MEDIATION PRACTICES IN LAW

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A Survey of Northwest Mediators

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BACKGROUND

In August 2012, the Washington State Bar Association Section of Dispute Resolution commissioned a survey on the practice of mediation in Seattle, Washington. The primary focus of the research is on mediators in the litigated-case setting where parties are represented by counsel. The content of the report is derived principally from in-person interviews with experienced Seattle mediators and attorneys. The purpose is to identify local mediation trends and present a continuum of related useful practices as developed by experienced Northwest mediators.

All interviews were conducted by the same person from August 2012 – December 2012. Each interview started with an overview of the project and a promise the information discussed would not be attributed to any particular interviewee. Thirty-four veteran mediators were interviewed for the survey. All but one of the mediators interviewed is an attorney. The in-person mediator interviews lasted between one hour and two-and-one-half hours. The mediator survey questions covered five general areas: mediator background, pre-conference mediation practices, mediation conference practices, post-conference practices, and general comments about mediation. The interview questions were not exactly the same during any particular interview, and many questions were refined throughout the survey process. A dozen brief follow-up conversations were conducted with select mediators to clarify comments and findings.

After the mediator interviews, twelve experienced attorneys were interviewed about their perspective on mediation in Seattle, Washington. The attorney interviews lasted between twenty-minutes and forty-five minutes. The survey questions covered five general areas: attorney experience with mediation, essential qualities of effective mediators, pre-conference mediation work, post-conference work, and general comments about mediation.

The statistics and information in the report are based on the experience of some of Seattle's most experienced and well-respected mediators and attorneys. Collectively, the survey participants have been involved in about 50,000 mediations over the last several decades. In gathering particular statistics some survey participants were not included either because of a lack of experience on a specific issue or they may not have been asked that particular question. The footnotes indicate the number of interviewees that were surveyed to determine a particular statistic.

In total, forty-six mediators and attorneys volunteered their time to participate in this survey. I personally would like to express gratitude to the survey participants listed below for generously contributing their thoughts and insights about the practice of mediation.

I would like to extend a special thanks to the following individuals for reviewing and providing feedback on the content and structure of this report: Bob Alsdorf, Gregg Bertram, Mark Honeywell, Jennifer Davis, Teri Wakeen, Charlie Burdell, and Paris Kallas. Alan Alhadeff and Micky Forbes developed the initial research concept and provided ongoing feedback as the report was written. Jeff Bean, Stew Cogan, Terry Carroll, and Larry Mills generously contributed their time for follow-up interviews and offered in-depth comments that informed the report structure and content. Lastly, I would like to thank Rina Goodman, Anamaria Gil, and the rest of the WSBA ADR Section Executive Committee for sponsoring the research used to write the report.

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INTRODUCTION

Mediation is more of an art than a science. Like other forms of creative work, experienced mediators have developed a broad continuum of mediation practices that exemplify an astonishing capacity to resolve human conflict. The diversity in how mediation is practiced is significant and akin to the spectrum of diversity a person might find exploring other artistic forms of human expression. Not only are there substantial differences among experienced mediators, but individual mediators tend to adjust their mediation approach to the unique circumstances present in each dispute.

Experienced mediators tend to have a fluid mediation style that is responsive and adaptive to the needs of parties and attorneys ("disputants") instead of a formulaic one-size-fits-all approach. Few, if any, of the mediators interviewed subscribe exclusively to any one predefined style or structure of mediation. Instead, mediation approaches represent a dynamic and somewhat non-transferable integration of personal background, training, personality, intuition, empathy, perception of conflict, and mediation experience refined through practice.

An important difference among mediators appears to be along what Leonard Riskin termed the "narrow" and "broad" problem-definition continuum. The problem-definition continuum refers to how mediators, attorneys, and parties define the relevant subject-matter of a dispute. Mediators can and do exert control over how disputes are defined by parties and counsel. Some mediators enforce a narrow expression of the dispute in mediation and keep the disputants focused on the litigation issues present. Other mediators respond to broader interests that exist outside the legal characterization of the dispute and adjust the problem-definition to be inclusive of those other interests. A mediator's sensitivity, willingness, and ability to adjust along the problem-definition continuum is a product of their personal mediation approach, which draws from prior personal experience, training, and natural attributes. The variation in how mediators exert control and influence over the scope of conflict in mediation has a significant impact on the process and range of potential resolutions options that are produced.

Traditionally, mediation was a concentrated event that started and ended on a specific day. In contrast, recent trends indicate that in many cases mediation has evolved into more of an ongoing process where the mediator commonly has multiple interactions with disputants before the mediation conference, and frequently after the mediation conference when disputes do not settle. While the bulk of the mediation process continues to occur at the mediation conference, many mediators now initiate the process earlier with pre-conference dialogue with disputants, and they stay involved with post-conference follow-up until either a resolution is reached or they become convinced further contacts would be unproductive.

The perceived benefit of pre-conference mediation work has led to innovations in the type of work mediators do early in the process; while new post-conference practices have emerged as fewer disputes appear to be settling at the first mediation conference. The increasing use and perceived value of pre-conference practices and post-conference practices have led to a fundamental change in how the mediation process may unfold in the litigated-case setting. The report divides mediation process into three stages: pre-conference practices, mediation

conference practices, and post-conference practices. At each stage of the process, the report identifies trends and useful practices expressed by experienced mediators.

PRE-CONFERENCE PRACTICES

Pre-conference contact between the mediator, attorneys, and occasionally parties, has become a regular practice among Seattle mediators. Sixty-two percent of the mediators interviewed routinely attempt to have contact with attorneys, and sometimes parties, before the mediation conference.[1] Mediators use the pre-conference communication as a way to prime all participants in the process to hit the ground running at the mediation conference and identify and preempt potential impediments to settlement. In most cases, pre-conference mediation work entails briefs conversations between the mediator and disputants, but a few mediators have begun to have more substantial interactions with disputants before the conference. The remaining thirty-eight percent of mediators usually rely chiefly upon mediation briefs and other written materials to prepare for mediation.

The amount of pre-conference dialogue between mediators and disputants seems to vary depending on the type of dispute, the complexity of the case, the written submissions, and whether the mediator and attorneys are familiar with each other. Despite these variables, the general trend appears to be toward mediators initiating more substantial contacts with disputants earlier in the mediation process. Many mediators now consider these pre-conference communications as key parts of the mediation process rather than some type of extraneous "pre-mediation" work that exists outside the mediation process.

Mediators find written briefs useful, if not necessary, preparation tools for both the mediator and the disputants (i.e., attorneys and parties). Mediators recommend attorneys submit and exchange mediation briefs between three and seven days before the mediation conference, and will often provide an option for counsel to submit a confidential brief exclusively to the mediator. Mediators prefer attorneys exchange mediation briefs to provide time for counsel and parties to evaluate new information about the dispute, reassess risk, and revise potential settlement options. Some mediators use the briefs and other written materials to understand the history of the dispute, and to develop a chronology of key events leading up to the trial date.

Despite the importance of mediation briefs and thorough preparation, a significant number of mediators noted that attorney preparation for mediation varies dramatically. Some attorneys prepare well and are able to obtain optimal outcomes from the mediation process. Other attorneys submit briefs late, do not exchange briefs with opposing counsel, and have not prepared their clients for the process. One mediator noted, a surprising number of lawyers go into mediation without an expectation the case will settle, do not know their case well enough to negotiate effectively, have not prepared their clients for the process, have not thought through potential settlement terms, and have not written a draft settlement agreement before the conference. Mediators attempt to pick up the slack, but recognize that a lot of time and money is wasted when preparation for mediation is not taken seriously.

[1] The percentage is based on twenty-eight mediator responses. The attorney interviews seemed to indicate a lower overall percentage of pre-conference contacts by Seattle mediators.

The majority of mediators found pre-conference dialogue between the mediator and disputants a useful practice before the mediation conference. In the words of one mediator, you learn way more in a twenty-minute phone conversation with each counsel than you ever do in a twenty-page brief. The phone conferences typically last approximately ten to thirty minutes, and cover a variety of topics, including: timing of mediation, process structure, general logistics, mediation style, personality assessments, hot-button issues, pending motions, trial date, and a brief conversation about the key issues underpinning the dispute.

In situations where the mediator and the disputants do not know each other, pre-conference dialogue can be a useful way for a mediator to introduce disputants to their particular style of mediation. For example, some mediators will talk about the defining characteristics of their mediation style. The aim of these conversations is to set reasonable expectations for attorneys and parties about what to expect from the mediator and the mediation process. In the case of early mediations, some mediators use the pre-conference dialogue to evaluate with attorneys the timing of the mediation, and attempt to identify potential information gaps or other impediments that need to be addressed before either side can make informed decisions about settlement.

Other mediators use pre-conference contacts with disputants to customize the structure of the mediation conference. For example, a common topic addressed by mediators is whether to use joint session and opening statements. Some mediators are completely flexible about the structure of the mediation process and will allow disputants to determine whether opening statements will be done and whether joint sessions are used. Some mediators have strong opinions about the use of joint session and opening statements, and will try to persuade disputants to adopt the mediation structure they view as most constructive for the process. Mediators use discussions about mediation style and process structure to generate buy-in from disputants, create positive momentum, and manage expectations going into the mediation conference.

An innovative practice described by a handful of mediators is to conduct extensive phone or in-person conferences with attorneys and sometimes parties before the mediation conference. The purpose of the extensive pre-conference work is to fold disputants into the mediation process earlier, and jump-start the mental shift to creative and fluid thinking about potential resolution options before the conference. One mediator referred to these substantial pre-conference contacts as “situation assessments,” which this report will use to refer to two variations on the approach.

The first variation on the situation assessment approach is for the mediator to have a brief fifteen minute “organizing” phone conference with the attorneys, review the submitted mediation briefs, and then follow-up with an hour to two hour phone conversation with each attorney. The extensive pre-conference discussions give the mediator an opportunity to analyze the legal and non-legal issues related to the dispute, identify potential issues that may promote settlement, and identify potential obstacles that may hinder settlement. One mediator that uses this approach in complex commercial disputes has received uniformly positive feedback from attorneys. Additionally, the mediator has discovered that doing substantial pre-conference work earlier in

the process tends to reduce the duration of the actual mediation conference because disputants are more prepared to focus on the negotiation aspect of mediation.

A second variation on the situation assessment approach is to have in-person meetings or extensive phone conversations with both attorneys and parties prior to the mediation conference. The in-person meetings are generally held with each disputant separately and substitute for what is normally accomplished during the first few rounds of private caucus meetings, but in a more flexible, less pressurized environment. The pre-conference meetings allow the mediator to explore the conflict in-depth with the disputants, identify underlying interests, and determine whether the parties have developed a clear sense of what they are trying to accomplish in mediation. One mediator noted, while attorneys tend to be apprehensive about this amount of pre-conference work, attorneys usually end up gaining a broader understanding of their client and the dispute. Many experienced mediators recognize that effective pre-conference work can harmonize the expectations of disputants about the process and set the tone for a constructive conference.

CONFERENCE PRACTICES

The purpose of the mediation conference is to provide a venue where disputants can look at the same dispute, the same facts, and the same laws in a more open and receptive mode than is possible when engaged in the fighting mentality often solidified by our system of civil adjudication. One attorney put the difference in psychology succinctly: At trial, you're thinking "kill the opposition." In mediation, you're thinking outside the box at a wide range of potential solutions to solve the problem. The mediation process can shift the psychology of disputants from a reactive mentality to a receptive mentality, loosen hardened positions, and open all participants to think more fluidly and creatively about settlement options.

The different styles of mediation and the different structures available have been a source of heated debate among many professional mediators and dispute resolution experts. One of the most widely used ways of understanding different mediation approaches is the Riskin Grid ("Grid"), developed in the mid-1990s by Leonard Riskin. The Grid recognized the now well-known styles of "facilitative" and "evaluative" mediation.[2] Initially, the Grid consisted of (1) a vertical continuum depicting the spectrum of mediator behavior from "facilitative" to "evaluative," and (2) a horizontal continuum depicting a problem-definition continuum from "narrow" to "broad." These two continua intersect, producing four quadrants representing four types of mediation approaches: evaluative-narrow, evaluative-broad, facilitative-narrow, and facilitative-broad.[3]

Over the years, the Grid has been subject to various criticisms. In response, Riskin developed new mediation labels, new grids, and new commentary to address concerns expressed

[2] Riskin, Leonard, *Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed* in 1 Harvard Negotiation Law Review 7-51 (1996).
[3] *Id.*

about the original Grid and how it depicted different mediation orientations. The evaluative and facilitative labels were replaced with the broader terms "directive" and "elicitive." Directive means the mediator is directing the parties toward something or away from it.[4] Elicitive means that the mediator draws out information or perspective or influence from the parties.[5]

Despite the various revisions of the Grid, the narrow and broad problem-definition continuum has remained the same. It refers to how the mediator, parties, and attorneys define the subject-matter of a dispute in mediation. Mediators that encourage a narrow problem-definition keep the dialogue in mediation focused primarily on the litigation issues at stake; while mediators that allow a broader problem-definition tend to be more inclusive of party interests that exist outside the legal framework.

Experienced mediators tend to have a fluid mediation approach with a blend of elicitive, directive, narrow, and broad components that are expressed in different and evolving combinations to meet the circumstances present in mediation. Few, if any, survey participants are exclusively elicitive or directive throughout the mediation process. A number of mediators mentioned that early in their mediation career they gravitated toward certain distinct styles of mediation, such as facilitative or transformative, but overtime have come to see value in using an eclectic mixture of styles refined through practice.

A mediator's approach is often sensitive and responsive to the evolving moment-to-moment dynamic created by the interaction among the attorneys, parties, and the mediator. Usually, but not always, elicitive techniques are used early in the process to allow parties to be heard and tell their story. Directive techniques are more frequently used later in the process when disputants are stuck, going in circles, or the mediator feels it necessary to intervene more assertively to close a large gap between disputants. In some cases, mediators will do exactly the opposite of this pattern of elicitive and directive techniques, and start with a more directive approach and conclude with an elicitive style. However, like a person's right or left handedness, some mediators appear most comfortable when they are communicating in a strongly directive or evaluative fashion. They may identify themselves as an "evaluative mediator" or say they like to offer their opinions during mediation. Other mediators may say they are "good listeners" or more comfortable in an elicitive or facilitative style.

Among Seattle mediators in the litigated-case context, there appears to be a more stark contrast along what Riskin termed the narrow and broad problem-definition continuum. Mediators use elicitive techniques to allow the party's to be heard and illuminate the different issues underlying the dispute, but exert different levels of directive techniques to shape and focus how parties are able to define their dispute in mediation. Some mediators primarily keep the parties focused on the litigation issues present in a dispute; while other mediators are more willing to adjust the scope of the problem-definition to be inclusive of broader interests.

Mediators who focus and shape the subject-matter of disputes into a narrow problem-definition tend to keep the dialogue in mediation focused within the legal parameters outlined by

[4] Riskin, Leonard, *Replacing the Mediator Orientation Grids, Again: The New New Grid System Alternatives to the High Cost of Litigation*, Vol. 29, pp. 127-132, (2005).

attorneys. If parties express concerns too far outside what is likely to be considered by a judge or jury, the mediator may empathize and affirm the value of the party's expression, but will refocus the dialogue on the legally relevant issues in the dispute. These mediators tend to believe that legal subject-matter expertise is crucial for a mediator to be effective because the dialogue in mediation revolves around the litigation issues that are present. The bread and butter of mediation from a narrow approach are the emotional and financial cost associated with litigation, the inherent uncertainty, and the overall risk of going to trial. A trial attorney noted this leverage works because there's only one guarantee at trial: "you could lose." Uncertainty, risk, and cost are the key tools used by a mediator that operates from a narrow approach to leverage disputants toward compromise, and perhaps a reasonable settlement.

Mediators who are open to allowing disputes to be defined broadly view the legal framework as just one perspective of many potential perspectives through which a dispute can be expressed, understood, and resolved in mediation. A broad problem-definition is inclusive of an array of other human factors that may include core personal interests, business interests, relational interests, and community interests that may permeate a dispute. By expanding the breadth and depth of how conflict is defined, the mediator is able to open-up the parties to consider new information that may expand the pie of potential settlement options. As one mediator noted, information shifts perspective, and when parties are able to absorb and express more information about their dispute, the range of possible solution options tends to increase. If parties are stuck in diametrically opposed legal positions, broad perspectives may provide the only outlets for parties to move forward in mediation and think beyond their entrenched positions.

Most experienced mediators recognize the value of being able to adjust proficiently along the narrow and broad continuum depending on the nature of the dispute and the interests of the parties. For example, one mediator asserted that if there is a discrete dispute between parties who will never cross paths again, like a personal injury dispute, the discussion will tend to be narrower. If there is a significant history between the parties (spouses, family members, former business partners, long-term former employee and former employer, parties to a lengthy business relationship, etc.) it is natural the discussion will be broader. Similarly, if there will likely be a continuing relationship between the parties in the future (business partners, family members, employee relationship etc.) the scope of the problem-definition may be broader. A mediator's sensitivity and capacity to address the potentially broad range of human interests that a dispute may involve seems to vary from mediator to mediator. For example, an attorney-mediator with prior training in psychology or therapy will have a different capacity to diagnose and address a conflict between two business partners than an attorney-mediator with a background in public accounting.

The extent a mediator is able to adjust the scope of his or her problem-definition to be inclusive of the range of potential human interests will impact how the mediation process unfolds and what type of outcomes are produced by the process. Unfortunately, the narrow anchor of the problem-definition continuum is probably too restrictive to accurately describe the approach of mediators that tend to focus primarily on litigation issues, and the broad range of the continuum covers too much diversity among mediators to illustrate how these variations impact the mediation experience for parties and the possible mediation outcomes.

One consequence of the variations along the problem-definition continuum appears to be in how different mediators structure the mediation process. Specifically, Seattle mediators who tend to be inclusive of broader interests usually integrate joint session into the mediation process more frequently than mediators who view disputes narrowly. Many of the mediators who perceive disputes narrowly dislike joint session meetings, and rarely find any reason to bring disputants together in the same room. The concern is that when disputants are in the same room, the dialogue is likely to devolve into legal argument, polarize disputants, and potentially trigger an emotionally volatile situation that results in the collapse of the mediation. In contrast, mediators who strongly gravitate toward a broad problem-definition tend to find joint session more useful and frequently encourage disputants to come together in the same room. Mediators who frequently use joint session believe the format improves transparency, efficiency, authenticity, and perhaps generates conditions that can connect parties to broader interests that may not surface if the disputants are always separated in private rooms during mediation.

POST-CONFERENCE PRACTICES

Over the past five years, the importance of post-conference mediation practices has increased because fewer disputes appear to be settling after the first mediation conference. Eighty-eight percent of attorneys and eighty percent of mediators have observed a decline in settlement rates after the first mediation conference. [6] A common estimate expressed by mediators is that fifteen to twenty-five percent fewer cases now settle after the first day of mediation. Some attorneys and mediators have observed more significant declines; while others have perceived little if any decline in settlement rates. The causes of the perceived decrease in settlement rates are uncertain, but common speculations include the downturn in the economy, unripe early mediations, the greater familiarity of attorneys and parties with the mediation process, an increase in the percentage of mediations that are court-ordered, attorneys scheduling shorter mediation conferences, and the shift by many lawyers to use mediation as the start of the negotiation process rather than the end.

The decline in settlement rates after the first mediation conference has created a strong incentive for mediators to rely more heavily on post-conference mediation work to keep overall settlement rates high. It is now more common for mediators to have post-conference follow-up with disputants, schedule multiple mediation sessions, and provide parties with the option to arbitrate unsettled issues at the end of mediation. Eighty-nine percent of mediators interviewed regularly have post-conference follow-up with attorneys when disputes do not settle at the mediation conference.[7] Similarly, nearly all attorneys interviewed found post-conference follow-up by the mediator essential or very important if the dispute had a reasonable chance of settlement. One attorney noted that he would not use a mediator if he knew ahead of time the mediator would not do post-conference follow-up.

Mediators have different approaches to post-conference work. Some mediators rely heavily on email to follow-up with disputants, while others prefer phone conversations or in-

[6] Percentages based on fifteen mediators and nine attorney responses.
[7] Percentage based on nineteen mediator responses.

person mediation sessions. Some mediators find that email provides more control over timing, content, and framing of communications than in-person meetings or phone conversations. One mediator often follows-up with mediator proposals written separately to each attorney. The separate mediator proposals include written support for why the mediator believes each of the disputants should accept the recommend settlement proposal.

A growing practice for several local mediators is to offer disputants an arbitration option if they cannot agree on some or all of the settlement terms after the mediation conference. In the past, a common practice among mediators had been to insert an arbitration clause into settlement agreements that appoints the mediator as an arbitrator if a disagreement emerges about the interpretation of settlement provisions. This was sometimes done at the request of the parties or their lawyers and sometimes done at the suggestion of the mediator. A recent trend is for attorneys to more commonly ask mediators to switch roles and arbitrate unresolved substantive issues at the end of mediation. Although this practice does not appear to violate any specific rules, there is a clear ethical split among experienced mediators about whether this practice is appropriate.

Some mediators believe a mediation-arbitration process is appropriate if the neutral makes appropriate disclosures, the parties sign a document acknowledging they understand the arbitrator has received confidential information in the mediation, and the disputants will not use that as grounds to vacate the arbitration award. In contrast, a number of mediators strongly disagree with the practice of arbitrating unresolved substantive issues at the end of mediation. The primary reason is the mediator is frequently exposed to information not shared with the other side that would often not be disclosed during a traditional arbitration hearing. Additionally, some mediators expressed concern about the business consequences of rendering adverse decisions against repeat users of their mediation services. Despite the potential problems, a growing number of attorneys seem to appreciate the mediation-arbitration option and frequently request this process because it allows them to choose their decision-maker, control timing, fix cost, and receive a prompt decision.

CONCLUSION

Mediation has emerged in various forms as a constructive response to conflict and as a counter to conflict's destructive potential. Over the last several decades, professional mediators have refined their craft, developed new practices, and responded to changes in the dispute resolution field.

Traditionally, mediation was a concentrated one-day event that unfolded from start to finish on a given day. Rarely did mediators engage in pre-conference and post-conference mediation work. Now, mediators frequently initiate the mediation process prior to the conference with varying levels of communication with the disputants, and often keep the process alive when cases do not settle with post-conference follow-up. The evolution of mediation into more of an ongoing process that occurs over-time may be a natural and positive development in the field. It

is also possible that this is a sign of ineffectiveness or increasing sophistication on the part of parties and lawyers about the mediation process.

Mediators have the ability to exert control over the scope of problem-definition in mediation, and thereby influence the range of potential problem-solutions that are produced by the process. In other words, how a mediator facilitates and directs disputants to define the subject-matter of their dispute in mediation has a significant influence on how the process unfolds and what outcomes are achieved. In some cases, a narrow problem-definition is appropriate and aligns with the expressions and interests of the disputants. In other cases, many mediators recognize the conflict involves broader interests that go beyond the litigation issues presented by attorneys.

Mediation has incredible potential to satisfy the interests of parties and generate tailored, cost-effective resolutions to conflict that go beyond what a court could create or impose. How mediation unfolds depends upon the nature of the dispute and the key participants in the process: attorneys, parties, and especially the mediator. Nearly all experienced mediators described a fluid mediation approach that is sensitive and adaptive to disputants rather than preset by allegiance to fixed styles of mediation or a rigid process structure. Mediators have developed a personalized mediation approach that is rooted in personal background, training, personality, intuition, empathy, perception of conflict, and prior mediation experience. Mediators draw from this well of personal experience to connect with disputants and create an environment where conflict can be resolved by the parties.

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