SEPTEMBER 2015

The settlement drift

Mediation has drifted from the expectation of 25 years ago that it would be "the final act" in the litigation drama

By Jeffrey Krivis

According to commentator Rachel Maddow in her book "Drift," the way the United States goes to war has gradually become more secretive and less democratic. She observes that in the last half century, the decision to go to war has become too easy. This is contrary to what the Founders of our nation had in mind. Hence, we have "drifted" away from our founding principles about war.

The drift in our ability to go to war is similar to what has become of modern mediation in the litigation arena. Initially a product of the desire for more efficient and cost-effective settlements, the mediation session was seen as the final act in the drama: The moment the curtain would close and the audience would applaud. The mediation session represented the end of the show and a chance to step back and look away from the play. All of the preparation that went into the production was effectively utilized to present the play, and the actors were on their best behavior. If the case had a chance to settle, it would. There were no excuses for parties not being prepared, authority levels not available, or decision makers hiding behind layers of bureaucracy. Cases resolved because the process was designed for closure.

Now, almost 25 years later, the mediation session has transformed itself into one additional step in the litigation menu. Certainly it is still a popular opportunity for case closure, but not necessarily in the minds of the litigants. The process has become strained to the point that the current approach is to schedule mediation without a sense of urgency. It is done to comply with a court order or simply as a matter of practice, with often no expectation of finality. It is often exhausting to be in the middle of this type of drift when the founders of the movement desired the mediation session to be the final moment in the play.

What caused this cultural lethargy in mediation?

1. The dilution of the process by mandatory mediation programs. The institutionalization of mediation into court programs has resulted in way too many cases going to mediation that did not belong in that process in the first place. Why? The court viewed mediation as a panacea to court funding issues and a way to manage caseloads, while the mediation community viewed it as a distinct process that is client centered and empowering. The court imposed strict time guidelines on the process and the litigants, resulting in less thought given to process management and more thought given to court compliance. Another bureaucracy was born at the expense of a successful process.

2. The failure of litigators to be fully prepared to discuss, not argue their cases. When the court put its imprimatur on the concept of mediating litigated cases, it impliedly encouraged the same type of approach that lawyers use when they are pleading a case to a judge. That approach seems to involve arguments where one side wins and the other side loses. Arguments of this nature made outside the formal structure of a courthouse are not as persuasive as discussions between counsel and parties where blame is discussed, but not the focal point.

To counter this dynamic, mediators and parties have gone to extremes to avoid direct dialogue. This has often reduced the role of the mediator to a "water carrier" of offers and counter offers, similar to a production worker. This automated approach reduces what has been the main ingredient in successful mediation practice – creativity.

3. Loss of confidence in the process. After years of participating in repetitive and somewhat scripted processes, some litigators have lost confidence in the process of mediation. They take extreme and unreasonable positions early on and lose patience if the case is not in the proper settlement range by the second or third move. Mediators are guilty of not shaking up the process so that the parties are actually forced to think a bit outside their comfort zones. This reality, coupled with the usual and customary gamesmanship that occurs in every negotiation, has resulted in a contamination of the process and lack of patience on the part of litigators.

What was once considered a simple negotiation tactic to get a better deal has turned into an inadvertent effort to fool the mediator into actually believing negotiation tricks and tactics. This can and often does result in the mediator calling an early impasse, or the parties folding up their tents without letting the process unfold.

4. The follow-up syndrome. Some lawyers conclude that there might be more value in not settling so long as the mediator "follows up" and nudges the parties to different numbers after the session has gained momentum. One strategy that has become commonplace is for lawyers and companies to use the mediation

session as a sort of "scratch and sniff" opportunity. The idea is to check out what might be below the surface, but don't let the other side know you're open to settlement. The latter would be accomplished by the work of the mediator after the session when s/he calls everyone to follow up, at no charge to the parties. While follow-up is critical to the success of some mediation, it is lately overused by some parties to gain more favorable resolution.

5. The concept of managed care. Like doctors, lawyers who are hired by insurers are to some extent following the guideposts of the treatment the insurers deem necessary and appropriate for the dispute. In order to reduce costs, insurers impose limitations on settlements. While this has been an effective way for insurers to save money, it does come at a price by sometimes paralyzing defense counsel who are sincere about resolving disputes. A cycle can occur in which truly excellent defense lawyers are unable to be proactive and honest about risk, for fear that their principal will not respect their suggestions.

6. The economics of ADR providers. The proliferation of administrators of private mediation and arbitration programs has added an economic layer to the system. While there are benefits to this business model, it creates added pressure on the neutrals to increase their billable time in order pay the costs of the administrator. This economic reality has bled into the system so that it has become acceptable to conduct numerous hearings at a sizable cost to the parties in order to satisfy the multiple economic interests that are integrated into each case.

What can be done to fix the system?

Some might argue that the system doesn't need fixing. After all, most providers and successful mediators are enjoying sizable financial benefits, and the courts continue to inundate private industry with referrals. Indeed, when the mediation process is successful it is a joy for all involved and a reminder of why the process gained such favor in the civil justice system. Yet, like any "system," when it becomes too standardized and repetitive, marginalization occurs. To counter this dilemma, a few ideas are worth considering:

1. Reduce the number of cases referred by courts to mediation. Judges have limited tools in their boxes for managing increasing caseloads. Encouraging every case to go to mediation was good 25 years ago when lawyers needed to get used to and educated about the process. Now that we have moved into the institutionalization phase of mediation, courts should become more deliberative about which cases they encourage to mediate as well as the timing of the recommendation. Many cases need a proper exchange of information before negotiation. In fact, many lawyers are great negotiators and should try their hand at direct dialogue with their adversary before simply scheduling mediation.

2. Encourage the exchange of pocket briefs between the parties before the mediation so that time spent in the session is productive and less adversarial. The pocket briefs between the parties should be primarily focused on highlighting the information that best supports the case narrative.

3. Consider the appropriate use of joint sessions during the mediation, but not necessarily right out of the gate. What has happened in the "settlement drift" is that the parties have relied exclusively on the mediator to be responsible for all information and numbers exchange. By delegating all responsibilities to the mediator, the parties have missed out on a huge opportunity to influence the other side with direct dialogue. Lawyers should use direct dialogue to their advantage, particularly when they are articulate and trained as great communicators. Mediators don't have an exclusive license on communication skills. A lawyer should be courageous and ask for direct dialogue from time to time if it will move the ball forward.

4. Respect the need for timing in negotiation. No one ever free falls or gets to their magic settlement number quickly, despite the best efforts. It is human nature to get accustomed to reduced expectations over time, which is why reducing a complex negotiation into a short period is a recipe for failure. Allow the process to play out and respect the fact that the mediator is managing expectations in more than one conference room.

Final thoughts

The settlement drift does not have to be the new normal. With the institutionalization of mediation into the fabric of the civil justice system, the process of mediation will continue to change, and corrections are inevitably going to occur. The trend toward better screening and intake of mediation cases is already taking place on the front lines, and mediators have begun a concerted effort to bring creativity back to the forefront. Moreover, law schools have produced a huge crop of advocates who are highly educated in the proper use of mediation and will not stand for "same old same old." It's time to control the drift in the process and press the reset button so we can return to our founding principles about mediation as a preferred method of dispute resolution.


Krivis

Jeffrey Krivis has mediated thousands of cases since 1989. He and his partner, Mariam Zadeh, are the principals of First Mediation, *based in Encino. He regularly handles cases in San Francisco and Carmel/Monterey. www.firstmediation.com.*