PART I

MEDIATION AND OTHER NONADJUDICATORY METHODS

[3:1] **Background:** Mediation in one form or another has been around since the dawn of civilization, and is widely used for dispute resolution in many cultures. However, mediation was not a part of the common law process, and was utilized only for certain types of disputes (notably, labor-management grievances).

Today, mediation is used in all types of disputes.

Experience shows mediation is one of the least expensive and least disruptive processes for resolving disputes. It is also the most effective in preserving whatever relationship exists between the disputing parties.

[3:2] **Statutes Requiring Mediation:** Mediation is now *required by statute* in certain types of disputes (*see ¶1:12 ff.*).

[3:2.1] **Voluntary Mediation by Local Rule:** Other courts have established voluntary mediation programs by local rule (*see ¶4:234 ff.*).

Cross-refer: Judicial Council standards of conduct for mediators in court-connected mediation programs for civil cases are discussed at ¶*7:11 ff.*

[3:3] **Mediation Service Providers:** Numerous institutions, both public and private, now offer mediation programs and panels of qualified neutrals to assist resolution of practically every type of dispute. "Neighborhood Dispute Resolution Centers" have sprung up around the country, specializing in the use of mediation to settle disputes among family members, neighbors, landlord/tenant, and even minor criminal complaints. (A list of selected public and private mediation firms with a short description of their specialties is included as *Appendix B*.)

[3:4] **Quasi-Judicial Immunity:** A common law civil immunity is recognized to protect neutrals engaged in mediation and similar dispute resolution processes from damage claims arising out of duties connected to the judicial process. This immunity extends to services performed pursuant to private agreement and without any court order for such services. It is sufficient that the neutral's services were rendered "in the shadow of pending litigation" to effect a resolution of the dispute. [*Howard v. Drapkin* (1990) 222 CA3d 843, 855-860, 271 CR 893, 898-901]

A. GENERAL CONSIDERATIONS

1. [3:5] **"Mediation" Defined:** Mediation is the next step beyond direct negotiations and is an alternative to "unnecessarily costly, time-consuming, and complex" court proceedings. [*Foxgate Homeowners' Ass'n, Inc. v. Bramalea Calif., Inc.* (2001) 26 C4th 1, 14, 108 CR2d 642, 653; *Wimsatt v. Sup.Ct. (Kausch)* (2007) 152 CA4th 137, 150, 61 CR3d 200, 208 (citing text)]

   In mediation, a *neutral third person* attempts to "facilitate" settlement negotiations between the disputing parties. [See Ev.C. §1115— " 'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them

in reaching a mutually acceptable agreement"; *Jeld-Wen, Inc. v. Sup.Ct. (Marlborough Develop. Corp.)* (2007) 146 CA4th 536, 540, 53 CR3d 115, 117; *Travelers Cas. & Sur. Co. v. Sup.Ct. (Plaintiffs & Defendants in Clergy Cases I)* (2005) 126 CA4th 1131, 1138-1139, 24 CR3d 751, 756-757]

The various forms of mediation share the following important characteristics:

a. [3:6] **Voluntary:** The mediation process is entirely voluntary (although ADR agreements may require the parties to mediate before commencing other dispute resolution procedures; *see* ¶*8:32 ff.*). The process continues only so long as the parties agree. [See *Jeld-Wen, Inc. v. Sup.Ct. (Marlborough Develop. Corp.)* (2007) 146 CA4th 536, 540, 543, 53 CR3d 115, 117, 119—"essence of mediation is its voluntariness"; see also *Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1626, 43 CR3d 846, 851 (J. Sills concur.opn.)—"Mediation is by definition a voluntary process which achieves a voluntary result"]

(1) [3:6.1] **Statutory programs:** A mediation process is provided by statute for certain types of disputes.

Cross-refer: For a list of statutes requiring or providing for mediation (and other forms of ADR), see *Appendix A.*

- [3:6.2] In some cases, the process is purely voluntary and does not affect the parties' right to pursue litigation or arbitration. [See Gov.C. §66030—court may invite parties to mediate *land use disputes*]
- [3:6.3] In other cases, a state agency may order a party to mediate the dispute and pay the costs of mediation. [See Ins.C. §10089.70 et seq.—if insurers unreasonably refuse to participate in mediation, insurance commissioner may order mediation of certain residential fire insurance disputes, earthquake coverage claims involving personal lines of insurance, and automobile collision coverage or physical damage coverage claims; *and further discussion in Appendix A*]
- [3:6.4] In addition, various programs for court ordered or voluntary mediation are now available in certain courts (some established by statute, some by local rule). *See* ¶*1:11.2, 4:203 ff., 4:234 ff.*

b. [3:7] **Generally nonbinding:** Traditionally, a mediator has no power to impose a settlement. Indeed, in "classic" mediation (*see* ¶*3:10*), the mediator expresses no opinion on the merits of either party's case or its settlement value. There is thus no "winner" or "loser" in mediation and hence *no risk* involved. If the matter does not settle, the parties can decide whether to proceed with adjudication.

On the other hand, the parties may agree to empower the mediator to render a binding decision if the mediation reaches an impasse (i.e., med-arb). But the parties' agreement must be clear as to that intent. [See *Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1623-1625, 43 CR3d 846, 849-850—provision for "binding mediation" was too vague to allow enforcement of resulting settlement agreement; compare *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 CA4th 724, 736, 142 CR3d 64, 72-73 (distinguishing *Lindsay*)—parties' agreement to binding mediation was sufficiently certain to be enforceable; *see also* ¶*3:12.1 ff.*]

When parties reach a settlement during mediation, they may include an arbitration provision in the settlement agreement giving the mediator limited power in the event of a dispute to act as arbitrator and amend the agreement to "imply a reasonable term" that is "consistent with the purpose and intent" of the agreement. [*Kurtin v. Elieff* (2013) 215 CA4th 455, 465, 155 CR3d 573, 581-582; *see* ¶*1:66.3 ff., 3:12.1a ff.*]

(1) [3:8] **Compare—arbitration:** The big difference between traditional mediation and arbitration is that an arbitrator is usually authorized to render a binding decision but a mediator is not. [*Cheng-Canindin v. Renaissance Hotel Assocs.* (1996) 50 CA4th 676, 684, 57 CR2d 867, 872; see *Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1626, 43 CR3d 846, 851 (J. Sills concur.opn.)—"mediator with binding power is an arbitrator, not a mediator"; see also *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc*. (11th Cir. 2008) 524 F3d 1235, 1240—"because the mediation process does not . . . adjudicate or resolve a case in any way, it is not 'arbitration' within the meaning of the FAA"]

There are other differences as well: e.g., mediators do not usually hear testimony or receive evidence under oath. Also, mediators may "caucus" separately with each party (*see* ¶*3:132*), which is rarely done in arbitration (i.e., in camera review).

2. [3:9] **Various Forms:** Mediation encompasses any voluntary, nonadjudicatory dispute resolution process involving a neutral third party. As will be seen, it is a very flexible process and can be conducted in whatever form the parties wish.

The most common forms are described below (*see* ¶*3:10 ff.*). But there are numerous variations on these forms (depending on how active a role the mediator takes and whether attorneys are actively involved). As a practical matter, most mediators do *not* practice within the confines of a single category; instead, they employ facilitative (¶*3:10*) and evaluative (¶*3:11*) mediation as needed.

a. [3:10] **"Classic" (facilitative) mediation:** In "classic" mediation, the mediator meets directly with the parties (attorneys gen-

erally not involved) and attempts to facilitate settlement negotiations. The mediator's primary function is to help the parties evaluate their positions *realistically* so they can move toward settlement on their own. The mediator usually plays a passive role, and does not express any judgment or opinion on the merits of either side's position. (Typical examples: Mediation of labor-management grievances; child-custody disputes.) [*Travelers Cas. & Sur. Co. v. Sup.Ct. (Plaintiffs & Defendants in Clergy Cases I)* (2005) 126 CA4th 1131, 1139, 24 CR3d 751, 757; *see further discussion at ¶3:112 ff.*]

b. [3:11] **Voluntary settlement conference (VSC) (evaluative mediation):** The term "mediation" also applies to voluntary settlement conferences before a retired judge or other experienced litigator under the auspices of a court VSC program. Here, attorneys usually represent the parties and make their presentations. The settlement officer can take a much more active role in attempting to settle the case, and often expresses an opinion as to its merits and settlement value, but is usually not authorized to render a binding decision. [*Murphy v. Padilla* (1996) 42 CA4th 707, 715, 49 CR2d 722, 727, fn. 5 (citing text); *Travelers Cas. & Sur. Co. v. Sup.Ct. (Plaintiffs & Defendants in Clergy Cases I)* (2005) 126 CA4th 1131, 1139, 24 CR3d 751, 757; *and see further discussion at ¶3:146 ff.*]

In practice, however, VSC officers, including federal magistrate judges, usually employ the same skills and approaches as mediators.

c. [3:12] **Mini-trial:** The inaptly-named "mini-trial" is a form of mediation sometimes used in disputes between large corporations. Instead of the attorneys presenting their positions to a mediator, the presentations are made to a panel consisting of each side's decision-makers. A neutral mediator is present to facilitate the presentations. The decision-makers then meet privately and attempt to negotiate a settlement. *See further discussion at ¶3:196 ff.*

d. [3:12.1] **Med-arb (mediation/arbitration):** This process starts with traditional mediation but the parties agree in advance that if there is an impasse they will proceed to arbitration before the same person who acted as mediator. (The arbitration involves formal proceedings—i.e., presentation of evidence, witnesses, etc.) The arbitration may commence immediately or at some agreed date after an impasse is declared (*see ¶1:66 ff., 3:188 ff.*).

(1) [3:12.1a] **Compare—mediator appointed as arbitrator in event of settlement agreement dispute:** Settlement agreements may include a provision appointing the mediator as arbitrator in the event of a subsequent dispute concerning the terms of the agreement. For example:

- [3:12.1b] In a business partnership dissolution action, the parties settled their dispute during mediation.

The settlement agreement included an arbitration provision giving the mediator limited power in the event of a dispute to act as arbitrator and amend the agreement "to imply a reasonable term" that is "consistent with the purpose and intent" of the agreement. After defendant defaulted on the balance owed and a CCP §664.6 enforcement motion was denied (*see* ¶*1:97 ff.*), the mediator turned arbitrator decided that plaintiff was owed the balance but that plaintiff could only foreclose on defendant's personal interests. Subsequently, plaintiff sued defendant for the unpaid balance and was awarded damages. On appeal, the court rejected defendant's argument that the "arbitration" precluded plaintiff from recovery under the res judicata doctrine because the arbitrator's limited power and sole act was only to interpret the settlement agreement, not to award damages. [*Kurtin v. Elieff* (2013) 215 CA4th 455, 458-460, 465-468, 155 CR3d 573, 576-578, 581-584]

(2) [3:12.2] **Compare—"binding mediation":** Parties sometimes agree to "binding mediation" (*but see* ¶*3:12.5 ff.*). They authorize the mediator to render a binding decision in the event an impasse is declared with respect to settlement negotiations. The parties' intent is that the dispute resolution procedure becomes, in effect, an arbitration. [See *Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1624, 43 CR3d 846, 849-850 (citing text)]

Their purpose is to provide a fast, inexpensive way to overcome deadlock where the remaining alternatives are arbitration or trial, which are more formal and time-consuming proceedings.

- [3:12.3] The parties signed a stipulated settlement agreement following mediation. Most signed a version stating that they agreed to resolve disputes concerning the settlement terms by binding arbitration. But some signed a different version requiring the mediator to resolve disputes. Moreover, in one provision, a line was drawn through the word "mediation" with "arbitration" typed directly above. And another clause required plaintiffs to pay defendants a sum of money, subject to terms to be agreed on, or if there was no agreement, to be decided by binding mediation. Plaintiffs objected, but participated in the binding mediation concerning the terms of their payment. The trial court erred in confirming the award because the parties never agreed on a specific procedure to decide the payment dispute. The "binding mediation" provision was an *uncertain material term*, and the settlement agreement was unenforceable. By striking

"mediation" and substituting "arbitration," it was evident the parties viewed binding mediation as different from arbitration.

Moreover, some parties did not even agree to binding mediation, agreeing instead to arbitration. [*Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1620-1625, 43 CR3d 846, 847-850 (criticizing concept of "binding mediation" without concluding it was categorically unenforceable)]

- [3:12.4] *Compare:* The parties entered into a written settlement agreement during arbitration, resolving some issues and agreeing to participate in a full-day mediation for the remaining disputes. Moreover, if no resolution was reached in mediation, the mediator was authorized to set the judgment amount for Plaintiffs between $100,000 and $5,000,000 (baseball high/low, *see* ¶*3:189 ff.*) by selecting either Plaintiff's demand or Defendant's offer. The "binding mediator judgment" would be "entered as a legally enforceable judgment" in superior court.

  After the full-day mediation with no agreement, Plaintiff demanded $5,000,000, and Defendant offered $100,000. The mediator selected the $5,000,000 demand as the judgment. The trial court properly refused to confirm the mediator's decision as an arbitration award, but correctly enforced it as a settlement agreement and mediation award under CCP §664.6. The appellate court rejected Defendant's arguments that (i) it consented only to mediation, which, if unsuccessful, would be followed by binding arbitration with an evidentiary hearing; (ii) "binding mediation" was an uncertain term (relying on *Lindsay v. Lewandowski*, supra); and (iii) binding mediation was not a permissible way to waive a jury trial under CCP §631(a), (d). Substantial evidence supported the trial court's conclusion that the parties mutually consented to a well-defined procedure that was a constitutionally and statutorily permissible way to settle their disputes. Section 631 applies only to *civil actions*, not to binding mediation in a *nonjudicial* forum. [*Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 CA4th 724, 728-737, 142 CR3d 64, 66-74 (distinguishing *Lindsay*)]

[3:12.5] ***PRACTICE POINTER:*** Even after *Bowers*, supra, where the parties were quite specific and the binding mediation was recognized, the concept is still arguably paradoxical and a clear road map is not currently available. Be aware of

procedural conflicts in moving from a self-determining mediation to the win/lose outcome when the mediator is empowered to make an award. Parties should be quite specific about designing the process and agree in writing as to the elements, including stating precisely:

— the scope of the powers of the mediator-turned-arbitrator;
— whether additional evidence will be heard;
— the reach of mediation confidentiality into the binding portion of the proceeding; and
— the correct enforceability mechanism.

[3:12.6] ***FURTHER PRACTICE POINTERS:*** If you provide for a binding procedure following an impasse in case the mediation fails, carefully spell out the governing rules and specify the procedural elements of mediation/arbitration the parties want to use and/or expressly waive:

— specify whether the facts presented to a mediator can be used in the binding portion of the procedure;
— obtain all parties' consent to waive mediation confidentiality for the binding portion of the process, should the nonbinding mediation fail to resolve the dispute (*see* ¶*3:25 ff.*);
— state that the mediator-turned-arbitrator is subject to the same disclosure and disqualification requirements as mandated for arbitrators (*see* ¶*7:14 ff., 7:236 ff.*);
— consider and specifically designate whether any arbitration formalities will be used (e.g., sworn testimony or an evidentiary hearing in the binding portion of the procedure);
— include a provision requiring the mediator to comply with the standards of conduct for mediators in court-connected mediation programs, particularly the requirement of informed consent (see CRC 3.850 et seq.; *and* ¶*4:234.20 ff.*);
— require the mediator to inform the parties when the process is transitioning from mediation to arbitration;
— specify that, once an impasse in negotiations has occurred, the parties have the option of selecting another neutral for the arbitration proceeding;
— consider whether/which arbitration enforcement procedures govern and specify (CAA or FAA, ¶*5:295 ff.*); and

— if there is pending litigation, provide for summary enforcement of the settlement agreement (see CCP §664.6; ¶*1:97 ff.*).

(3) [3:12.7] **Compare—mediator turned temporary judge for class action settlement approval:** An appellate court questioned the propriety of having the mediator later appointed to act as the temporary judge and rule on the fairness and reasonableness of the mediated class action settlement. The court predicted "an uphill battle" for any class member objecting to the settlement before the temporary judge who "clearly believed in the propriety of the settlement when acting as a mediator." [*Luckey v. Sup.Ct. (Cotton On USA, Inc.)* (2014) 228 CA4th 81, 91, 174 CR3d 906, 913, 916, fn. 14 (*discussed further at* ¶*3:39.2*)]

[3:12.8-12.10] *Reserved.*

e. [3:12.11] **Arb-med ("last chance" mediation):** This refers to mediation *following* arbitration. An arbitration is conducted first. The arbitrator prepares a written award but does *not* disclose it to the parties. The arbitrator then conducts a mediation in a last-ditch attempt to settle. If mediation is successful, the arbitration award is destroyed; if not, the parties are bound by the award (*see further discussion at* ¶*1:67 ff.*).

3. [3:13] **Advantages Over Litigation:** The advantages of mediation over litigation are numerous. [See *Rojas v. Sup.Ct. (Coffin)* (2004) 33 C4th 407, 415, 15 CR3d 643, 648; *Marriage of Kieturakis* (2006) 138 CA4th 56, 86, 41 CR3d 119, 141 (citing text)—advantages include flexibility, cost savings and speed; *Wimsatt v. Sup.Ct. (Kausch)* (2007) 152 CA4th 137, 150, 61 CR3d 200, 208]

a. [3:14] **Voluntary and nonbinding:** The process is completely voluntary. The initial decision to attempt mediation and any subsequent decision to continue the process is completely up to the participants.

No one can be forced to take part, and a party can withdraw if the party becomes dissatisfied at any point in the proceedings.

Mediators usually do not make findings or decisions. But even if they do, their findings are *not binding* unless the parties agree otherwise. Thus, the parties know the mediator cannot force anyone to compromise his or her position. Litigation is still available (as is arbitration or some other form of dispute resolution).

(1) [3:15] **Comment:** Traditional mediation is almost a "risk-free" process. The only possible risk is that matters disclosed in the course of mediation may "educate" opposing parties, enabling them better to defend against the claims raised if the matter is not settled.

b. [3:16] **Available any time:** Mediation may be used at any stage of a dispute. The parties can agree to mediate before or even after a lawsuit has been filed.

(1) [3:17] **Anticipated disputes:** Mediation can be used to solve disputes that have not yet risen to the point that a lawsuit could be filed.

For example, a contracting party may be talking about breaching its obligations but has not yet actually repudiated the contract or refused to perform. The legal system would reject such cases as "premature" (i.e., no present case or controversy).

(2) [3:18] **Prelawsuit:** In a pre-suit mediation, the parties forego formal discovery for an efficient and quiet resolution. They do not have any or much information from their counterpart, but they also have not incurred much in attorney fees. The respondent usually has received a demand letter with whatever supporting documentation the claimant wishes to provide. One upside for the parties is that the allegations are not yet included in a publicly filed complaint to which the press and public have access.

For example, a prelawsuit settlement conference is often successful in cases involving minor automobile accidents in which liability is reasonably clear and plaintiff's injuries have stabilized. In such cases, if plaintiff's medical expenses appear to be reasonable (conservative medical treatment), and each side has access to the medical and police reports, early settlement is advantageous. It is in both parties' interests to avoid the expense of pleadings, depositions, discovery and pretrial preparations.

Indeed, parties sometimes consider *binding arbitration* at this point: i.e., if the only issue is the amount of damages, they may agree to be bound by the neutral's evaluation of the case (*see med-arb discussion at* ¶*3:12.1*).

(3) [3:19] **After suit filed:** Sometimes a mediation is more effective during litigation after an information exchange and completion of a few key depositions. Consider setting a mediation on a date shortly before the court is to rule on a significant matter—e.g., a motion for summary judgment or *Markman* hearing in patent cases. *See* ¶*3:56 ff.*

Even if no settlement is reached, mediation can be a useful adjunct to litigation: It can clarify and narrow the focus of issues for discovery and trial; e.g., certain claims can be settled, leaving only the intractable problems for litigation. In multi-party cases, a mediated settlement may pare down the number of claims and parties, allowing the core dispute to be litigated more efficiently and economically.

(a) [3:19.1] **No extension of case management deadlines:** Submission to mediation does not affect case management time periods for case disposition (Gov.C. §68600 et seq.). [CRC 3.896(a); *see* ¶*4:212*]

1) [3:19.2] **Exception—stipulations for mediation:** If the parties so stipulate in writing, case management deadlines may be extended for up to 90 days to permit mediation. [CRC 3.896(b)]

(b) [3:19.3] **No extension of involuntary dismissal deadlines:** Similarly, submission of an action to mediation does not extend the deadlines for service of summons or bringing an action to trial under CCP §583.110 et seq. [CCP §1775.7(a)]

1) [3:19.4] **Exception—extension for court-ordered mediation during last six months of CCP §583.310 five-year dismissal period:** If an action is or remains submitted to court-ordered mediation during the last six months of the CCP §583.310 five-year dismissal period, that period is extended: The time beginning six months before the five-year date and ending when a statement of nonagreement is filed by the mediator (*see* ¶*4:230*) is added to the five-year dismissal period. [CCP §1775.7(b); see *Gaines v. Fidelity Nat'l Title Ins. Co.* (2016) 62 C4th 1081, 1090-1091, 199 CR3d 137, 144; *Gonzalez v. County of Los Angeles* (2004) 122 CA4th 1124, 1129-1130, 19 CR3d 381, 384-385]

a) [3:19.5] **Compare—no tolling for engaging in *private mediation:*** The five-year dismissal period is *not* tolled for *private* mediations. [*Castillo v. DHL Express (USA)* (2015) 243 CA4th 1186, 1198, 197 CR3d 210, 218—five-year dismissal period automatically tolled "only if the parties participate in a mediation conducted through a court-annexed mediation program"]

2) [3:19.6] **Effect on CCP §583.310 five-year dismissal period if court-ordered mediation coupled with stay of proceedings:** Where a court-ordered mediation concludes before the last six months of the CCP §583.310 five-year dismissal period, the time during which the case was in mediation does not itself extend the five-year period. But the five-year dismissal period *is* extended by the time the case was in mediation where the court both ordered the parties to mediate and *completely stayed* the