The Case for Mediation Optimization Orders
Theory-of-Change Symposium
indisputably.org/2019/10/theory-of-change-symposium-part-2
October 17, 2019

David Henry proposes that courts generally use "mediation optimization orders" that order lawyers and parties to prepare for and participate in mediation early in litigated cases. The orders normally require them to attend a second mediation session if they do not settle in the first session. He described these ideas in more detail in this article. He is a Florida Supreme Court certified civil mediator.

Need for Court Structure to Promote Productive Mediation

There is little doubt that mediation will continue to be a frequent, if not mandatory, feature of dispute resolution in state and federal courts. Recognizing that only two to three percent of filed civil cases go to trial and that most mediated cases are settled in mediation, it makes little sense to delay mediation. In the "overflowing bathtub" of civil litigation and crowded court dockets, we need a better and faster "drain." Mediation is an inexpensive fix compared with hiring more judges and building more courtrooms. Even a modest increase in settlement rates would have a profound effect on the large number of cases that state and federal courts are struggling to manage.

From this author's experience, there is not enough time spent thinking and preparing for success at mediation because (a) there are no rules compelling lawyers to do this in many courts, (b) there is no prejudice to the merits of a case if parties do not settle cases, (c) litigators are inconsistent in their preparation and not inherently settlement "mindful," and (d) mediation lives in the shadow of the more labor-intensive litigation process.

Courts should advance public and private interests by nudging the parties and lawyers to do the groundwork needed to cultivate a mediation environment from which a bumper crop of settlements can be harvested. As they have done in the past, courts can advance the goal of promoting fruitful mediation processes by issuing "mediation optimization orders" (MOOs) to avoid problems resulting from lack of preparation and to promote tailored communication in mediation. Like a good dinner party, the key to a successful mediation is advance planning. A MOO "sets the table" for more fruitful mediation by ferreting out potential problems that can prevent parties from reaching durable agreements. These problems include things like the absence of key decision-makers, unwanted attendees, surprise damages figures or non-economic terms, undiscovered insurance coverage, and non-joinder of necessary parties.

MOOs would get more cases mediated sooner. This would reduce the aggregate private and public cost of unresolved conflict in the community, shorten the length of lawsuits, and reduce the volume of cases on the docket over time. The rationale for MOOs is similar to

the "planned early two-stage mediation" process described by John Lande but would have the benefit of courts nudging and at times mandating the process.

How Mediation Optimization Orders Would Work

MOOs would direct the parties to schedule two mediation sessions and prescribe preparation for mediation. The first mediation session would occur early in the case, after some preliminary information sharing. Because disparity of information is one of the chief causes of impasse, parties need some discovery or informal information sharing before the first mediation session. However, most mediations during litigation occur far too late and after too much time and money has been spent, causing large sunk-cost problems. If the parties don't settle in the first mediation session, they can litigate some issues, get new information, and then revisit their strengths and weaknesses, objectives, and anticipated expenses before a second mediation session. Many elements of MOOs involve simple telephone calls or meetings that would not add much expense.

MOOs should require lawyers to exchange position statements with each other and not merely provide confidential statements to mediators. This provides an opportunity to educate the other side directly, explain one's case, articulate the problems, and even solicit some empathetic response for the shared plight that all litigants face. Lawyers often resist exchanging position statements, fearing that they would give away "trial strategy" or sound "soft." The objection based on "giving away" secrets is flawed because modern rules of discovery eliminate "sandbagging" during trial, and persuasive pre-mediation submittals go beyond the four corners of the case and evidence.

MOOs can prompt task-saturated lawyers and clients to *transition from an adversarial posture to a more collaborative settlement mode.* Position papers should not be recapitulations of all of the evidence amassed for the purpose of convincing the other side they will lose. In writing position papers for the other side, lawyers should address the opposing parties – not merely the lawyers – to motivate the ultimate decision-makers to consider their interests served by reaching a deal. Pre-mediation submittals can set the tone for themes that the mediator can refer to during the mediation process (e.g., delay, cost, uncertainty of outcome, publicity).

Judicial involvement in fostering effective mediation is normal in many venues. MOOs would not undermine self-determination considering that courts regularly issue orders in managing the litigation and establishing mediation processes and deadlines.

MOOs can be tailored to the facts of cases and can be narrowed or expanded depending on local custom and judicial attitudes toward court involvement in mediation. In Florida, for example, the court adopted rules of civil procedure specific to conducting mediation, selection of the mediator, and reporting to the court. The legislature codified the mediation privilege in Florida Statutes Section 44.401 *et. seq.* (The Florida Mediation Confidentiality and Privilege Act).

How to Persuade Courts to Use Mediation Optimization Orders

Change is not likely going to come "by itself." It will require bar associations and lawyers touting the advantages of MOOs as tools for lessening the duration and the private and public expense of litigation. Lawyers and bar associations that have ADR committees typically have judicial liaison committees or "bench and bar" conferences where this idea can be promoted.

Bar organizations or lawyers can approach court administrators to ask them to encourage their courts to regularly use MOOs as a standard procedure. More settlements early in the life of a case means fewer court filings and some relief for overburdened court administrators and, of course, less judicial labor.

Model Mediation Optimization Order

Mediation optimization orders would typically include the following terms, which can be tailored to particular cases. The orders would require counsel to have the "best voice" and final decision-maker (and insurance representatives) in attendance for corporate parties. In some cases, parties do not reach achievable agreements because key decision-makers are not present. In addition, the parties would disclose the anticipated attendance of any non-party participant such as an expert, advisor, or consultant.

MOOs direct counsel to educate clients about their cases to help them develop realistic expectations. MOOs encourage lawyers to provide clients with a report of best- and worst-case possibilities, and a future budget to designated milestones (e.g., summary judgment, mediation, and trial). The parties are directed to exchange pre-mediation demands and position statements with other parties, including non-economic terms that might be part of a larger deal. Significantly, MOOs require defendants and their lawyers and insurers in multi-defendant civil cases to meet prior to the mediation session to consider possible intra-defendant litigation funding arrangements and pro rata indemnity contributions.

MOOs would set a deadline for a first mediation session early in the case. If the parties do not settle, lawyers would schedule a second mediation session after sufficient time to conduct additional discovery or investigation or after motions that may impact the merits. The second session would be held unless doing so would be unduly burdensome or prejudicial.

MOOs would be largely suggestive and would not create sanctionable offenses for non-compliance. They would not include onerous or subjective terms might invade the attorney-client privilege, undermine purposeful strategies, and interfere with self-determination. Requiring phone calls and communication in broad terms without dictating the contents of the communication is not objectionably invasive.

One of the key benefits of an "order" is that it makes mediation preparation more likely to be thoughtful, consistent, and intellectually elevated so that mediation lies less in the shadow of litigation. As a result, parties and counsel would appreciate mediation as a process not merely a "day" in the life of the case.

Here is a model MOO for courts and counsel to use and adapt.