



Enhance Your
Chance of Success

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Given the current economic climate, utilizing this “most popular ADR technique” is now more important than ever.

Practical Considerations for Effective Mediation

It's no secret that alternative dispute resolution (ADR) has in recent years become more widespread throughout the country. More and more of our clients have become less concerned with whether we win a motion or score points

during a deposition. Instead they have focused on finding cost-effective, bottom-line solutions to their business problems or litigation woes.

Former Chief Justice of the United States Supreme Court Warren E. Burger once said that “our system is too costly, too painful, too destructive, and too inefficient.” Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66. In response to litigants and clients echoing these sentiments, our profession has embraced ADR and particularly, mediation. A few statistics tell the story. The ABA Section of Dispute Resolu-

tion has over 18,000 members and is one of the ABA's most active sections. James F. Henry, *More Changes Coming*, 27 Alternatives to High Cost Litig. 1, 4 (2009). Virtually every state and local bar has an ADR committee. *Id.* Research indicates that when ADR is used in federal cases, 65 percent of the cases settle. Lisa Blomgren Bingham *et al.*, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 Ohio St. J. Disp. Resol. 225, 225 (2009). The American Arbitration Association reports that over 85 percent of all mediations result in settlement. *Supra*, at n.2. In the federal court system only one to two percent of the docketed cases are actually tried. *Id.* The rising use of ADR in civil cases is a main factor in the decline of trials. *Id.*

When ADR is introduced to a civil case in the first 90 days the average disposition time to the end of the case is 90 days, while the average time from litigation filing to disposition without ADR is 150 days. *ADR Brief*, 26 Alternatives to High Cost Litig. 136, 136 (2008). Using ADR it is estimated that businesses save an average of \$10,735 per case. *Id.* at 137. These measured time and cost-saving benefits along with rising settlement rates indicate that clients view ADR not only as beneficial but as neces-

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sary to a legal system that can prove to be, at times, too costly, painful, destructive, and inefficient.

When ADR is used appropriately it can drastically reduce the amount of time and cost needed to resolve a dispute because it focuses the parties on key issues and limits discovery and unnecessary motion practice. By increasing a client's involvement

Confident and competent

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in the process at an earlier stage, the client has a measure of control and predictability. Another benefit to early ADR is that a client has an opportunity to see its attorney "in action." An attorney who obtains a good result for a client with "the minimum bloodshed" could put him- or herself in position to represent that client again, or to receive referrals from that satisfied client. Confident and competent trial attorneys should not fear ADR. Many litigation skills are very useful in resolving cases through mediation or in arbitrations, mini-trials, and summary jury trials. These skills include an attorney's ability to assess legal risks and potential costs, to break down complex issues and present them in an understandable and persuasive manner, to organize a client's resources in a positive way, and to develop a specific dispute-resolution strategy.

However, a litigator and a mediator must recognize that mediation will not thrive on adversity. If the parties and the attorneys confront each other with a no-holds-barred litigation approach, mediation will not succeed.

Years ago, attorneys had to decide whether alternative dispute resolution would be appropriate before a trial. Now almost every jurisdiction mandates arbitration, mini-trials, summary jury trials, or mediation. Because mediation does not involve an evidentiary hearing or impose a decision on the parties by a neutral, it is the most popular ADR technique.

Advantages of Mediation

Mediation has many advantages that other forms of ADR do not. First, a mediation typically promises a quick resolution to a case. A mediation can be scheduled at any time. Even the most complex cases can be mediated in a few days, with most cases taking a half-day. Not only is mediation faster than other forms of ADR, it offers finality. Once a mediation is over, the parties cannot appeal a mediation decision.

Second, with a successful mediation, all parties win. Compared with other ADR forms, parties in a mediation do not relinquish any legal rights, and in a mediation, parties are not forced to settle. Third, parties can maintain complete confidentiality in a mediation. Proceedings are conducted in private without a "public trial." Fourth, a mediation is potentially the most inexpensive form of ADR. Fifth, the mediation process is flexible and can be molded to the specific needs of your case. A mediation offers broader relief than the relief available in other ADR forms, such as letters of apology, bartering, compromises in business arrangements, and other imaginative settlements. Sixth, mediation can be more effective than a judge's "settlement conference." And mediating through a selected neutral avoids having the settlement positions of the parties disclosed to a presiding trial judge.

Step One—Timing the Mediation

Once parties have selected mediation as the ADR process of choice or a court has mandated it, the first important decision to make is when to mediate. Unmistakably, the timing of a mediation is important to ensure both cost effectiveness and an increased likelihood of settlement.

Effectively timing a mediation requires that a litigator know his or her case and opposing counsel. Is a case one that could change significantly as discovery pro-

gresses, or will its material facts likely remain unchanged? If a case is subject to summary judgment or other significant motions, do both sides have an appreciation of the risks of all potential outcomes?

For example, unless all counsel truly appreciate the strengths and weaknesses of their positions, if a case seems prone to a summary judgment, an early mediation will probably be unsuccessful. Typically, a defendant that believes in good faith that a court will grant a summary judgment motion will not offer significant money to settle a case, and a mediation can become a waste of time. Similarly, if an attorney believes that in taking depositions he or she will expose the opposing side's weaknesses, the attorney will probably not want to mediate a case until after taking those depositions.

In a personal injury case if the parties have a dispute about the plaintiff's medical condition or medical causation issues, scheduling a mediation before an independent medical examination of the plaintiff has been completed and reviewed by counsel can also present problems. If a dispute is significant, you will want to have the independent medical examination completed and to review it before mediating.

While early mediations can be very cost-effective if both sides are willing to make the necessary concessions, if the credibility of a few witnesses will decide a case, and those witnesses have not been deposed, the attorneys may not be able to evaluate their cases properly. In product liability cases, without expert discovery in the form of answers to interrogatories, expert witness reports, or expert witness depositions, the parties may not know enough about the other side's case to make to make decisions on liability and damages that may lead to an early settlement. Sometimes, cases begin to mediate too soon before they are ready for mediation.

Step Two—Selecting a Mediator

If the time is right for mediation, the mediating parties will need to select a mediator. Selecting a mediator is typically a decision wholly within the discretion of the parties and their attorneys. Deciding which mediator to choose is an important one that you should not take lightly.

It is important to choose a mediator with the appropriate background and expertise

to ensure that a mediation is as effective as possible. A mediator with the right background will have the necessary grasp of the legal issues. This will make the mediator more credible to the parties. For example, if a personal injury plaintiff is hesitant to settle, an experienced mediator who does primarily plaintiff personal injury work could have more credibility than a young defense lawyer. A product liability attorney could be more persuasive in a product liability mediation than a construction attorney.

Also consider a mediator's negotiation style in choosing a mediator. Mediators have different styles, and all parties need to feel comfortable with the chosen mediator's style. An effective mediator usually is (1) sincere, caring, and conscientious; (2) a good listener and observant; (3) professional and ethical; (4) optimistic; (5) sympathetic and understanding; and (6) an expert negotiator.

Choose your mediator wisely. All too often, attorneys tend to choose a mediator who they believe will be most receptive to their cases, but selecting a mediator who the other side will respect is equally important. It is imperative to the success of a mediation to choose a mediator who will have the requisite experience and a suitable style, and who all parties will respect universally. Doing so will help you to obtain the best possible result for your client.

Step Three—Preparing for the Mediation

After selecting a mediator, your next step is to prepare for the mediation. Nothing can substitute for being well prepared. Preparation will typically include discussing the goals of a mediation with a client, evaluating the case for the client, and exchanging information with opposing counsel and the mediator.

Determining a client's mediation goal is one of your most significant prefatory undertakings. Would a client like to settle this case? The answer to this question will affect the strategy that you should use on the day of the mediation. For example, if a client does want to settle, the mediation may be the time to disclose impeaching evidence. On the other hand, if a client does not want to settle, you may not want to disclose impeaching documents during a mediation.

Managing a client's expectations before a mediation also is crucial. Completing a thoughtful, thorough case evaluation is the best way to do so. A case is not likely to settle if one of the parties does not have reasonable expectations.

Most mediators request that the parties each submit a confidential letter in advance of the mediation that sets forth each party's position on the facts, the law, and damages. This letter often introduces a mediator to the case, and the mediator will use the information contained in the letter in negotiating a settlement. It is important to provide a mediator with accurate legal and factual information. The letter should present your client's position persuasively, but you may also want to discuss perceived weakness in your position and use the letter as an opportunity to explain why the mediator should not view the weaknesses as prominent factors during the mediation. You will help a mediator if you specifically point out the legal issues and the evidence that supports your liability and damage assessment.

Sometimes parties find it useful to begin settlement discussions before a mediation. Parties should provide a mediator with the past history of negotiations along with support for each party's previous settlement position. Weigh the pros and cons before recommending to a mediator a monetary settlement amount, or even a monetary settlement range.

A mediator should keep the contents of your letter on behalf of your client in strict confidence unless your client, through you, grants the mediator permission to share specific information. A case is more likely to settle if a mediator has a true understanding of the issues in the case. Confidentiality allows parties to express their positions more candidly with the mediator.

A good mediator will read the materials that the parties supply. It will shorten the mediation. Be thoughtful about the documents that you submit to a mediator. Remember that your client is paying the mediator to review the documents submitted. For example, in a personal injury case, it usually is not helpful for a mediator to receive every medical record of the plaintiff. A mediator's time is, in most cases, better spent reviewing the relevant medical reports from treating doctors and inde-

pendent medical examinations. Of course, if some impeaching documents or medical records are important for the mediator to review, you should supply them. However, you can save money by not supplying a mediator with every medical record on a plaintiff or every document in the plaintiff's personnel file. Mediators also find medical record summaries helpful.

If you plan to allow your client to speak freely before a mediator, you should prepare the client before the mediation so that the client does not undercut your case.

Mediating parties should also exchange important information before a mediation. It can thwart negotiations to have important evidence disclosed to an opposing party for the first time during a mediation. A party may need time to react to the newly disclosed evidence, which could become an impediment to settling a case on the day of the mediation.

Step Four—Negotiating on the Day of the Mediation

The next step in mediating a case is to effectively negotiate on the day of the mediation. Success depends on having the right people attend, although a judge or the local rules often determine who attends a mediation. Generally, the attorneys with the most case knowledge who will try a case need to attend a mediation to help your client best.

Regarding your client, have the person with settlement authority present during a mediation. Some judges and mediators insist that an individual with authority to settle attend mediations. However, you may sometimes need to use "telephone standbys," which can work if the standbys are readily available throughout the day.

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In some jurisdictions, mediators allow both sides to hear the case for and against them. Sometimes those mediators use a short summary of each side's case, similar to an "opening statement" in a trial. Unless a case deals with very sophisticated clients and very complicated legal issues, however, starting a mediation with this adversarial approach can work counterproductively.

A mediator's shuttle diplomacy is very important to success. This is when a mediator has an opportunity to meet separately with each party, both attorney and client, exploring strengths and weaknesses of the cases of each side, and relaying settlement demands and offers. At this time, a mediator may suggest alternative settlement proposals, such as structured settlements, annuities, or partial settlements.

During shuttle diplomacy, a mediator may try to accomplish several things. By having the parties continue to negotiate, a mediator will promote further exploration of the strengths and weaknesses of positions. A mediator may actually play "devil's advocate" if a client or an attorney needs "encouragement."

A mediator will continually obtain confidential information from each party that will assist in facilitating the settlement. Information that was not contained in each parties' original position letters will come forward and may become useful in settling a case.

As mentioned, as a mediation continues and the parties exchange demands and

offers, a mediator may suggest alternative settlement approaches or structures. If a case involves more than one defendant, a mediator could suggest settlements with some but not all the defendants or other innovative approaches to resolve a case.

You have important strategy decisions to make throughout a mediation. Sometimes, a plaintiff's attorney does not want to make a client's lowest demand because he or she doesn't want that number to reach a judge if the mediating parties do not settle. That same rationale applies to a defendant. Thus, attorneys for both sides may not actually make their lowest demand or highest offers. Parties may not want to "split the difference" during a mediation because they have concerns that a judge will make them "split the difference" later during a settlement conference.

Sometimes, you may appropriately consider making an "unofficial" demand or offer so that the official position of each side remains one number yet a mediator can move a mediation forward with this "unofficial" demand or offer. If a traditional demand and offer or "unofficial" demand and offer approach does not work, parties should consider discussing "settlement ranges."

Mediators generally want to hear directly from the parties. However, if you plan to allow your client to speak freely before a mediator, you should prepare the client before the mediation so that the client does not undercut your case. An experienced attorney can use a client's comments

quite appropriately during mediation, but discuss the issues in advance.

Before concluding a mediation, make sure that a mediator has resolved all the issues. Does your client want the settlement to remain confidential? Are there any outstanding liens? Remember that in personal injury cases you must take Medicare set-aside requirements into account. There is nothing worse than realizing the day after a mediation that an outstanding issue was not resolved.

A close second is failing to come to common understanding of the terms of a settlement with the other side. If you settle a case, you should make the terms of the mediation agreement clear and put them in writing. It is essential that all terms are discussed and agreed to with a signed agreement by all parties and counsel. In most states a mediator cannot be a witness in a future proceeding in a dispute over the terms of a mediation agreement. Get it right in writing at the mediation.

Conclusion

Mediation is here to stay. With only one to two percent of the cases docketed in federal court actually resulting in trials, you will resolve most cases before you reach that stage. Given the current economic climate, effectively mediating a case is now more important than ever. By strategically timing a mediation, choosing the right mediator, and adequately preparing for a mediation, a litigator can enhance the chances of mediating successfully and of satisfying your client. **FD**

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of part of the claims under Kansas law, the court reiterated the factors demonstrating that FedEx retained control over results, not manner:

This court held that the controls reserved to FedEx were results-oriented: FedEx provides work to and pays contractor-drivers to provide the specific result of timely and safely delivered packages to FedEx customers.... FedEx has no right to discharge drivers at will. FedEx can non-renew a contract or cancel a contract for breach, but these are unexceptional rights common to any contractee in an independent contractor relationship; notably, FedEx is contractually

unable to discharge a driver at a whim and on the spot the way an employee in an at-will employment relationship could be discharged....

FedEx supervises the drivers' work and offers numerous suggestions and best practices for performance of assigned tasks, but the evidence doesn't suggest that FedEx has the authority under the Operating Agreement to require compliance with its suggestions. Further, other factors strongly weigh in favor of independent contractor status; in particular, the parties intended to create an independent contractor arrangement, *the drivers have the ability to hire helpers and replacement drivers, they are*

responsible for acquiring a vehicle and can use the vehicle for other commercial purposes, they can sell their routes to other qualified drivers, and FedEx doesn't have the right to terminate contracts at-will.

Id. at *5-6 (internal citations omitted) (emphasis added).

For companies considering self-audits, this decision demonstrates the importance of considering context. And while the case presents a relatively clean analysis of the right to control means versus results within the context of many state laws, in the normal course of enforcement or litigation, a company will be called upon to provide evidence of the relationship outside of