46 La. B.J. 100

Louisiana Bar Journal
August, 1998

Feature

BLUEPRINT FOR EFFECTIVE ADR
Mediation Advocacy in the Wake of the Louisiana Mediation Act

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During the 1997 Regular Session of the Louisiana Legislature, the Legislature enacted House Bill No. 2347, the Louisiana Mediation Act (La. R.S. 9:4101 through 4112). The purpose of the Louisiana Mediation Act (the Act) is to provide encouragement and support for the use of mediation to promote settlement of legal disputes. The Act promotes the use of mediation:

> by encouraging lawyers to discuss the merits of mediation with their clients;

> by providing that all mediation proceedings conducted in Louisiana are confidential; and

> by stating that a professional code of conduct shall apply to mediators appointed under the Act.

This article discusses how the Act will affect lawyers who represent clients in mediations.

Through a question and answer format, this article will provide an explanation of the Act and provide practical information and advice for those lawyers who will be advocates in the mediation process.

WHAT IS MEDIATION?

Under the Act, mediation is defined as a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solutions to promote reconciliation, understanding and settlement.

WHAT IS THE EFFECTIVE DATE OF THE ACT?

The provisions of the Act apply to all civil cases pending on, and all civil cases filed on or after, Jan. 1, 1998.

IS MEDIATION MANDATORY UNDER THE ACT?

No. Under the Act, the trial judge cannot order the referral of a case to mediation without the motion of both parties. Moreover, the Act is permissive: the trial judge is not required to order the referral of the case to mediation even after both parties have joined in the motion.[1] Because the motion of both parties is required before a case can be referred by a trial judge under the Act, it appears that this provision of the statute ***101** [2] will be seldom utilized because the parties have virtually no incentive to file a joint motion for the referral of a case to mediation. If the parties want to mediate a case, they can voluntarily agree to do so without an order of the court. The parties can simply call on one of the many private mediation services currently operating in Louisiana to arrange for the mediation of the case. The time and expense involved with filing a motion with the court can then be avoided. It is important to note that the Act, as initially introduced, allowed the trial judge to order the referral of a case to mediation after the motion of only one of the parties.[3] However, through the legislative process, that provision was amended and, now under the Act, the motion of both parties is required before the trial judge can order the referral of a case to mediation. While a trial judge arguably has the inherent power to refer a case to mediation, that power is not explicit under the Act.

IF A CASE DOES NOT SETTLE AT A MEDIATION, DOES THE MEDIATOR MAKE A RECOMMENDATION

TO THE COURT OR TO THE PARTIES?

No. Under the Act, the mediator is a facilitator, not an evaluator. The mediator does not render a decision or make a recommendation to the court or the parties.

IS MEDIATION BINDING UNDER THE ACT?

Under the Act, mediation is non-binding unless all the parties specifically agree otherwise in writing. If, as a result of a mediation, the parties agree to settle and reduce the settlement to writing, the agreement is enforceable as any other transaction or compromise. Mediation should not be confused with arbitration. Arbitration is a dispute resolution process where the neutral party, the arbitrator, renders a decision that is usually binding on the parties.

ARE LAWYERS NOW REQUIRED TO ADVISE THEIR CLIENTS OF THE PROPRIETY OF USING MEDIATION?

While the Act stops short of requiring counsel to advise clients of the propriety of using mediation, the Act does encourage counsel to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts. Because of this "encouragement" by the Act, lawyers should educate themselves about the advantages and disadvantages of mediation and advise clients accordingly. A corollary issue is whether a lawyer has a duty to inform his client that an opposing party has suggested the use of mediation as a method of resolving a dispute. The Act does not answer this question. However, the encouragement provided by the Act coupled with a lawyer's ethical duty to "keep a client reasonably informed about the status of a matter"[4] would indicate that a lawyer has such an ethical duty. Consequently, the author "encourages" lawyers to not only learn about the benefits of mediation but also to talk with their clients about the propriety of using mediation.

HOW MUCH DOES A MEDIATION COST?

The cost of a mediation depends on such factors as the number of parties involved, the complexity of the case and the amount in dispute. In Louisiana, most mediators charge an administrative fee and an hourly fee for civil mediations.[5] The administrative fee covers ministerial costs such as:

> the scheduling of the mediation;

> the provision of lunch, beverages and other refreshments;

> long distance phone costs; and

> copy costs and other incidentals.

The hourly fee compensates the mediator for each hour that he or she spends in the mediation. Currently, in Louisiana, administrative fees range from between $300 to $400 for a two-party case and the mediator's hourly fee is usually found to be between $150 and $200 per hour. In cases where there are multiple plaintiffs or defendants, parties should expect to pay more than the costs mentioned above. Contingency fees that are related to the amount in dispute or the final settlement amount are generally viewed as unethical.

HOW LONG DO MEDIATIONS LAST?

Most civil mediations begin and end in the same day.[6] Some mediations may be completed in three to four hours while others may take eight to 10 hours to complete. In complex cases with multiple parties, it may take several days to complete a mediation. This is particularly true when class action cases are mediated.

WHAT IS THE BEST WAY TO FIND A GOOD MEDIATOR?

Ask around. Mediators have different experiences and approaches to mediation. Mediators have different backgrounds and training. Before selecting a mediator, you should consider the following questions:

***102** > How many mediations has the mediator conducted?

> Will the mediator evaluate the case and give an opinion?

> Has the mediator mediated a case of this type before?

> What expertise and experience does the mediator have in a case of this type?

> What mediation training has the mediator received?

In selecting a mediator, you should consider the mediator's training, experience and credentials. Another important consideration is whether the mediator has knowledge of the subject matter. Questions about these matters and other relevant subjects should be asked of the mediator directly or the mediation firm that administers the mediation. For example, a mediator in a construction case should have familiarity with the construction process, knowledge of statutes affecting claims and disputes in construction cases, as well as skill in conducting mediations in construction cases. You should obtain a biography from all prospective mediators prior to your final selection of a mediator.

WHAT ROLE DOES THE CLIENT PLAY IN A MEDIATION?

The mediation process is for clients. It is their day in court. Consequently, you should throughly prepare the client for the mediation to ensure that the full potential of the process is achieved. To prepare the client for a mediation, you should meet personally with him to discuss in detail the manner, length and substance of the opening presentations, the joint session, the caucus and the closure of the mediation. You also should explain the negotiation process to the client, that a mediation is a structured negotiation, and that there will be many offers and counteroffers exchanged at the mediation. Prior to the mediation, the client should be aware of the strengths and weaknesses of his case as well as those of his opponent. You also should inform the client that a good mediator will explore those strengths and weaknesses during the mediation. Finally, you should inform the client that most cases that are mediated settle, that he should be patient and that he should allow the process to work for him.

ARE THERE ANY ETHICAL STANDARDS GOVERNING THE CONDUCT OF MEDIATORS IN LOUISIANA?

There is no code of conduct for mediations that are not conducted under the Act. As mentioned earlier, the overwhelming majority of mediations in Louisiana will not be conducted pursuant to the Act. For those few mediations that will be conducted under the Act, the ethical code entitled "The Standards of Conduct for Mediators" adopted by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution applies to the professional conduct of mediators appointed under the Act. Since the Louisiana Legislature has adopted the Standards of Conduct for Mediators at least in a limited capacity, it may be appropriate for all mediators in Louisiana to govern themselves by that code.

WHAT HAPPENS TO THE PILOT MEDIATION PROGRAMS IN THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS AND IN THE FIRST CITY COURT OF THE CITY OF NEW ORLEANS?

Under the Act, both pilot mediation programs will continue in their present forms uninterrupted until Aug. 31, 1999. The rules of the pilot programs take precedence over any provisions of the Act which are inconsistent with the rules. The Act also requires the ADR Section of the LSBA to study the pilot mediation programs and issue its report to the Louisiana Legislature before the commencement of the 1999 Regular Legislative Session.

DOES THE ACT PROVIDE FOR THE CONFIDENTIALITY OF MEDIATION PROCEEDINGS?

Yes. With limited exceptions, all mediations conducted in Louisiana, those conducted under the Act and those private mediations not conducted under the Act, are confidential. All written and oral communications and records made during any mediation, whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding. Further, the parties, counsel and other participants in a mediation shall not be required to testify concerning the mediation proceedings and are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the disclosure of any communications or records of mediation. The exceptions are that:

(1) a mediator may report, pursuant to court order, whether the parties appeared as ordered, whether the mediation took place and whether a settlement resulted;

(2) the disclosure of communications ***103** and records made during the mediation may be made by any participant in the mediation in connection with a motion for sanctions made by a party to the mediation based on a claim of a party's

non-compliance with the court's order to participate in the mediation proceeding; and

(3) when necessary to prevent fraud or manifest injustice, the disclosure of communications and records made during the mediation may be made by any participant in the mediation in a judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure.

CAN THE PARTIES THEMSELVES WAIVE THE CONFIDENTIALITY OF THE PROCEEDINGS WITHOUT THE MEDIATOR'S CONSENT?

No. Under the Act, confidentiality may be waived only when all parties and the mediator specifically agree in writing.

Footnotes

a1 Note 1. *Bobby Marzine Harges is a professor of law at Loyola University Law School where he teaches mediation and arbitration, evidence and torts. He is a graduate of Harvard University Law School and the University of Mississippi Law School. He is chair of the Louisiana State Bar Association's Alternative Dispute Resolution Section, a member and past co-chair of the Alternative Dispute Resolution Committee of the Mississippi Bar and a member of the Family Mediation Council of Louisiana. An experienced mediator and arbitrator, he is a member of the panel of mediators of ADR inc. and the American Arbitration Association. He also is a member of the Task Force for the Orleans Parish Civil District Court Pilot Mediation Program and the Louisiana Supreme Court ADR Study Group. (7214 St. Charles Ave., Box 901, New Orleans, La. 70118)*

1 La. R.S. 9:4103(A) states: "On motion of both parties, a court may order the referral of a civil case for mediation."

2 La. R.S. 9:4103(A).

3 House Bill No. 2347 was a substitute for House Bill No. 660. Under House Bill No. 660, as initially introduced, the court, on its own motion or on the motion of a party, could refer a pending dispute to mediation, non-binding arbitration or any other alternative dispute resolution system established pursuant to state law or contract.

4 Louisiana State Bar Association Rules of Professional Conduct, Disciplinary Rule 1.4, Communication.

5 In domestic relations mediations in Louisiana, payment is usually made at the mediation. This is because most mediators charge by the hour utilizing the therapeutic model where each mediation session usually lasts for one or two hours per week. With the parties knowing in advance how long the session will last, they are required by the mediator to make payment at each session. In court-appointed child custody mediations in Jefferson Parish, the Family Mediation Council of Louisiana, Inc. offers reduced fee mediations on a sliding scale that depends on the combined income of the disputing parties.

6 In child custody and visitation mediations, the mediation sessions may take place over a series of weeks or months because most mediators utilize the therapeutic model where each mediation session usually lasts for one or two hours per week.