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From the bench to mediation: What it takes to settle a case

Drawing on his experience as a judge and private mediator, the author explains how mediation can ease court backlogs, reduce litigation costs and give parties greater control over resolving their disputes.

By Gary Y. Tanaka



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When I began my judicial career, I assumed my experience as a lawyer would provide the tools needed to effectively dispense justice, efficiently manage the calendar and help parties satisfactorily resolve disputes in a timely manner short of trial. I was quickly disabused of those assumptions. On a daily basis I saw firsthand the tremendous challenges the bench faced. Judges were overworked, courtrooms were overbooked, caseloads increased and administrative solutions remained elusive.

The expectation of judges to efficiently manage high-volume calendars is nothing new. Indeed, it is to be expected. Learning to efficiently manage 400 independent calendar civil cases, conducting law and motion, handling jury trials and bench trials, while also writing statements of decisions–if you wanted to go the civil route, that seemed to be the norm.

At some point, post-COVID, things changed. Learning to manage 750 cases became the new norm, then 1,000 cases, then 1,500 cases. Something needed to change — but what? There was only so much that our district's two independent calendar courts could do.

Something had to change

At the Torrance courthouse in the Southwest District, we had to contend with many intractable problems. As one of only two independent calendar civil courts in the district, our caseload was starting to take a toll. Managing 1,400 cases may not sound astonishing today, but back then the alarm bells were ringing; something had to change. One solution was to add a third civil court. The net result? Our calendar grew to 1,500 cases.

We were forced to actively look for solutions to help counsel and their clients potentially resolve their cases sooner rather than later. At that time, the criminal courts maintained a program called the Early Disposition Program, or EDP. The concept was simple: Can the case settle short of moving forward to trial? The question then became whether the civil courts could attempt to mirror the criminal court's approach to efficiency. Could an endorsed program supporting the civil courts directly within the Southwest District offer a similar opportunity to resolve civil cases short of trial?

It wasn't that voluntary settlement conferences had not occurred before; there really is nothing new under the sun. The difference was that Torrance would begin to actively inform counsel of its willingness to conduct voluntary settlement conferences on a regular basis, despite the absence of additional resources. Then-Supervising Judge of the Southwest District, Judge Alan Honeycutt, recognized the benefit of such a program, embraced the idea and gave the green light to active promotion of a voluntary settlement program within the district.

We didn't expect miracles, just a small step toward taking pressure off the trial docket, as well as counsel and their clients. This was the birth — out of both necessity and desperation — of Torrance's active push to promote a voluntary settlement program. Whether judges were burdened by a heavy calendar, jury trial, bench trial or chamber work, one day a week would be dedicated to settlement conferences. We hoped that at least a few brave litigants, with support of their counsel, would give it a try. The program began with just one day a week, on Fridays.

It was like pulling at a scab; once the bleeding started, it wouldn't stop. In almost no time, a steady rhythm of calls began. As the program marched forward, the need for a second day became apparent, then a third, then a fourth. It was working. The bar was responding. Eventually, we found ourselves fielding calls to fit in appointments five days a week while still managing a caseload of 1,400 cases. By the time I left the bench, the voluntary settlement conference program was handling more cases than I could ever have imagined.

Why mediation matters

Anyone who has tried enough cases, regardless of which side they represent, can appreciate the following observation: "How is it that so many smart people got it so wrong?" Perhaps the fault lay with

the credibility of a client, a percipient witness, an expert, or maybe it was simply that the jurors or court rulings were wrong. Surely, it had nothing to do with how the case was presented ... right?

The fact of the matter is that no one, no matter how smart they are, can foretell how random fact finders called to sit in judgment on a case that tugs at their hearts will embrace one side's interpretation of the evidence and reject the other. Try enough cases, and it's just a matter of time before even seasoned practitioners find themselves exclaiming, "Wow, I did not see that coming!"

When parties participated in our district's court-supervised settlement conferences, most were anxious to put their matters to bed; they just weren't sure how to make that happen. In our settlement conferences, the court's undivided attention was focused on a single case. There was no other noise, no 1,400 other cases to worry about. I now had just one job — to help them figure this out.

In each settlement conference, parties were given a confidential safe space to work through their conflicts. I supported them by carefully listening to their concerns, answering their questions, providing critical counterviews to their evidence where appropriate, emphasizing what direct and/or cross-examination might look like in order to drive home a point and allowing them to navigate a path toward resolution that made sense to them. There were no three-hour time limits. Some settlement conferences took half a day, some took an entire day, and some took more than one session. Patience, not time limits, would carry the day.

Private mediation is no different

Now as a private mediator, I see my job no differently. I have one job and one job only — to help the parties figure this out. The variables I learned on the bench working alongside counsel and their clients to settle cases now naturally apply in the private sector. Just as in the court-supervised conferences, parties in private mediation must be able to freely confide in their neutral. They should have confidence that the neutral will be objective, will possess the necessary skillset to communicate effectively and will be versed in the art of defusing difficult circumstances. Discerning directional movement and developing parameters for reaching consensus will be shaped gradually through careful listening, not just to what is said but also to what is not said.

Private mediation, like settlement conferences, allows counsel and parties to have a seat at the table — to have an actual say in the outcome of their matter. Parties are in the best position to determine what is in their best interests, not twelve strangers. Importantly, mediation provides an opportunity to test narratives, identify weaknesses, determine valuation, manage risk, and avoid negotiating against yourself. Additionally, mediation offers the opportunity to reconcile positions through the scrutinizing eyes of a proverbial "thirteenth juror."

The significant difference between what I did to settle cases through the court versus private mediation is, of course, the cost; time management is also a factor. However, that said, sitting in a private setting as a neutral allows greater freedom to utilize observational tools that I refrained from using while sitting on the bench. While time periods do play a role, the end goal remains the same: to help them figure this out. Counsel knows when it makes sense to extend time periods, and no settlement negotiation goes into overtime unless meaningful progress is being made.

The right mindset

"I'm right, you're wrong, end of story!" No trial, in my experience, goes that fast. Litigation is like a movie that plays out in slow motion, nuance after nuance, loop after loop, objection after objection, and if the repeat button gets hit too often, jurors get educated to the amorphous number 352.

Mediation does not mean that litigants have surrendered anything. It means that there is a readiness to hear out the other party's position and demand, to explore whether movement is warranted under the circumstances and, if not, why not.

Mediation requires a mindset that reflects a readiness to talk and listen. Parties should come ready to talk. Counsel will always have an opportunity to argue in court if the case cannot resolve. At mediation, each party should use the occasion to communicate their narrative and note whether it is fully resonating with the neutral. This is what carries over into the other room. Parties should also be ready to listen. If concerns are identified, they should remember that those same concerns could be on full display in front of a jury. Critical feedback is one of the key benefits of mediation. It can help set up the turntable and begin moving the needle.

To maximize the benefit of mediation, counsel and clients should be ready, willing and able to fully engage in the process. If they are not, there is little chance that their matter will be resolved out of court at that particular point. My principal job as a mediator is to keep counsel and their clients on track to figure out what it will take to actually resolve their dispute. If I accomplish nothing more than this, the parties will at least be able to document what their bottom line may be as they work to bring litigation to an end.

The right timing

No case will settle — through the courts or privately — if the timing isn't right. But when is the right time to settle? Counsel knows the answer to this question, but the short answer is: it depends. In Torrance, I had occasion to work with counsel and parties to settle cases pre-filing, cases in default status, cases with pending case management conferences, summary judgment motions, post-mediation status conferences, final status conferences, during voir dire, during trial testimony, and post-judgment. Settling pre-filing or post-filing is case specific, and counsel knows best when the timing will be optimal for their clients to engage in the process.

As a private mediator, I know that counsel and parties have chosen me to help them achieve a successful result, but I cannot determine the right time for them. Just as in the public sector, parties in the private sector may have extremely hardened positions or carry significant emotional weights that need to be stripped away. Their cases may need to be worked up to a certain degree before decision makers can properly engage in meaningful discussions in search of potential solutions. It takes time and experience to sort through these things. Counsels' efforts preparing clients and their cases for mediation matters because in private mediation, they're paying to be here.

Conclusion

Backlogged dockets mean that cases can take years to reach trial. Cases with statutory preference can even experience extended trial dates beyond expectation. Mediation allows parties to establish control over timelines, have a seat at the table, and define what is in their best interests. It allows parties to control the positional outcome of their case instead of letting twelve strangers decide their fate. Mediation, when handled with thought and care, can bring about an end to the heavy expectations, financial hardships, and burdensome weight of litigation.

To experience litigation is to understand the toll it takes on individuals, families, and businesses. Every case is important. Every case matters. In Torrance, we endeavored to go the extra mile and tried to make a difference for counsel, litigants, and the court, one case at a time.

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