Mediating in California and Across the Pond

An examination of some of the similarities and differences between the approaches to mediation by Federal, California and English courts

by Malcolm Sher

Court-sponsored mediation programs

Most federal and state courts require information concerning ADR options to be served along with the complaint or notice of removal. Counsel and the parties individually must certify that they have considered ADR options [see NDCA Rule 16-6(a)] and California Rule of Court Rule 201.9.

English courts have also shown an increasing willingness to uphold these sentiments and encourage litigants to explore mediation and/or other methods of ADR before (or even after) going to trial. As part of the implementation of Lord Woolf's Final Report on Access to Justice (1966), new civil procedure rules designed to further "active case management" were written. They include Rule 26.4(1), which provides that, *"A party may...make a written request for the proceedings to be stayed while the parties try to settle the case by Alternative Dispute Resolution or other means."*

In March 2004, Central London County Court established a program called the Automatic Referral to Mediation Scheme (ARMS) whereby 100 cases per month are randomly chosen to be stayed and are assigned to mediation. Numerous mediation organizations — such as the Centre for Effective Dispute Resolution (www.cedr.co.uk), In Place of Strife, (www.mediate.co.uk) and ADR Now (www.adrnow.org.uk) — exist to provide services and there are many private mediators among Britain's solicitors and barristers, some of whose practices have morphed into mediation as this form of ADR has become increasingly popular.

Although California state courts have no random assignment, parties may opt to participate in court-sponsored programs such as Contra Costa Superior Court's Extra Assistance to Settle Early (EASE) program.

Mandatory mediation provisions in contracts

Although California law recognizes the concept of "good faith and fair dealing" in the negotiation of contracts, English courts, however, find the concept "inherently repugnant to the adversarial position of the parties when engaging in negotiations." Nevertheless, once negotiations have resulted in a contract that includes a mediation provision, the courts consider the mediation provision as "analogous to an agreement to arbitrate" and "capable of being enforced by a stay of the proceedings or by an injunction..." [Coleman J in *Cable Wireless Plc v. IBM UK Ltd.* (2002).]

Compelling mediation

The question often arises as to whether courts can force parties to mediate. Because the policy behind mandatory mediation clauses is to encourage parties to resolve disputes without resort to litigation, California courts give great weight to these provisions and will even penalize parties who refuse to participate in the mediation process. In *Frei v. Davey* (2004) 124 C.A.4th 1506, a prevailing party was denied recovery of any of the more than $120,000 in fees and costs because the party had refused to mediate prior to the filing of litigation. In the English case of *Cable & Wireless Plc v. IBM UK Ltd.* (*supra*), an ADR clause specifically referred disputes to mediation, but was vague in terms of the precise nature of the procedure that should be used. The court nevertheless held the clause to be contractually enforceable and a stay of proceedings was ordered while the parties complied with the mediation provision.

Since the advent of England's new Civil Procedure Rules (CPR) in April of 1999, English judges suddenly found themselves with an arsenal of weapons to encourage mediation, one of which is the imposition of costs against parties who refuse to mediate. CPR 44.3(2) (whilst recognizing the general English rule that the unsuccessful party will be ordered to pay the costs of the successful party) allows for the court to make different orders, taking into account the conduct of the parties, "before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol" such as those recommended by Lord Woolf in his report.

In *Halsey v. Milton Keynes General NHS Trust* (2004) EWCA (Civ) 576, the appellate justices considered whether the court had power to order parties to submit disputes to mediation against their will, concluding that direct compulsion violated Article 6 of the European Convention on Human Rights (right to a fair and public hearing within a reasonable time):

"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwill-

ing parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their rights of access to the Court. {And} even if (contrary to our view) the Court does have jurisdiction to order unwilling parties to refer their dispute to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it." (Dyson LJ)

Instead of compelling mediation, English courts allow the loser at trial to show that a request to the winning party to mediate was unreasonably rejected and request the court to deny costs or impose other sanctions. The court will take into consideration all relevant factors including the nature of the dispute (such as injunctive relief), the merits of the case and how strong it was on the facts and law, what other settlement methods have been attempted, the relative costs of and delay occasioned by mediation, whether mediation had no reasonable prospect of success and whether the court has already encouraged the parties to mediate.

Confidentiality of mediation process

Both California and existing UK law recognize a general right to confidentiality for statements made in the course of conciliation. In England this is an extension of the so-called "without prejudice" rule similar to our Evidence Code §§1115 *et seq.* and 1152. But it seems to be restricted to the parties. There is some precedent in the UK in the pre-action protocol for construction engineering disputes allowing any party who attended the pre-action meeting to disclose to the court: *(a) that the meeting took place, when and who attended; (b) the identity of a party who refused to attend and the grounds for such refusal; (c) that the meeting did not take place and the reasons why not; and (d) any agreements concluded between the parties.* Arguably, this may fly in the face of Lord Justice Dyson's comments in the *Halsey* case that, *"If the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."*

The European Commission, commenting on ADR in civil and commercial cases has stated: *"As a rule the third party {mediator} should not be able to be called as a witness...within the framework of the same dispute if ADR has failed."*

In California, Evidence Code §§1115-1128 outline parameters for confidentiality in mediation. Section 1119 states that no evidence of anything said or of any "writings" prepared for the purposes of mediation are admissible or discoverable. The controversial question of whether confidentiality applies to the mediator was considered in *Foxgate Homeowner's Association, Inc. v. Bramalea California, Inc. et al.* (2001) 26 Cal.4th 1. A lawyer for one of the parties attended a mediation without his client and without experts contrary to the order of a special master/mediator assigned to the case by the court. Plaintiff's motion for sanctions contained information on what occurred at the mediation and included a mediator's written report to the court stating that defendant had disobeyed the special master's prior order. Sanctions granted by the trial court were reversed on appeal. The court created a non-statutory exception to the confidentiality requirements of Evidence Code §§1115-1128, which allowed the mediator to prepare and submit a report in order to place the conduct in context, including communications made during the mediation. The California Supreme Court affirmed the reversal of the trial court order but disagreed with the Court of Appeal, finding no such non-statutory exception to exist even for sanctionable conduct. California mediators may file a statement of agreement or non-agreement containing information about the mediation but nothing extending so far as evaluated feedback.

Conclusion

Although mediation of cases in the UK is not nearly as prevalent as in the US, English courts seem to be slowly catching up with American jurisprudence relating to mediation, adopting some of our principles and philosophy. Whilst stopping short of compelling non-contractual mediation, they are willing to impose cost sanctions against successful litigants and even stay proceedings to not-so-subtly encourage mediation. ◆

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