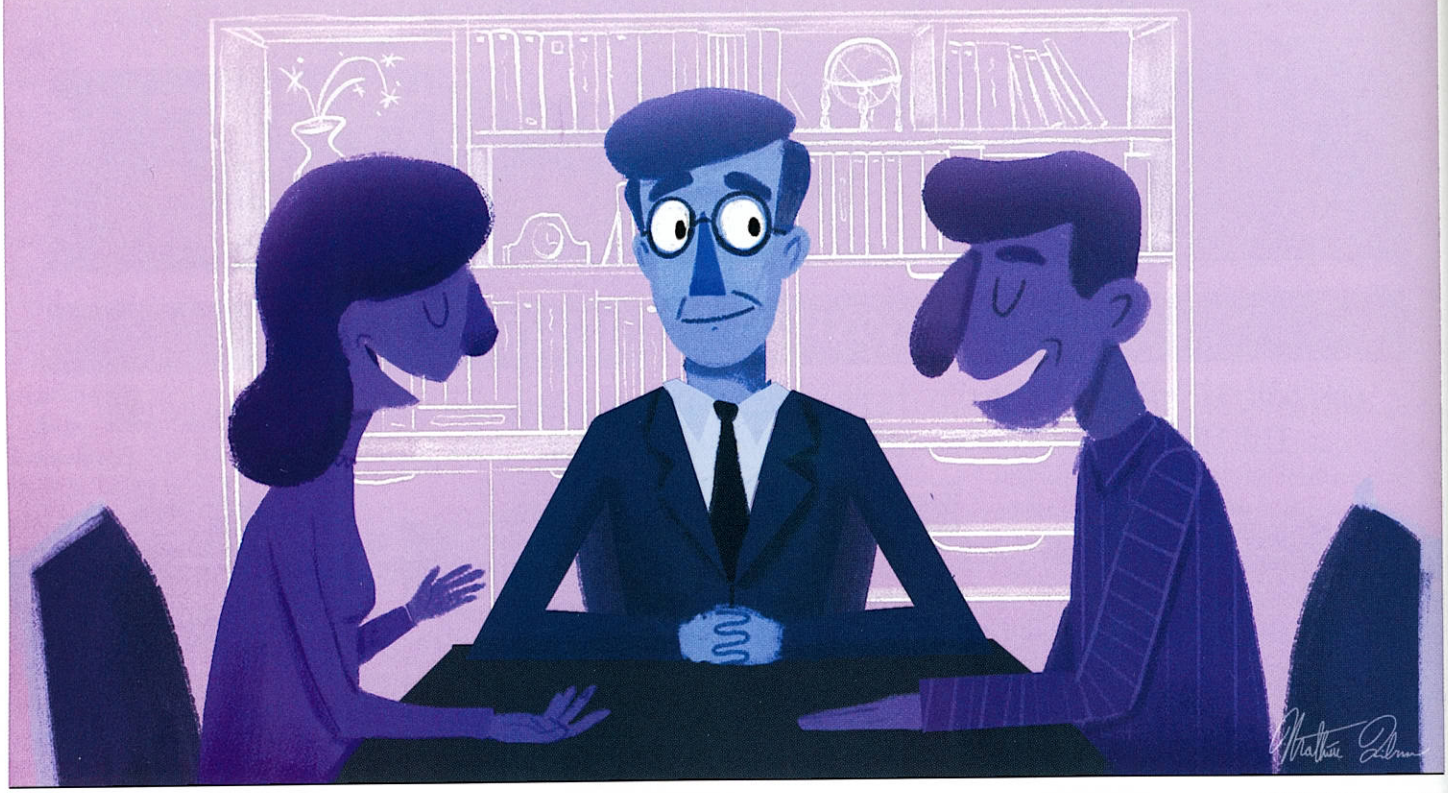
BENEFITS OF EARLY MEDIATION: WHY NOT SAVE SOME TIME AND MONEY?

by DAVID E. LIBMAN

After fifteen years as a litigator, with civil litigation comprising much of my practice, I cannot help but repeatedly ask myself: Why don't more people mediate? And why don't they do it sooner? With this article, I offer thoughts on the many potential benefits of mediating early and conclude with suggestions to make that happen more often.



Artwork by Mathieu Libman

A Few Caveats Regarding the Suggestion to Mediate Early

If your case can settle early without mediation, do it. But sometimes a third-party mediator is necessary to make settlement happen.

I have been involved with a number of cases where going to trial was my client's best or only legitimate choice. Even then, an early mediation that did not lead to settlement was (or could have been) a great exercise because of its confirmation that settlement won't happen. In those cases, mediation also can give the parties a window into their opponents' views and strategies as the lawsuit proceeds.

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This article does not opine on the current controversy regarding whether mediation confidentiality protections should be lifted in cases of lawyer misconduct. Regardless of how that pans out, a truly successful mediation probably avoids the issue of whether a lawyer engaged in misconduct.

I offer no opinion here on whether mediation should be facilitative, evaluative, transformative, collaborative, etc. Most statistics I have found overwhelmingly conclude that private mediation (regardless of type) has success rates that typically exceed 80%, so choose whatever style you like.

Holes in the Theory That We Need More Time Before We Mediate

When parties mediate, they are more likely to reach a settlement that they choose, as opposed to having an arbitrator, judge, or jury choose the result. Parties are correspondingly more willing to pay money pursuant to an agreement reached in mediation than they are in a court judgment. Successful mediation will probably save the parties time, stress, and expense, so why don't parties engage in it sooner and more often? One obvious answer is that too many parties enter into agreements that fail to expressly require them to mediate before or soon after filing suit.

Another reason is that non-contractual disputes typically do not require mediation. Some take the position that mandatory mediation is, by its nature, contradictory because mediation should be voluntary. Still, in my research, I found statistics suggesting that even court-mandated mediation can have relatively high success rates that typically exceed 50%.

One of the biggest impediments to early mediation, in my view, is many attorneys' assumption that mediation should take place only after "enough time" has passed in the lawsuit. They argue that for mediation to be successful, the pleadings must no longer be at issue, significant discovery must have taken place, and the parties must be sufficiently worn down by their battles to finally indulge

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the notion of settling through mediation. A similar argument is that for some nebulous reason, it's "too soon to settle."

I'm often suspicious of the notion that litigants know too little about the case. Sure, in cases of fraud, a party may have hidden something that may later come to light. But should that prevent mediation? My observation is that, regardless of the state of discovery, litigating parties seem to know a great deal about each other. If discovery is truly your issue, mediation may help you learn more about your opponent's case than a dedicated discovery tool ever could.

Some attorneys think mediation needs to take place later because the prospect of upcoming trial expenses is necessary to bring clients to the mediation table. Attorneys will sometimes theorize, along with their clients, that their clients are completely in the right, so the mediator's role as trial approaches must be to convince the opponent of his wrongness so he will capitulate and settle before trial. Here's a problem: How many people do you know who admit they are wrong?

Yet another problem with the "let's mediate later" approach is that, as parties litigate longer, they become more entrenched, and they have less money to spend (or give up) on settlement. By the time the parties get through early stages of discovery, they may have spent thousands (or tens of thousands) of dollars for pleadings, demurrers, court reporters for depositions, attorney fees, and the like. Consequently, their attitude is that if they mediate, they need to recuperate some portion of the damages they would seek at trial—plus all of their litigation expenses to date.

By this later phase of the lawsuit, will they consider that their case could have weaknesses if it goes to trial? Maybe, but these concessions could be less likely than they would have been earlier in the case. To get this far (into or beyond discovery), the client has already had to psychologically concoct multiple ways to bolster the strengths of his case while minimizing its weaknesses.

Ultimately, the problem with waiting until later in the lawsuit is that it increases the odds that parties may be unwilling to mediate at all. I cannot prove that cases that never went to mediation would have settled. But I strongly suspect that if more cases went to mediation sooner, their success rates would continue to be high. If engaging in early mediation increases the odds of settlement when parties have spent less on their lawsuit, that seems like a good bet.

I'll acknowledge that some attorneys may not want to settle early precisely because doing so potentially decreases their attorney fees on that particular case. But we all have duties of loyalty and competence with respect to our clients. So I'd like to think that helping clients save money will still make you more money in the long run because you become known (and recommended) as an attorney who truly serves your clients' best interests.

Going to Court: Do You Like to Gamble?

If you're still on the fence about the benefits of early mediation, maybe some of the negatives associated with going to court will persuade you.

The Judicial Council of California's 2015 Court Statistics Report noted that for fiscal year 2013-2014, statewide civil case filings in the superior courts totaled: 155,428 small claims ($10,000 or less in dispute); 486,597 limited civil ($25,000 or less); and 193,190 unlimited civil (over $25,000). Of those cases, most were disposed of before trial, but the following percentages were disposed of after trial: small claims = 58%; limited civil = 6%; and unlimited civil = 22%. Hence, if your client's goal is to go to trial and have her "day in court," the odds are low.

Trial or no trial, the time it takes to get your case disposed of through the California court system is lengthy. By way of a few examples, with limited civil and unlimited civil cases, California Rules of Court, Rule 3.714(b) sets the following goals for resolution within twelve months: limited = 90%; unlimited = 75%. The statistics for 2014 did not meet those goals. With limited and unlimited cases, only 86% and 66% respectively were disposed of in twelve months. After twenty-four months had passed, 95% of limited cases and 84% of unlimited civil cases were disposed of—meaning that there were still cases remaining after two years.

Federal courts face a similar fate. The USCourts.gov website publishes statistics reporting that for the twelve-month period ending March 31, 2014, in the Central District of California, out of a total of 11,560 cases, there were 146 where court action was taken at trial. For those few cases, the median time to get to trial was 21.4 months. Do you like those odds?

Let's return to the California state courts again. Arguably, the 58% of litigants who pursued small claims cases have less incentive to mediate because of a low barrier to entry: a filing fee of up to $75 in Orange County for claims between $5,000 and $10,000. Attorneys generally aren't allowed, which decreases litigation costs. Still, the Orange County Superior Court offers small claims litigants the opportunity to mediate with volunteer mediators, so it would seem shortsighted to pass up that "free" opportunity and instead simply risk whatever the court may decide.

With limited civil cases in Orange County, the barrier to entry increases, with initial filing fees ranging between $370 and $385. Despite limited civil's streamlined process, that process still requires the time and expense of filing pleadings, discovery, potential motion practice, and, if you get there, a trial. Parties in limited civil cases may be represented by attorneys, who have little incentive to accept a contingency fee, given the small amount of the potential award at stake. So parties with attorneys likely have to pay them. There's no guarantee of a win, or of an attorney's fees award. All of this equates to quite a high risk in exchange for a low possible reward of up to $25,000. Correspondingly, parties considering limited civil litigation may have the strongest incentive to mediate early than any other category of civil litigants. Doing so could save a lot of time, stress, and money, which sounds pretty good when one considers that the potential $25,000 at stake may pale in comparison to the expenses to get there.

Unlimited civil litigation has the highest barrier to entry: a $435 filing fee in Orange County. If millions of dollars are in dispute, $435 may be a drop in the bucket. Still, the statistics above reveal that most unlimited civil cases will never go to trial; even fewer will be tried with a jury; and those that go to trial often take over a year to get there. By that time, a litigant's fees and costs will likely be in the tens of thousands of dollars, and can often be over $100,000—and again, the litigant has no guarantee of winning.

Furthermore, within any of these categories—small claims, limited and unlimited—even if the litigant wins in court, there remains the problem of collecting.

How to Make Early Mediation Happen More Often

If there is no contractual requirement to mediate, encourage your client to mediate early. If you're concerned that making that suggestion makes you look like you lack confidence in the case, remind your client that judges and juries are people, which means they can be unpredictable, regardless of the strengths of your client's case. Or you can show your client this article as a hopefully persuasive argument for early mediation.

Fix the problem before it happens. In my practice, I have the good fortune to also do a fair amount of contract drafting and revising. Some alternative dispute resolution (ADR) provisions require arbitration, but not mediation. This seems shortsighted. Why not draft an ADR provision that requires mediation before the parties file suit, or by some specifically delineated short period of time after filing?

Do not assume that mediation and arbitration go hand in hand. Consider requiring mediation before arbitration, or requiring mediation without also agreeing to arbitrate, in which case, a failed mediation leads to a court battle. Arbitration may sometimes be efficient, but it can get quite expensive with arbitrator fees and administrative fees, and the parties don't choose the result: the arbitrator decides.

Avoid the battle over who should be the mediator. I've seen this backfire too many times. The contract requires the parties to mediate with an unspecified "mutually agreed-upon" mediator. A dispute arises. Jack suggests his favorite retired judge, who charges $600 per hour. Jill rejects Jack's judge in favor of her favorite $525-per-hour retired judge, whom Jack rejects. The parties fight over mediators for three weeks, and eventually agree (the only thing they can agree on) to forego mediation. To avoid this, consider drafting a mediation provision that: (1) identifies three or four mutually acceptable mediators by name; (2) lists a maximum acceptable hourly rate for the mediator; and/or (3) stipulates that when a dispute arises, each party may suggest a few possible mediators who will be chosen by a coin toss. In that case, name who will be heads, who will be tails, and who will toss the coin. One can never be too careful.

Finally, keep in mind that not only longtime attorneys or retired judges can be fantastic mediators. There are many qualified attorney mediators who may not have practiced for thirty years, but who still have the right demeanor and skills for the job. Wonderful mediators may also come from other fields (such as psychology). Consider naming those individuals, or their organizations, as options in your agreement to mediate.

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