

CASE MANAGEMENT AND MEDIATION: INTERACTIVE CONCEPTS

- A. Judges must first be taught the overall theory before the specific task.
- B. To develop a more effective trial system and decrease backlog, there are only three methods which can have some assurance of success:
 - 1. Increase the number of judges
 - 2. Take cases out of the court system
 - 3. Increase the flow of cases through the system
- C. The first is dependent on the political branches and is usually unsuccessful.
 - 1. Even if successful, there are institutional concerns about unlimited horizontal expansion.
- D. Taking cases out of the system comes under the category of Alternative Dispute Resolution.
 - 1. While arbitration has diverted some disputes from the court, it has not generally been successful in taking cases out of the system after filing.
 - 2. Mediation has proven to be the most useful tool in removing cases from the court.
 - 3. Mediation can be free-standing or court-annexed.
 - a. Free-standing mediation proceedings are not connected to the court. Cases may end up there, but there is no direct connection.
 - b. Court-annexed mediation has a connection to the court. The mediators are court employees, volunteers, judges, or

mediation organizations which accept referrals from the court. (Some judges can be taught to be mediators.)

4. Court-annexed mediation has proven to be most effective because it is driven by hint, suggestion or direction of the judge to enter mediation.
 5. An off-shoot of mediation is judicial settlement. Here, the judge is not an objective mediator, but is more directive in leading to a conclusion.
 6. Once a decision has been made to adopt court-annexed mediation, a decision must then be made as to the role of the judge. Then the necessary skill can be taught.
 7. A flexible approach is helpful, as a different type of mediation may be better suited to a community -- or even to an individual judge.
- E. Speeding up the cases through the system is the province of case management.
1. Case management skills are easily taught once the judge understands the theory.
 2. Case management merely transfers who determines the pace of litigation from the lawyer to the judge.
 3. It begins with an early conference so the judge understands the nature of the case, sets the litigation schedule, solves discovery and other problems, and encourages cooperation.
 4. There is always a date to which the lawyers work: another status conference, a pretrial conference, or a specific and firm trial date.

5. The pretrial conference is the key. There, the parties should be prepared to agree to a pretrial order which will contain:
 - a. Agreed facts
 - b. Facts to be litigated
 - c. Stipulations for admission of evidence
 - d. List of evidence to be presented and any foundational objections
 - e. List of witnesses with any foundational objections
 - f. Curriculum vitae and reports of experts which, in a non-jury trial, will be considered the direct testimony
 - g. Agreement on issues of law
 - h. Issues of law not agreed upon
 - i. Estimate time for trial
 6. The judge will include his orders on
 - a. Admissibility (unless must await trial)
 - b. Any briefing on law issues with date to be filed
 - c. A firm trial date after considering lawyers' conflicts, if any
 - d. Time trial is to take
 7. The pretrial order takes the place of the pleadings for the trial
 8. The judge dictates his judgment immediately at the end of the trial (orally to court or first draft if to be a written judgment)
 9. Each of these tasks can be taught -- but they are better learned if the overall theory of case management is understood
- F. Both mediation and case management are important skills to be taught -- but properly implemented, they have a synergistic effect.
1. As a judge directs the case preparation for trial, he/she is in an increasingly stronger position to encourage mediation

2. As the two are seen as one overall process towards resolution, both case management and mediation are enhanced.