

Welcome to the 3-hour mediation

By David Geffen

When everybody's enlisted and working toward the same goal, three hours is plenty to get a mediation deal done using the THM tools and techniques.

Declining Court Resources – Declining Justice

The tightening of judicial budgets here in California has hit litigants with limited budgets especially hard: the affordability of effective mediators is becoming an actual factor in the access to justice.

It's time for a fresh look at what mediators can do to increase the odds of a resolution in a three-hour window of opportunity.

Three Hour Mediation to the Rescue - How it Developed

For many years, it was not surprising when attorneys who showed up for court-assigned mediations were unprepared and reluctant. To some, it felt like detention. Even when counsel were willing and vested, often they hadn't completed important discovery and pressure of gearing up for trial hadn't set in.

Despite the less than optimal circumstances, for mediators passionate about their profession, these unique challenges gave them an opportunity to develop *new tools* for efficiency to increase the likelihood of success in three hours, tools that are easily applied to private-pay THMs.

Here are a few basic THM tools that I've developed.

Schedule the THM for Success

THMs are frequently scheduled before discovery is completed and well in advance of trial. The most typical reasons are:

- “the court made me do it;”

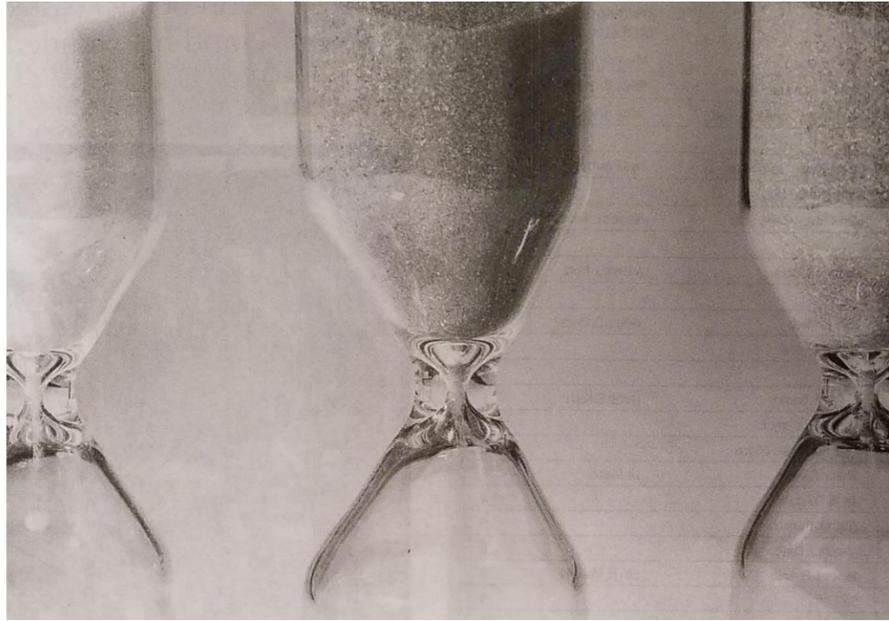
- the facts are generally agreed on, and an early settlement will save money that can go toward settlement;
- there are inconvenient facts that a party would rather not disclose through discovery;
- the parties don't expect the case to settle, but need help with something else; and
- one party is desperate to settle, and thinks mediation will yield a better result.

In short, schedule the THM strategically to capitalize on the parties' underlying motivations.

The Pre-Mediation Phone Conference with Counsel - Best Friend to Speedy Settlements

When the mediation is calendared, the THM mediator should notify each counsel to schedule a 15 minute pre-session call about a week before the mediation. During the call, the mediator confirms that he or she is expecting a detailed Mediation Statement and *asks counsel to share the Statement, or some part of it, with opposing counsel.* Verify that counsel will have someone with settlement authority at the mediation, and if not, that they have permission from the other side to have a person with full settlement authority available by cell phone, including after hours. Each counsel should be asked to bring any material evidence or support for its litigation position that is likely to be in controversy at the mediation, whether or not the evidence has been formally exchanged. This evidence, or its absence, can be just what the mediation needs to clear the clouds that foment unproductive argument and blur reason. Left to linger, for the photographs or admissions can work for the mediator when the mediator is out of the room.

The parties should also be asked to bring proposed settlement agreements.



Again, while the mediator is out the room, the attorneys can be exchanging suggested language, leaving only to add the final settlement amount. No more sitting around for another hour to get the deal wrapped up.

Mediation Statements and Follow Up With Counsel Before the Mediation

Early mediation statements are critical to the THM: the mediator must hit the ground running and can't spend valuable mediation time reading statements. It's not uncommon that the mediation statement is the first time the parties' attorneys have really thought through the case, matching their theory of liability, or defense, and damages with the evidence. *The key to fast-paced mediation is to get everyone honed in on the bona fide aspects of the dispute and working on resolution before the mediation takes place.*

When the skilled mediator compares the mediation statements, anticipated conflicts stand out like elephants. Instead of waiting to discuss it, the THM mediator

build on the work that they know has already begun.

Making Your Three Hours Count Set Your Goal

We assume that the goal of mediation is to arrive at a settlement that each party can live with and honor. With THMs, your goals may aspire to both more and less.

Before mediation begins, the THM mediator has already learned from counsel what they think the chances of resolution are. Nevertheless, the mediator should allow plenty of slack here: the parties may have overstated their belief that the case isn't likely to settle as a bargaining strategy, or may have reconsidered their initial analysis – doing some work toward resolution now has them focusing on the actual possibility of settlement.

THMs should start with an acknowledgment that *everyone intends to utilize their best efforts to settle the case today within three hours.*

Round One – Triage

Mediations are often compared to a dance that must take its course. THMs are more like directed exercise with the mediator as both facilitator and drill sergeant. In THMs, there is less give-and-take, less getting to know one another, less “Tell me how you feel.” This may compromise a bit on the very thing a party needs but that's why successful THMs require a mediator's well-choreographed and precise approach.

In the initial stage of the THM, the mediator will quickly confirm the facts, adjust to personalities, and check for changes in bargaining position. The mediator knows the strengths and weaknesses on each side. Everyone, including the mediator, believes it when the mediator says, “I think there's a good chance we'll settle the case today.”

Fully informed, with complete credibility and confidence, it's time now for

the mediator to make surgical moves on the real obstruction. The barrier might be a difference in accounting, the sobering realization of the real cost of going forward, or unaccounted-for medical information. Get past it so everyone can get down to negotiating. *Bargaining should start as soon as practical but at least by the beginning of the second hour of the THM.*

Keep the Pace

The THM mediator keeps the parties busy even when he or she is out of the room – working on a response to a question or concern, coming up with alternatives to the last offer/demand, brainstorming out of the box solutions, providing evidence or legal support for a prior argument, or drafting and reviewing terms to get the written settlement agreement closer to completion.

If parties digress, quickly get the process back on track. Remind them that exaggerated demands and lowball offers that no one reasonably expects the other party to consider will make the process last longer and encourage the other party to make the same gesture. You are not telling them what the case should settle for, just what it won't settle for.

When everybody's enlisted, when all are working toward the same goal, three hours is plenty to get a deal. Display your faith that the matter can and will settle within the allotted time. Let everyone envision how nice it will be to have this dispute behind them, and to beat the traffic home.

Conclusion

As mediators and litigators adjust to the new economic realities of judicial reform, they will search out and find new ways to resolve disputes, lessening the strain on our courts, reserving courtrooms for those who need them. *Effective mediators using well-honed THM tools offered at an affordable price can help ensure that justice is evenly distributed and within everyone's reach.*