

Managed Mediation



V. Gene McDonald

The term “managed mediation” has never been defined nor has the concept been widely recognized. Those mediators who do manage the process typically view management as an integral part of mediation. But it can be seen as a distinct function, performed by a mediator to enhance the effectiveness of mediation as a dispute resolution tool. Management of mediation involves proactive and thoughtful intervention by the mediator in the mediation process, both at the outset and continuing.

The management process begins with the mediator’s preparation for the mediation session. A review of the submissions by counsel — followed by a conversation between the mediator and each attorney — constitutes both the mediator’s preparation and the initial step in the management process.

The purpose of those conversations is to make the session more efficient and effective. The conversation will deal with the case as well as the process and the mediator’s approach. These conversations should focus the attorneys’ attention on the issues seen as important by the mediator to permit the attorney to better prepare for the mediation. They

Hon. V. Gene McDonald (Ret.) was a trial judge in San Mateo County for 20 years and has been a full time JAMS panelist since 1997.

also provide an opportunity for an attorney to give a confidential heads-up to the mediator about things such as a client issue that can’t be put in writing.

The next management opportunity occurs at the commencement of the mediation session. The mediator may meet briefly with each attorney, separately, to find if there are any additional concerns that need to be accommodated.

Most one-day mediations resolve the dispute and essentially end the mediator’s involvement. But there are cases in which the management role survives the settlement. It may be advisable to leave the mediator in place to help resolve such things as disagreements over the final formal documents. It may even be necessary to convert the mediator into an arbitrator to resolve minor disputes in a binding manner.

The failed mediation presents additional opportunities for the mediator to function as a manager. The form this management takes depends on the problem that frustrated the process. Problems range from those that are easily addressed to the absolutely insoluble. At the conclusion of an unsuccessful session, but before adjournment, the mediator and the attorneys should meet to discuss the process to determine what caused the mediation to fail. The failure to resolve the case, most often, involves a lack of objectively credible information that permits the parties to cling to conflicting factual positions. Or it may be a legal issue on which the attorneys hold hopelessly irreconcilable views.

If the problem is factual, the issues need to be identified and potential procedural solutions should be put in place. Limited discovery may be required. Further investigation, perhaps including the retention of an expert consultant, may be necessary. The process should be agreed upon and a date set for returning to mediation. The discovery/investigation should deal only with problems identified by the mediator

and counsel. The idea is to shed light on the issue without opening the litigation floodgates. It is the mediator/manager’s job to help identify the troublesome issue and assist in fashioning a cost-effective approach to minimizing the impact of the issue on the process.

Strongly held conflicting views of the relevant law present a more challenging problem. The mediator will probably have an opinion favoring one party. If he or she is not able to convince the other party of the error in its analysis, it may be necessary to take the dispute to the law and motion department of the court in which the matter is pending. The pendency of a dispositive motion may bring a more realistic assessment of the legal issues and a ruling will definitely cast the case in a different light.

The mediation process is held in abeyance while the parties pursue these factual or legal avenues. It is the job of the mediator, as manager, to keep the attorneys focused and working. The mediator, having assigned the homework, needs to follow through.

Many mediators engage in post-mediation follow-up when the initial session does not resolve the case, even in the absence of a planned approach. Whether this is additional management or simply an extension of the mediation session is unclear, but it is part of the process which has become expected and appreciated. It may foster settlement without further sessions or it may lead to additional, hopefully more effective, formal mediation.

Occasionally, a case presents in which the parties are so emotionally charged or conceptually divided that it appears no amount of additional information or legal examination will cause the requisite change. But with effective management, even these cases may be resolved.

One such case involved a mediator who recognized an opportunity and suggested it. The case involved parties who had previously been married. One party accused

the other of forging a deed to real property. The parties were each represented by competent real estate litigators, but they were not making progress. The mediator called a temporary halt to the process and caused the parties to bring family law practitioners into the mediation. These lawyers dealt effectively with the emotional issues that prevented the parties from agreeing and the case settled.

Frequently, a mediation stalls because parties important to the dispute are not there. A mediator once had a two-party, typical failure-to-disclose case brought by the buyer against the seller of a single-family home. The mediator recognized very early that the allegations made by the plaintiff implicated additional parties. At her urging, the mediation was adjourned and continued. Realtors, the general contractor, several subcontractors and various other parties joined the process. Ultimately, 20 parties became involved and the case settled, in pieces, over a two-year period.

More complex cases may require more structured processes. Several years ago, a mediation lasted nearly a year. At the center of the litigation was a corporation facing bankruptcy. On its face, the case was a derivative action brought by the founder

of the company against the current management. The case involved multiple parties, several insurance carriers and a dozen or more law firms.

The mediation began with an all-day planning session attended by the mediator and the attorneys. The purpose of the session was to provide the mediator with a candid assessment of the facts, the personalities and the subsurface “real issues.” From this briefing, a plan for the mediation emerged. Multiple sessions were scheduled which involved all parties, while others were limited. The litigation settled in segments over a several month period.

A work in progress for the author involves six law firms. Counsel created a plan that called for several sessions, the number of which would be a function of the progress made at the early sessions. Between sessions, the attorneys met to create an agenda for the next session.

The mediation sessions commenced with meetings between the attorney and the mediator, with the mediator functioning as a committee chair/discussion leader. The joint session broke into separate caucuses, which included the parties, and the mediator moved between the caucuses. The attorney “committee” would

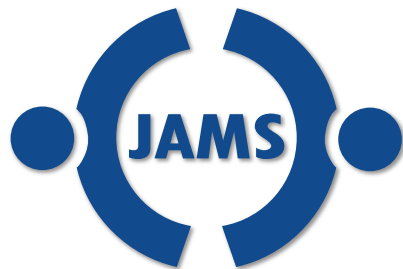
reconvene to discuss progress made in the caucus. Counsel would return to the caucuses or additional attorney meetings as the discussions made appropriate.

At the conclusion of each session, a written formal agreement, dealing with those items which had been discussed and resolved, was prepared and signed. The issues needing further work were identified and deferred.

It is hoped that all issues will be resolved through these sessions. Failing total resolution, it is contemplated that the unresolved issues will be isolated and a plan for addressing them will be agreed upon.

In each of the situations described above, the management function is purely a process between the mediator and counsel. It is a problem-solving process, purely pragmatic rather than philosophical. The “mediation” takes place in those sessions in which the parties participate. The management of the process merely creates a framework within which the mediation process can be more efficient and more effective.

Management of the mediation of a complex case is possible only if the attorneys recognize the value of the process and its availability. As gatekeepers, they must bring the dispute to the mediator.



THE RESOLUTION EXPERTS®