Program F
Timing of Mediation in Civil Cases

Program Overview

This program addresses mediation timing issues and the implications for litigants, attorneys and court personnel. The program addresses the question: "Is there a preferred time to hold a mediation during the course of litigating a case in U.S. District Court?"

The answer to this question is challenging for parties, the attorneys, the court administration and the judiciary. Parties face emotional, strategic and financial issues regarding the timing of mediation. Attorneys face complex strategic, ethical, discovery and case management issues. Court administrators face administrative, staffing and financial issues. District judges, magistrate judges and bankruptcy court judges face oversight and case management issues. These competing issues make determining the appropriate time to hold mediation quite difficult.

Program Objectives

1. To explore the issues involved in determining the appropriate timing for mediation in U.S. District Court
2. To learn the views of plaintiffs, defendants, court administrators, district judges, bankruptcy court and magistrate judges
3. To create a broad range of criteria by which to make this fundamental decision
4. To create a specific product – a list of criteria for making this determination, which will be compiled and reproduced as a document to be included in the court's ADR packet of information and/or placed on the court's website

Time for the Program

Activity	Time
Introductory comments	10 minutes
Set-up of small group discussion	5 minutes
Small group discussions	30 minutes
Small group reports	15 minutes
Comments	15 minutes
Questions and responses	10 minutes
Concluding remarks	5 minutes
Total time	**90 minutes**

Program Presenters

1. **Moderator**: The moderator should be closely connected with the district's ADR program and understand the relevant issues and how settlement conferences fit into the district's ADR program.

2. **Panelists/facilitators**: Program organizers should recruit knowledgeable, articulate and entertaining speakers, who might include the following:

    - Plaintiff's attorney
    - Defense attorney
    - Staff member from court administration – someone who knows the timing for mediation in the district
    - District judge, magistrate and/or bankruptcy judge
    - Neutral from the district's panels

Room Set-up and Seating

The moderator and panelists/facilitators should sit on a dais or stage in order to be visible to participants. The participants will form small (4-5-person) discussion groups, so they should sit theater style in chairs they can move or sit at round tables that seat 8-10, so that they can easily move their chairs to form their small groups.

Instructions for the Program

1. **Opening Presentation (10 minutes):** The moderator welcomes the participants and introduces the panelists or speaker and the topic by presenting an overview of the program objectives and agenda and highlighting the issues related to mediation timing from various perspectives, including those of the court.

2. **Set-up of Small Group Discussion (5 minutes)**: The moderator instructs participants to form groups of 4-5 persons. The groups can be composed in various ways,[1] including the following:

    a. Form diverse groups that, ideally, include a plaintiff's attorney, a defense attorney, someone from the court staff and/or a neutral in each group, district judge and/or magistrate and/or bankruptcy court judge
    b. Allow participants to form random groups
    c. The moderator structures the small group discussions. See "Timing of Mediation in Civil Cases: Participant Instructions for Small Group Discussions," included in this module as a handout for participants. Briefly, the instructions direct participants to:

        - Form groups of 4-5 (according to the program organizers' preference)
        - Select a scribe

[1] If court ADR program staff is small, it may not be possible to include a staff member in every group, in which case program planners, in advance of the program, could ask ADR program advisory members or selected mediation panelists to represent the court's perspective in the small group discussions. At a minimum, the panel should include at least one staff member who is responsible for ADR and who represents the court's perspective regarding the benefits of mediation.

- Imagine the group is a sub-committee for the court administration assigned to analyze the cases and timing set forth in the "Timing Grid" (included in this module as a handout for participants)

c. Brainstorm appropriate criteria by which to determine the timing for scheduling mediation, filling in criteria for each block in the Timing Grid

d. Following the discussion, report back to the large group on the group's analysis and criteria

3. **Small Group Discussions (30 minutes):** Groups hold discussions consistent with the above instructions.

4. **Small Group Reports (15 minutes):** Scribes for each group report to the large group the most significant issues, questions, concerns or learning from their respective discussions.

   a. **Panelist Discussion (15 minutes):** Panel members respond to discussions, small group reports or "Timing of Mediation in Civil Cases: Relevant Issues" (included in this module as a handout for participants). Panel members should focus on analysis and criteria they believe to be most important in determining mediation timing issues. As much as possible, the panelists should engage in conversation with one another, instead of making formal presentations. If necessary to equalize the "air time," the moderator may direct questions to individual panelists.

   b. **Questions and Responses (10 minutes):** Moderator invites participants to ask particular panelists questions.

      - **Concluding Remarks (2 minutes):** The moderator thanks the panels and participants.

   If the program organizers decide to do so, the moderator states that the organizers will compile the criteria generated by the groups and the panel members and the court will distribute it to the Bar as a handout to include in the court's ADR program information packet or as a document to be published on the court's website.

<u>Written Materials</u>

1. Relevant Issues
2. Participant Instructions for Small Group Discussions
3. Timing of Mediation Criteria Grid

Possible Follow-up

To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. Alternatively, or in addition, the information could be posted on the court's website.

Resources

Articles

1. "Dispute Resolution under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States," 9 Admin. L.J. Am. U. 1007, 1069-1075.
2. Fairbanks, George C. and Street, Iris C., "Timing Is Everything – The Appropriate Timing of Case Referrals to Mediation: A Comparative Study of Two Courts," James City County Court (York County, Virginia) (June 26, 2001).
3. Seitman, John M., "Timing of Mediation Is Just as Important as Picking of Neutral," Los Angeles Daily Journal, June 11, 2004.
4. Varma, Arup and Stallworth, Lamont E., "Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry.," 6 Empl. Rts. & Employ. Pol'y J. 387, 405 ( ). (See pp. 411-412 for discussion of the relationship between disputants' satisfaction with mediation and the appropriate timing for mediation.)
5. Wissler, Roselle, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17 Ohio St. J. on Disp. Resol. 641 (2002).

Timing of Mediation in Civil Cases
Relevant Issues

1. How do parties' primary purposes or goals of mediation influence the decision regarding timing of mediation?
2. While settlement often will be the primary purpose, sometimes other purposes are significant, and settling the case at the mediation can be a secondary objective.
3. Pressing parties to consider this question can encourage them to appreciate that mediation can have many purposes and can be used to achieve a number of ends.
4. It also can encourage lawyers and parties to develop intermediate objectives for at least an initial mediation, for example:
    - Developing a cost-effective plan to conduct the core discovery necessary to position parties to make reasoned settlement decisions
    - Clearing some emotional air
    - Laying necessary trust foundations that will support detailed negotiations at a later date
5. What interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary might be served in scheduling mediation during the following stages of the litigation process?
    - Before discovery and motions?
    - After focused discovery and motions essential to negotiations?
    - After percipient discovery but before expert discovery?
    - Immediately after close of all discovery?
    - Just before final pretrial conference?
6. What interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary might be frustrated in scheduling mediation during the following stages of the litigation process?
    - Before discovery and motions?
    - After focused discovery and motions essential to negotiations?
    - After percipient discovery but before expert discovery?
    - Immediately after close of all discovery?
    - Just before final pretrial conference?
7. What is the relationship between the cost of litigation and the timing of mediation? Are the following assumptions about this relationship accurate?
    - Cost and fees already suffered wear people down and make them more economically rational as time passes.
    - If you have an economically rational actor at the outset, an early mediation is appropriate; if you have an economically irrational actor, it is better to mediate later, after the reality of the cost of litigation has set in.
8. What is the relationship between the passage of time and the litigants' (and lawyers') readiness to mediate? Is it true that in some cases it is imperative that time must pass before settlement is possible (independent of the cost of litigation)?
9. What should a court consider in determining policy about the timing of mediation?
10. Should different criteria apply, depending upon the type of case and, if so, what should the criteria be?

11. Who should determine which criteria have priority in scheduling a particular mediation?
12. If the litigants believe mediation may be appropriate late in the case, rather than early, what avenues are available to them for moving the case most quickly and efficiently to mediation?
    - An early neutral evaluation, or early mediation, in districts in which it is available, as an inexpensive way to create a discovery plan, evaluate the case and prepare for a second mediation focused on settlement
    - A limited-purpose "case management" meeting with the mediator to determine what needs to occur before the case is ready for mediation and to develop a plan to accomplish the necessary tasks or information exchange to enable mediation to occur as early as possible
    - Planning for a series of two (or more) mediations – one fairly early to identify what really separates parties and to develop a surgical case development plan that focuses on the case-specific sources of those separations, then a second mediation in which parties are well positioned to take a hard run at settlement

Timing of Mediation in Civil Cases
Participant Instructions for Small Group Discussions

1. Once the group comes together, select a scribe who is willing to take notes and report back to the large group.
2. Using the Timing Grid, consider the case examples and the litigation stages to analyze the issues involved and the appropriate criteria to determine the timing for scheduling mediation.
3. Regardless of the composition of your group, do your best to analyze the issues from the points of view of litigants, parties, plaintiff and defense attorneys and court personnel.
4. To assist with the brainstorming process, consider the following questions:
    - What are the underlying interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary in scheduling mediation during each stage of the litigation process?
    - What are the strategic issues raised for plaintiff and defense attorneys?
    - What are the ethical issues raised for plaintiff and defense attorneys?
    - What communication issues between attorneys and clients and between attorneys are raised by the various situations?
    - What are the case management issues raised for attorneys and court personnel?
    - Are different criteria relevant depending upon the type of case?
    - Who should determine which criteria have priority in scheduling a particular mediation?
    - How should the various criteria be determined and applied in specific cases?
5. Each group's scribe takes notes in preparation for reporting the group's ideas to the large group, preferably writing the report on poster paper, if provided, so other participants can see and hear the group's analysis and suggested criteria.
6. The scribe submits notes (or the poster paper) on the group's work to the program organizers for use in compiling a document with criteria for making a mediation timing decision, which the court may include in its ADR packet of information or post on the its website.

Timing of Mediation in Civil Cases
Criteria Grid

	Before Discovery/ Motions	**After focused discovery/ motions Essential to negotiation**	**After percipient discovery but before focused discovery/ motions**	**After discovery and rulings on substantive motions**	**Just before final pretrial conference**
Complex business case					
Standard personal injury case					
Federal tort claim with government as a party					
Civil rights case					
Intellectual property					
Pro se litigants, including prisoner cases					
Labor and non-civil rights employment case, including ERISA claims					
Other types of cases common in the district and amenable to mediation					

Timing of Mediation in Civil Cases
Feedback Form

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module? If you presented a program, was the program well received?

   What factors likely account for its success or lack of success?

   - Presenters? Please explain.
   - Content? Please explain.
   - Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. Can you suggest additions to our list of issues related to timing of mediation in civil cases?

5. Are there additional examples of misguided settlement conference behaviors by judges or lawyers that we might include in this module?

6. Please suggest topics for future ADR program modules.