

Lawyers' Routine Participation Directs Shape of "Liti-Mediation"

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Mediation is becoming a routine step in contested litigation in many parts of the country due to court mandates and changing legal culture. Indeed, in some places, it is taken for granted that mediation is the normal way to end litigation.

I refer to this as a "liti-mediation" environment -- that is, where mediation has become institutionalized as a regular part of litigation. Although liti-mediation can be a government operation, it will probably more often operate on a private fee-for-service basis given the U.S. political culture.

In a liti-mediation environment, lawyers play an important role as they increasingly shop, plan for, attend, and participate in mediation. Lawyer participation in liti-mediation offers great potential benefits for the principals, mediators, and society as a whole.

[The term "principals" is used to refer to the parties because they are or should be the principal decision makers in mediation under codes of professional responsibility for both mediators and lawyers. For example, under joint Model Standards of Conduct for Mediators of the American Bar Association, American Arbitration Association, and Society of Professionals in Dispute Resolution, Standard I states: A "mediator shall recognize that mediation is based on the principle of self-determination of the parties."]

Lawyer participation can be especially valuable in disputes involving complex legal issues and where principals need strong advocacy in negotiating. On the other hand, routine lawyer participation can subtly -- and sometimes not-so-subtly -- jeopardize important values.

While acknowledging the significant potential benefits of regular lawyer participation, this article focuses on some of the serious risks involved. These include risks of weakening the principals' decision-making role and missing opportunities for interest-based problem solving as described in books and articles like "Getting to Yes," by Roger Fisher, William Ury, and Bruce Patton.

Depending on the setting and one's values, these may not be considered problems at all; in much civil mediation, positional bargaining conducted primarily by lawyers is normal. Thus the risks are problems only to the extent that one values mediation's potential to permit principals

to participate actively in interest-based problem-solving. Although some argue that such processes should occur in every mediation, this article is based on a narrower premise that mediators, lawyers, and principals risk losing valuable opportunities if they do not at least consider using such processes when they might be productive.

Routine participation of lawyers in liti-mediation also risks causing mediator bias in favor of some lawyers and their clients. Although there presumably are other factors potentially contributing to bias, such as the interests of institutional repeat players like insurance companies, this article describes why the lawyers' role may be particularly important.

These risks generally are not due to bad intent by lawyers. Nor would eliminating lawyers from mediation solve the problem of risks in liti-mediation. In fact, lawyers are some of the strongest and most sincere proponents of increased mediation use. Instead, these risks result in significant part from the dynamics of the markets for legal and mediation services in liti-mediation environments.

Thus, rather than suggesting that lawyers are purposely harming mediation, it appears that the opposite is true: The risks result precisely because most lawyers habitually follow traditional norms of the legal profession, acting to advance what they see as their clients' best interests. Indeed, lawyers often represent their clients assertively in mediation precisely because their clients want them to do so.

There is no simple solution in light of the range of possible options for addressing the risks, because the obvious remedies are likely to be unfeasible, ineffective, or counterproductive. The risks are serious and deserve more attention.

Confusing Relationships and Loyalties

Routine lawyer participation in liti-mediation is likely to result in increasing (1) dependence of principals on lawyers for managing a mediation strategy, (2) dependence of mediators on lawyers for continuing referrals, and (3) control by lawyers of the mediation process. As a result, relationships between mediators and lawyers are likely to develop that may overshadow their respective relationships with the principals. Moreover, the complicated sets of relationships between mediators, lawyers, and principals may lead to confusion about appropriate behaviors.

As mediation becomes more common, and especially where courts order cases into mediation, the mediation market is likely to expand and become more specialized and complex. Due to the wide variety of approaches to mediation (see the author's recent article calling for respect and collaboration by proponents of rival mediation philosophies at 16 Alternatives 1

(January 1998)) and the large number of mediation providers, principals typically rely on lawyers' advice about mediator selection and mediation strategy. As a result, most lawyers will want to be competent to advise clients about and represent them in mediation.

As lawyers become repeat-users of mediation services, mediators may well see the lawyers as the mediators' clients, rather than the principals, with whom the mediators are much less likely to have repeat business. This is especially likely where the lawyers, rather than the principals, shop for mediators.

It may be unclear whether principals are primarily the mediators' clients, primarily the lawyers' clients, or both equally. The significance of this issue is illustrated in a simulated mediation of a personal injury case from a training video featuring a prominent Florida mediator and trainer. After the plaintiff's lawyer completed the opening statement, the mediator turned to the lawyer and asked, "Would you mind if I ask her a question or two?" referring to the plaintiff. The question implied that the principal was primarily the client of the lawyer -- not the mediator -- and that the mediator could not address the principal directly without the lawyer's consent.

Mediators risk alienating lawyers, and perhaps the principals as well, if mediators direct the conversation toward the principals, sometimes even if it's done in caucus. If mediators assume that lawyers legitimately may use a positional approach in mediation, a mediator asking a principal questions may be perceived as inappropriately interfering with the lawyer's strategy and weakening the lawyer's authority.

As a result, mediators may feel reluctant to probe a principal's thinking, thus abdicating much of the mediators' responsibility. This is probably less of a problem with experienced mediators with well-established practices and much more of a problem with novice mediators seeking to build their practices.

In contrast to litigation, where lawyers normally make certain decisions and speak for the parties, mediation offers the potential for principals to speak for themselves and to take a greater decision-making role. When lawyers participate in liti-mediation, they often do most of the talking, which can undermine the principals' decision-making authority and participation.

Lawyers and clients often jointly decide on their strategy, positions, and division of responsibilities for presenting their side in mediation. Frequently they do not. When a lawyer takes the lead, the principal may feel reluctant to participate so as not to interfere with the lawyer's handling of the case. This is not a problem when principals are assertive or want their lawyers to take the lead. But a norm of lawyer control in mediation may deprive some principals of meaningful opportunities to speak and decide for themselves, which many would value if offered.

Although there usually is some pressure in mediation, mediators and lawyers may join in pressuring the principals. The resulting pressure can be excessive. Lawyers frequently find that their clients want to perpetuate the dispute and resist the lawyers' (often quite appropriate) exhortations to be "reasonable." Indeed, sometimes principals want to leave a mediation when the lawyers want to stay and settle the case. Lawyers often are reluctant to press their clients too hard, however, so that they do not lose the clients' confidence.

Empirical research shows that attorneys regularly look to mediators to provide pressure on the lawyers' own clients that the lawyers feel unable or unwilling to exert themselves. Craig McEwen, Lynn Mather, and Richard Maiman, "Lawyers, Mediation, and the Management of Divorce Practice," 28 Law & Soc'y Rev. 149, 163-66 (1994). This is not limited to divorce cases, as mediators and lawyers cooperate to pressure principals in business cases as well. See, e.g., Lavinia Hall and Eric Green, "Finding Alternatives to Litigation in Business Disputes," in "When Talk Works: Profiles of Mediators" 290, 301 (Deborah M. Kolb ed., 1994). This combined pressure can threaten principals' self-determination.

Relationships between lawyers, mediators, and principals in liti-mediation can be quite confusing. Given mediators' dependence on lawyers as regular sources of business, it should not be surprising if mediators cater to the lawyers' interests, possibly superseding the principals' interests.

Three Risks

These complicated relationships in liti-mediation may lead to at least three serious risks. First, lawyers may exercise excessive control, weakening both the mediators' and principals' authority as described above.

Second, continuing relationships between lawyers and mediators can result in mediator bias. When lawyers (or their major clients) in a two-party case are comparable in their status as repeat purchasers of mediation services, the mediator would presumably be equally dependent on both sides and generally would not have an incentive to favor one side over the other. But when one side is a repeat buyer, such as an insurance company or a lawyer who uses mediation frequently, and the other side is not, the mediator could consciously or unconsciously be affected by this.

Although mediators cannot make a formal decision favoring one side or another, mediators can help or interfere with the efforts of any side. Mediators can influence the outcome through control over the process, including decisions about what issues are worthy of discussion and what options are suitable for serious consideration, as well as through direct or indirect expression of opinions about particular positions.

Third, important opportunities for interest-based problem-solving and repairing relationships will be lost if lawyers and mediators assume (perhaps unconsciously) that a traditional positional process is the necessary or only appropriate approach. Recent research suggests that, in unmediated negotiation, lawyers often use a positional process out of habit even though both may prefer a problem-solving approach. Milton Heumann & Jonathan Hyman, "Negotiation Methods and Litigation Settlement Methods in New Jersey: 'You Can't Always Get What You Want,'" 12 Ohio St. J. on Disp. Resol. 253, 254-56, 295-305 (1997).

Unconscious use of a positional approach is especially likely when the mediator is also a lawyer or retired judge. Moreover, when lawyers play dominant mediation roles, mediators may be less likely to focus on building or repairing productive relationships between the principals even when it might be in the principals' interests to do so.

Potential Solutions and Limits

These risks do not inevitably ripen into actual problems. Even when the problems arise, there are some techniques for addressing them.

For example, in literature sent in advance of mediation and during opening statements, some mediators define and elicit agreement about the roles of lawyers and principals. When mediators want to emphasize the principals' responsibility for participation, the principals can be seated next to the mediators to signal that the lawyers are expected to act primarily as advisers rather than as advocates. Especially where courts order cases to mediation, judges can express their preference or in some cases assign the appropriate roles of principals and lawyers in mediation.

These tactics may help but they will not necessarily overcome the structural power that lawyers generally have over both principals and mediators in a liti-mediation market. Although there are possible changes in the markets that could, at least theoretically, address some of the problems described above, such changes may not be politically acceptable, practically effective, or without serious adverse side-effects.

The following possibilities highlight the difficulty of resolving these issues. I do not suggest any of them necessarily would be feasible and yield a net improvement over the status quo.

As one theoretical option, the courts could randomly assign private mediators in every court-ordered case and strictly refuse to permit substitution except for demonstrable bias. This would deny the freedom to choose mediators, however, and it would require the courts to embark on a controversial venture in mediator certification.

Policy makers could issue rules regulating the conduct of mediators or lawyers in mediation. For example, rules specifically requiring mediators to disclose prior mediations with any of the lawyers or other participants might reduce the risk of mediator bias.

While such rules probably would be desirable, they may not overcome the market pressures. It is not obvious what rules could effectively address the other risks. Many rules are unlikely to be effective without a major enforcement apparatus -- and quite possibly not even then.

Although some people might be tempted to suggest barring lawyers from attending mediation, I believe that this would be counterproductive. It would deprive principals of important legal advice and advocacy. It might cause unnecessary delay, expense, errors, and missed settlement opportunities due to indirect communication with lawyers. Moreover, lawyers' exclusion could lead attorneys to subvert the mediation process, consciously or not.

Another option would be to refrain from mandating mediation. But this is no guarantee that the pressures of an "unmandated" mediation market would not subvert the mediation process, especially where a liti-mediation environment already has been established.

Much professional activity is regulated through informal enforcement of unofficial norms, which are sometimes the most effective means of handling professional problems. Informal norms about roles of mediators, lawyers, and principals could address some of the problems described above by defining appropriate behaviors and shaping daily habits. But application of informal norms is indirect and uneven and may be overwhelmed by market pressures.

Although lawyers' routine participation in liti-mediation offers important social benefits, it also may jeopardize important values. While various measures taken by mediators and courts can reduce these risks, a significant element of the risk is due to the structure of the mediation market. These risks are likely to increase if not addressed directly. Effective solutions are likely to require a combination of approaches.

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