Creatively Designing Mediation Procedures to Include Evaluations by Courts

Theory-of-Change Symposium

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Jane Juliano, based on her experience mediating in a federal agency, suggests that mediators consider engaging courts to provide authoritative evaluations when appropriate. She is the chief of the ADR Unit of the U.S. Office of Special Counsel and adjunct professor, Georgetown University Law Center. The views expressed in this article are those of the author, writing in her personal capacity and not as an employee of the U.S. Office of Special Counsel or Georgetown University Law Center.

Especially since the Pound Conference in 1976, parties have increasingly used mediation in the legal cases. Some theorists and practitioners have criticized the process where mediators express their opinions to the parties about the merits of the cases. In some cases, mediators have enlisted others to give parties their assessments, which preserves the mediators' neutrality and avoids confusion about the mediators' role. In mediations in my federal agency, I have experimented with enlisting authoritative decision-makers to provide assessments to the parties, which resulted in more efficient and satisfying mediations. Based on my experience, I encourage parties, lawyers, and mediators in litigated cases to creatively design procedures that provide what the parties need, including authoritative assessments from judges that do not create doubts about the propriety of the process.

Mediation in the U.S. Office of Special Counsel

Mediation has a long history at the U.S. Office of Special Counsel (OSC). I was hired to oversee the mediation program and increase OSC's capacity to mediate complaints filed with our agency. These cases generally are filed by employees against their federal employing agency ("the agency"). The normal path for these complaints is investigation by OSC's investigation attorneys ("investigators") who decide to prosecute some cases before administrative judges at the Merit Systems Protection Board (MSPB).

OSC investigators have a role that is a combination of traditional prosecutor and neutral decision-maker. When investigators find violations, they present their findings to the agency, which may provide a remedy to the employee. Sometimes there is negotiation between the investigator, the agency, and the employee. If the agency refuses to provide an adequate remedy, the investigator can prosecute the case at the MSPB. In my experience, the OSC assessment usually is a good predictor of what the MSPB will decide in most cases.

After investigators complete a preliminary determination that there is evidence of a violation, they begin a full investigation of a case. They may refer a case to mediation after the preliminary investigation or any other time during the investigation. Cases generally are in only one OSC process at a time – mediation or investigation. Mediation is confidential. Investigators generally do not participate in mediation, though we have experimented with having investigators participate in selected cases, as described below.

Our Experiments Designing the Mediation Process

After we conducted a dispute systems design process and successfully expanded our program, we focused on some very difficult cases that did not settle. Some of these cases were large, complicated, fact-intensive cases that would save enormous amounts of investigative time and lead to a better resolution if we could settle them. Other cases had a party who resisted settlement. For example, we might spend hours to reach a tentative agreement, but then one side had doubts, having a gut feeling of discomfort about settling. On the other hand, these parties usually do not want to wait for a long investigation. Indeed, if we did not settle a case, OSC investigators would engage in the lengthy process of developing evidence and making a decision about whether to prosecute.

Time-honored mediation techniques were not always enough to resolve difficult cases. I focused on the mindset of the decision-makers and those who influenced them. What issues, views, or attitudes were they struggling with? How much of it was emotional or an automatic "gut" reaction against a person or organization? Was there a good faith disagreement about how the MSPB would decide an issue? Based on discussions with my colleagues in the OSC investigative unit, we tried several process experiments.

When parties' decisions in mediation are heavily affected by expectations about judicial decisions and the outcome is highly uncertain, the combination of mediators who have built trust with the parties and authoritative substantive experts can help the parties feel comfortable to reach agreement. By working together, the OSC mediation and investigation units have provided the support the parties needed to reach an efficient and satisfying resolution. In our experience, both units felt the results were better than either path alone would have provided.

In some cases, parties were reluctant to settle because they hoped to "roll the dice" and get a better result in a full investigation or a hearing than the other side's offer, possibly better than reported decisions would suggest. With the parties' permission, I would ask the OSC investigation unit to provide input. The mediation would engage either the investigator who actually did (or would) conduct the investigation if the parties did not settle or an uninvolved senior OSC attorney to advise the parties as a subject matter expert (SME).

Such sessions are, of course, voluntary and almost always conducted in caucus, which included the OSC investigator, mediator, and party participants. The mediator reaches out to the investigator assigned to the case or an uninvolved SME, taking into account who would be most useful to the party. The investigators on the case might or might not provide an assessment depending on whether (1) they had enough facts to provide an assessment that would be of greater depth and value than an uninvolved SME, and (2) sharing investigative information would compromise further investigation. When investigators provided assessments, they might describe how the evidence looks so far, compare the facts in the case to prior hearing decisions, and suggest the impediments that the party might face when the OSC investigator makes a determination or at a MSPB hearing. The investigators might also explain how the administrative investigation, prosecution, and hearing process would proceed if the parties did not settle.

When investigators who would actually conduct the investigation in a case are present, we do not discuss private mediation communications. When uninvolved SMEs participate, they become part of the mediation and are bound by mediation confidentiality. The mediator briefs the SMEs on the basic facts and issues in the case. The SMEs then provide similar information as the investigators, but cannot discuss the evidence in as much depth as the assigned investigator because the SMEs have not done any independent investigation. On the other hand, SMEs can discuss confidential mediation information with the party and can talk with the party in more depth about their concerns and help them compare the possible mediation options with their alternative in investigation and prosecution.

In several cases, we requested that the investigation unit investigate a particular issue. After receiving information about that issue, the parties resumed mediation.

If these conversations do not lead to settlement, the mediator returns the case to the investigation unit. Though mediators cannot share with investigators negotiation discussions in mediation, parties often make new settlement offers to the investigators, who can discern impasse issues. The investigators might express an opinion about a critical issue and the parties often can settle their case with that knowledge in hand. In some cases, the investigators must do some additional focused investigative work, after which the parties settle – sometimes in investigation and sometimes back in mediation. Several cases have moved between the processes twice.

In some cases, I offered the use of our senior investigation attorneys to “arbitrate” an issue. For example, in several cases, the parties agreed on the basic settlement terms but not on attorney’s fees (which can be an issue because of a fee-shifting statute). The parties agreed that a senior investigative attorney would review the attorney’s fees bills and the parties would accept the attorney’s assessment of what was reasonable. In these cases, after the parties agreed to set aside the attorney’s fees issue, they settled the other issues – and ultimately the attorney’s fees issue as well.

Applying These Insights to Mediation in Litigated Cases

In our adversarial system of justice, parties have the obligation to present relevant evidence in court and convince the judge or jury of the merits of their position. By contrast, mediators do not simply leave it up to parties to "make their best argument." We ask about interests, engage in brainstorming, and help parties talk with each other. We can focus intently on what all parties need to settle their dispute and design the process accordingly. In dialogue with the parties, mediators can develop not only *substantive* options but also *process* options that meet their needs.

In some litigated cases, parties would benefit by engaging the court when the parties need authoritative assessments so that they can feel confident to settle. Mediators and lawyers could arrange for this in several ways. If a case has been assigned to a specific judge, one option would be for the participants to meet informally with the judge in chambers to get input about certain critical issues. Alternatively, the parties can request a formal hearing to get a binding ruling on the issues. These options would be analogous to parties getting input from OSC investigators assigned to the case.

Another option would be to seek input from judges who are not assigned to the case. In some courts, certain judges specialize in conducting settlement conferences and would be logical candidates to provide authoritative input. Even when there are no designated settlement conference judges, other judges in the court may be willing to help. This is similar to OSC cases when the parties use investigative attorneys who are subject matter experts.

I hope that many judges would welcome requests to provide this kind of assistance. They generally want to help litigants and would be happy to share their experience and insights. In addition, if courts can avoid the need for a trial, they can save limited judicial resources.

Lawyers and mediators sometimes engage private practitioners to serve as neutral evaluators, which can be very helpful in resolving disputes. In some cases, using sitting judges would be even more effective. Savvy lawyers and mediators sometimes have used this procedure in their cases. You should consider it in your cases when it might be appropriate.