Marriage of Beetley* (2009) 2009 WL 1238785, offers a very good recitation of the mediation process.

It should be clearly understood that the mandatory settlement conference process and other forms of ADR specifically do not provide the same level of confidentiality and protection as the mediation process. In my experience, MSCs tend to be less successful because the information exchanged may be admissible at trial.

A long time ago, a senior colleague of mine said that being litigation counsel is one of those careers in which, if we do our job correctly, our income stops. While that is true on individual cases, I suspect that if the word gets around that a certain attorney gets cases resolved efficiently, quickly and inexpensively (relative to going to trial), that attorney will find that business will increase. Not many know that Abraham Lincoln was not only a very practical trial lawyer, but an attorney who urged mediation, as well. When asked by others if mediating cases and peace-making wouldn't hurt his law practice, he said, "There will still be business enough." Lincoln urged mediation in his largest cases. In the Superfine Flour case, though he had a very good case to litigate, he told his client: "I certainly hope you will settle it. I think you can if you will . . . ." He also said, "By settling, you will most likely get your money sooner; and with much less trouble and expense." With respect to most cases Lincoln said, "Persuade your [clients] to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time."

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The point is that if we are truly thinking of our clients' best interest, settlement, one way or another, is most often the best way to go. The last example (above) of a comment by trial counsel related to his ability to collect attorney fees should go without too much discussion. For an attorney to put his financial interests ahead of the client's best interest is professionally reprehensible. In that particular case, the "little guy" client would have left the mediation in a position far superior to that in which he will now likely find himself after trial, simply because the attorney wanted to make sure that he got paid first.

As in most situations, the conduct of counsel is critical in mediation.

It is the nature of the trial attorney to be somewhat possessive about his or her case. My observation is that this is particularly true in family law matters, where the majority of litigants are far less sophisticated than they may be in civil matters. Thus, family law counsel frequently resist mediation for the baseless reason that, though they may be able to take criticism from the bench or differ wildly from the opinions and perspectives of opposing counsel, they tend to not want to submit voluntarily to a neutral evaluation or to the input of a family law mediator or arbitrator. For reasons that frequently escape me, those of us who practice in the family law courts strenuously resist formal ADR for settlement. The analysis in this article applies here just as it does in civil cases. Who benefits from resisting ADR? Is it the attorney or the client?

Family law attorneys frequently overlook the benefit of Family Code section 2554, which gives the family law bench discretion to order some cases to judicial arbitration to determine property issues. It states, "[I]n any case in which the parties do not agree in writing to a voluntary division of the community estate of the parties, the issue of the character, the value, and the division of the community estate may be submitted by the court to arbitration for resolution pursuant to [Code of Civil Procedure section 1141.10 et seq.], if the total value of the community and quasi-community property in controversy in the opinion of the court does not exceed fifty thousand dollars ($50,000)." (See generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 8:970 et seq.) Thus, cases may be submitted by stipulation to arbitration of those issues, thereby saving the clients time and money. The process is almost identical to the civil judicial arbitration process. Instead of a wait of five months for a trial, the matter could be completed in a matter of weeks. If counsel is reluctant to submit to ADR because of the cost, I submit that even engaging the services of a private arbitrator or mediator will be less expensive than trying the same issues.

If we are determined to take a case to trial, irrespective of the net outcome to the client, we are doing our clients an incredible disservice. Most family law clients want the case to be over with, but also want to feel like they are getting a fair deal. Most of them (sometimes appropriately) distrust opposing counsel and sometimes even believe that their own attorney is in league with the opposition for the benefit of the lawyers. In those cases, if the matter is submitted to mediation, not only is the overall cost to the client generally less than if the case were tried, but the client should be able to air his or her concerns to a neutral party and, at the end of the case, know that he or she had a substantial say in the outcome. Furthermore, the lawyer is relieved of much potential acrimony with the client. Family law lawyers could be a little less territorial in these matters.

Preparation

Before I realized the efficiency and effectiveness of the mediation process, I, like many of my colleagues, sometimes elected mediation as my ADR of choice solely to avoid the downside of judicial arbitration, e.g., discovery cutoffs, premature preparation, etc. After all, we had to go to ADR anyway, and everyone knew that a case is never resolved in that process, so why not take the easy way out? As it should have been at that time, the answer is obvious. If counsel has an opportunity to resolve the case more quickly and efficiently for the client, he or she has an absolute duty to prepare and be ready to present the client's case to the arbitrator or mediator. Just because the mediation does not result in some kind of finding or order (though it may result in an enforceable stipulation), the mediation proceeding is not rendered unimportant. One of the purposes of mediation is to try to get cases resolved before there are huge expenditures for discovery, depositions, etc. That said, there should still be enough investigation and discovery completed to allow the proceeding to go forward. I have mediated several hundred cases. With the exception of the relatively few cases in which the parties were simply too entrenched to negotiate in good faith, the only cases that have had to be continued or the mediation simply adjourned were those in which the excuse of both counsel for not being able to negotiate was a lack of investigation and discovery.

Counsel should look at it this way: if preparation will assist in settling the case, it should be done, and even if the case doesn't settle, counsel will be better prepared to proceed to either another mediation, a mandatory settlement conference or trial. There is never a downside to preparation in order to meet the needs of the proceeding. In the infancy of mediation, the superior court judge in Riverside who ran the program (either before confidentiality was the standard, or in spite of the standard) would routinely check a box on the form he carried with him during mediation, requesting the trial court to set an order to show cause for sanctions against any attorney who was unprepared or refused to cooperate. I am a loyal adherent to the confidentiality standard, but I will admit that there are times when I would love to be able to march over to the trial judge to tell him or her that an attorney or the attorneys were being boneheaded. Though that is not the appropriate course to take, if counsel would refer back to their duty to the client to competently represent the client's best interest, counsel would be pre-

pared to submit cases to mediation and to attend mediation well-prepared to negotiate in good faith with the goal of resolving the case.

Settlement

More often than not, the actual parties to litigation are far more interested in resolving a case than in going to trial. If a settlement opportunity is presented, that settlement opportunity should be explained to the client, along with the net outcome, the savings of time and the avoidance of the continuing stress of litigation. While I was still actively litigating cases, I enjoyed trial. It provided a marvelous adrenaline rush and, when we prevailed, fed my ego tremendously. At the time, I failed to appreciate that no matter how great I felt, the client was generally happy just to get it over with. And if we lost at trial, all of my wonderful feelings from the previous victory dissolved, but the client was still just glad to get it over with. When considering whether or not your case should go to mediation, think very carefully about the best-case and worst-case scenarios for your client, win or lose. That consideration should include the cost and risk to the client. I strongly believe that if cases are analyzed in a businesslike manner, the answer should be obvious.

The Bench

One critical element in the ADR process is our bench officers. If bench officers view ADR as a necessary evil before they can send the case to trial or, in family law cases, as matters to which no one would agree, they can be as much of an impediment to the process as counsel and the parties. We are fortunate that in Riverside, we have civil bench officers who see the benefit in promoting ADR and, most specifically, mediation. If the bench assumes the attitude that ADR is ultimately in the best interest of the litigants, and if the bench will encourage the process, not only by providing ADR literature at the time of filing, but also at the beginning of every morning calendar, the ADR process will be enhanced. If the attorneys and litigants believe that the bench is indifferent to the ADR process, why should they show any interest, and why should they have any confidence in the process?

Litigants and, though to a lesser extent, counsel look to the bench for guidance and confidence that someone is hearing them and cares about their cases. If the bench can make it clear, or at least give the impression, that it has confidence in the ADR process, I believe that the perception will be contagious.

Now What?

When considering how to proceed in a civil or family law action, I encourage counsel to seriously consider mediation under the supervision of a trained and experienced mediator. If during that process counsel has questions or concerns as to how they or their clients will benefit from the process, counsel should contact a mediator they would consider for their case for the purpose of finding out how the process would proceed and what to expect. Most mediators who are serious about their profession will be happy to provide any information to assist counsel in making the decision.

I urge civil and family law counsel to seriously consider mediation for all cases and, frankly, the more contentious the case, the stronger my urging.

Donald B. Cripe is a sole practitioner in Riverside, having tried numerous civil and family cases over the past 20 years. Mr. Cripe is a professional mediator under the business name of Just Results Mediation Services. He is on the panel of civil mediators for the Riverside Superior Court, has been a mediator with the RCBA Dispute Resolution Service for the past 10 years and acts as a settlement conference referee and mediator in San Bernardino civil and family law cases.

Thanksgiving and Christmas Giving

There are many ways to give during this holiday season. Throughout Riverside County, organizations (including the RCBA Elves Program) are meeting the needs of families by:

1. Providing food, so that families can prepare their own Thanksgiving and Christmas dinners;
2. Providing meals, so that families can enjoy a hot meal on Thanksgiving and Christmas;
3. Providing gifts, so that needy children will have a present to open on Christmas morning.

The Volunteer Center of Riverside County has a list of the organizations in Riverside County that are providing these very important services during the holidays. Please consider contacting the Volunteer Center to donate to one of these organizations or to find out what organizations need assistance. If you are calling from within the County of Riverside, simply call 211. If you call from outside the county, please call (800) 464-1123. To donate your time and/or money to the RCBA Elves Program, please contact the RCBA office at (951) 682-1015 or rcba@riversidecountybar.com.

Thank you for doing what you can to make a difference in people's lives. Your generosity will touch many hearts.

Sincerely,

Jacqueline Carey-Wilson

Editor, *Riverside Lawyer*