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A "third-way" for handling conventional mediations

CAN THE SUCCESS WITH PROPOSITION 65 ENVIRONMENTAL LAWSUITS BE HAD IN OTHER PLAINTIFFS' CASES?

Last year, busy counsel in Proposition 65 environmental cases proposed mediation without conventional in-person or Zoom mediation sessions. The lawyers felt that dedicating a half or full day to mediation (in-person or Zoom) would be inefficient and unnecessary to get to the settlement. Instead, in a more flexible "third-way" approach, they retained the mediator for a set number of hours to employ a shuttle diplomacy-only style – by phone, email, videoconference, and text with the lawyers. This mediation method has been successful and may be worth exploring in other matters.

The conventional in-person or Zoom mediation session

Mediation is a process in which a neutral person facilitates communication between the parties to assist them in reaching a mutually acceptable agreement. (Cal. Rules of Court, rule 3.852(1).) The California Judicial Council's analysis of mediation programs concludes that they produce *"substantial benefits to both litigants and the courts. These benefits included reductions in trial dates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs."* (California Judicial Council, Evaluation of the Early Mediation Pilot Programs (2004) p. 1.)

In-person mediation

The conventional mediation of the litigated case occurs in person. The parties agree to a date and time (half or full day), the mediator reserves several conference rooms for the parties and walks the halls from room to room. The theory is that when the clients dedicate the time and personally attend the session, they become more invested in reaching a resolution. (Cialdini, Influence: The Psychology of Persuasion (2021), pp. 71-72.)

Nevertheless, in-person mediation can be unproductive if the parties are unprepared, or the procedural posture (pre-litigation, discovery is needed, before or after dispositive motion briefing, etc.) makes the case not ready for resolution. Thus, it is now common for the mediator to extend shuttle diplomacy (usually by phone) for days or weeks before and after the mediation session. (Krivis and Luchs, How to Make Money as a Mediator (And Create

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Value For Everyone) (2006), p. 201.) Sometimes, multiple mediation sessions are necessary.

Zoom platform mediation

Post-COVID, a second method to mediate litigated cases has become common – Zoom mediation. The parties still block half or an entire day, but they participate remotely. Insurance adjusters based on the East Coast, for example, can participate from their home office instead of incurring days of travel.

On Zoom, mediators still employ techniques to build rapport with parties and counsel – even if by video. Settlement momentum can be generated by clicking back and forth between Zoom rooms. In fact, data shows that the transition to Zoom mediation has been successful. One study found that a significant majority of participants in EEOC-led mediations (nearly 70%) prefer online mediation to in-person mediation. (See, e.g., McDermott, The Equal Employment Opportunity Commission Mediation Participants Experience in Online Mediation and Comparison to In-Person Mediation (February 18, 2022) <https://www.eeoc.gov/equal-employment-opportunity-commission-mediation-participants-experience-online-mediation-and>.) Similarly, an international study of mediators found that 83% described their experience mediating online as either positive or highly positive. (Claxton, Mediators Like Online Mediation And Other Verifiable Facts (June 4, 2021) <https://mediate.com/mediators-like-online-mediation-and-other-verifiable-facts/>.)

On the other hand, Zoom mediations have downsides similar to traditional in-person sessions. The parties and counsel still need to dedicate a half or entire day. Complaints about boredom and inefficiency can be expected when the parties stare at an empty screen. Attorneys are weary of marathon mediation sessions, especially on Zoom. (See e.g., Kanazawa "Zoom Status Conference Approach to Mediation" Daily Journal (May 1, 2024).)

Similar to the in-person mediation, the day can be unproductive on Zoom if the parties and mediator have not adequately prepared or have inadequate information to evaluate the case. (Camp, Start With N… The Negotiating Tools That the Pros Don't Want You to Know (2002), pp. 191-193.)

A brief discussion of Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 – better known as Proposition 65 – became law in November 1986, when California voters enacted it. (Health & Saf. Code, § 25249.5 et seq.) Proposition 65 requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer or reproductive harm. The law requires the state to publish a list of chemicals that require these warnings. (Health & Saf. Code, § 25249.8.) This list now includes over 900 chemicals. (Cal. Code Regs., tit. 27, § 27001.)

The California Attorney General enforces Proposition 65, as can any district attorney and some city attorneys. Private parties and individuals acting in the public interest may also enforce Proposition 65 by filing a lawsuit against a business alleged to be in violation. Suits can lead to penalties as high as $2,500 per violation per day, injunctive relief such as product warnings or reformulation, and attorneys' fees.

For 2023, it is estimated that private enforcers issued over 3,000 Proposition 65 Notices of Intent to Sue, and the California Attorney General's Office data shows over 800 Proposition 65 matters settled (out-of-court and in-court consent judgments). (60-Day Notice Search Database [Office of the California Attorney General] <https://oag.ca.gov/prop65/60-day-notice-search> [searched in December 2023].) Examples of Proposition 65 cases include those alleging failures to provide warnings about phthalates in consumer plastic products, chromium in leather goods, and lead or other metals in foods. Defenses may include lack of notice, insufficient exposure data, or federal pre-emption. (See, e.g., *Lee v. Amazon.com, Inc*. (2022) 76 Cal.App.5th 200.)

Mediation success and lessons learned with "third-way" Proposition 65 mediations

In 2023, counsel in Proposition 65 failure-to-warn cases proposed "third-way" mediations with neither an in-person nor a Zoom session. The lawyers had a high volume of these cases (with settlement values in the smaller $50,000 to $500,000 range), and they did not want to block out half or entire days for lengthy in-person or Zoom mediation sessions with extended periods of downtime. As a result, a different mediation method was devised where the mediator is retained for a specified number of hours and uses only a shuttle diplomacy style – by phone, email, videoconference, and text with the lawyers. The lawyers labeled the approach as "innovative."

By trying this "third-way" mediation style, the lawyers and the mediator were comfortable letting go of their attachment to the conventional in-person or Zoom mediation session. (See Dressler, *Standing in the Fire* (2010), p. 104.) By agreeing on the "third-way" mediation format, the lawyers and mediator had already started creative problem-solving. (See Noll, De-Escalate: How to Calm an Angry Person in 90 Seconds or Less (2017), pp. 53-59.)

Flexible "third-way" mediations

Despite the success of the traditional in-person or Zoom session, this nimble "third-way" approach led to significant success in mediating Proposition 65 environmental cases. This approach incorporates all aspects of modern communication technology and many of the best characteristics of the in-person and Zoom mediation models.

Settlement communications with the mediator vary in method and length –

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sometimes a quick text message or email, and in other instances, more lengthy and substantive phone calls. Most lawyers are already very comfortable with these informal communication practices and in applying them to mediation.

Maximum flexibility is the key to the "third-way" mediation – whatever works best for the lawyers and mediator to understand and communicate the parties' respective settlement positions. (Krivis and Luchs, *supra*, p. 203.) The lawyers have lauded the efficiency of this "third-way" method, and other mediators are now observing similar flexible practices in their mediations. (Kanazawa, *supra*.)

The "third-way" concept can benefit other mediation disciplines

The "third-way" mediation style has worked well in Proposition 65 matters because of factors that make it practicable, and its success can be applied to other types of litigated matters. It may work for the same reasons in other litigated matters such as PAGA negotiations, tort claims, and multi-party actions.

Familiarity is a key component of success

A factor that has helped "third-way" mediations is that the Proposition 65 bar of lawyers is relatively small, with familiar repeat players on both the plaintiff and defense sides. They know each other and the lay of the land in these cases concerning liability, injunctive relief, penalties, and legal fees. Spending hours in person or on Zoom is unnecessary to reach a common understanding of disputed issues. The clients in Proposition 65 matters (whether non-profit plaintiffs or consumer-product manufacturer defendants) often are repeat players. As a result, the lawyers generally can get the necessary settlement authority. The "third-way" style also has worked well in negotiations with defendants represented solely by in-house counsel versed in the subject matter.

That is not to say that settling Proposition 65 cases has been easy. The cases have not settled independently and need a confidential facilitated process to achieve resolution. In fact, these "third way" mediations all have involved multiple rounds of bargaining. In their phone calls, emails, and texts, the lawyers tell the mediator things they would never tell each other. The mediator strategizes with the lawyers about what to communicate to the other side. They "phone tag" with opposing counsel. Sometimes, the mediator convenes a carefully facilitated joint Zoom meeting or call with all the lawyers.

The "third-way" mediator may need to be flexible and tech-savvy

The "third-way" mediator must still work to create trust among counsel and the parties, but does so outside the conventional rubric of the dedicated half- or full-day mediation session. Repeated communication by emails, teleconference, phone calls, or texts over days or weeks can develop the same interchange and momentum that occurs in a traditional mediation session. (See Fisher and Ury, Getting to Yes: Negotiating Agreement Without Giving In, (2nd Ed. 1991) pp. 37, 157.)

At times, lawyers may not want to submit mediation briefs and prefer to explain the case and settlement posture with a phone call. In these instances, the mediator's flexibility and willingness to shed attachment to traditional mediation practices can engender goodwill with her lawyer clients. (Chodron, When Things Fall Apart: Heart Advice for Difficult Times, (1996), pp. 10-11, 38; Cloke, Mediating Dangerously: The Frontiers of Conflict Resolution, (2001), pp. 44-45.)

Of course, the mediator must budget for follow-up and carefully bill for all expended time, take good notes, and keep track of the back-and-forth bargaining when employing these different modes of communication. The mediator must vigilantly employ technology to protect confidentiality under the expansive mediation confidentiality rules of Evidence Code section 1115, et seq.

A ticking clock helps to get to "Yes"

The "third-way" style needs timeline pressure to resolve cases. Critics may observe that these mediations may lack the emotional salience of the traditional mediation session where the participants want to make the day worthwhile before it ends. And, it is well-established that the desire to reach a deal before the clock runs out helps settle cases in conventional in-person and Zoom mediation sessions. (Camp, *supra*, at p. 185.) Exhausted lawyers and mediators tell mediation war stories where no progress is made until a party is about to leave or burning the midnight oil to seal a deal. (Cialdini, *supra*, at pp. 252-255.)

For this reason, "third-way" mediations must have a mediation cut-off date, trial date, or other calendar deadlines to ensure they do not drag on. Counsel and the mediator must ensure the mediation effort occurs at the right stage of the case. Otherwise, the extended communications and shuttle diplomacy employed in this method can desensitize time and extend the process in a way that is not conducive to reaching a deal.

Conclusion

Flexible, "third-way" mediation, without the conventional half- or full-day session, has helped settle numerous Proposition 65 environmental cases. By studying the factors that have made "third-way" mediation successful in these matters, the "third-way" approach to mediation in other disciplines can be fruitful.

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