

Mediation Tips

FOR TRIAL LAWYERS & THEIR CLIENTS

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In recent years, the legal profession has felt pressure to hold down legal costs and to find expeditious, cost-effective methods of resolving disputes. A variety of alternative dispute resolution methods have been developed to respond to these concerns, including arbitration, mediation, mini-trials, summary jury trials, private judging and expert fact finding. Trial lawyers should always consider the method best-suited to their clients' problems.

Mediation has grown in popularity because it operates in an informal, confidential atmosphere that leaves decision-making in the hands of the parties. Mediation of complex commercial disputes can result in prompt, efficient business resolutions, and can be utilized at any stage of the litigation process. Mediation permits parties to achieve business objectives that might not otherwise have been attained, even if a client is successful at trial.

Mediation is a consensual process that bears no resemblance to litigation. The mediator has no independent power to resolve the dispute, which can only be concluded through the mutual agreement of the parties. The mediator conducts a series of joint sessions and separate caucuses with the litigants to facilitate agreement. The parties rarely submit evidence or witnesses, because evidence has no legal significance in the outcome of a mediation. The mediator can explore a wide variety of issues and concerns in helping the parties address the underlying problems that gave rise to their dispute. Mediators meet separately with the parties as an ordinary part of the mediation process.

Mediation offers a number of advantages over litigation in resolving commercial disputes. Mediation can be an ideal forum to resolve business and personal disputes at a reasonable cost, both financially and emotionally.

ADVANTAGES OF MEDIATION IN COMMERCIAL DISPUTES

Speed of Outcome

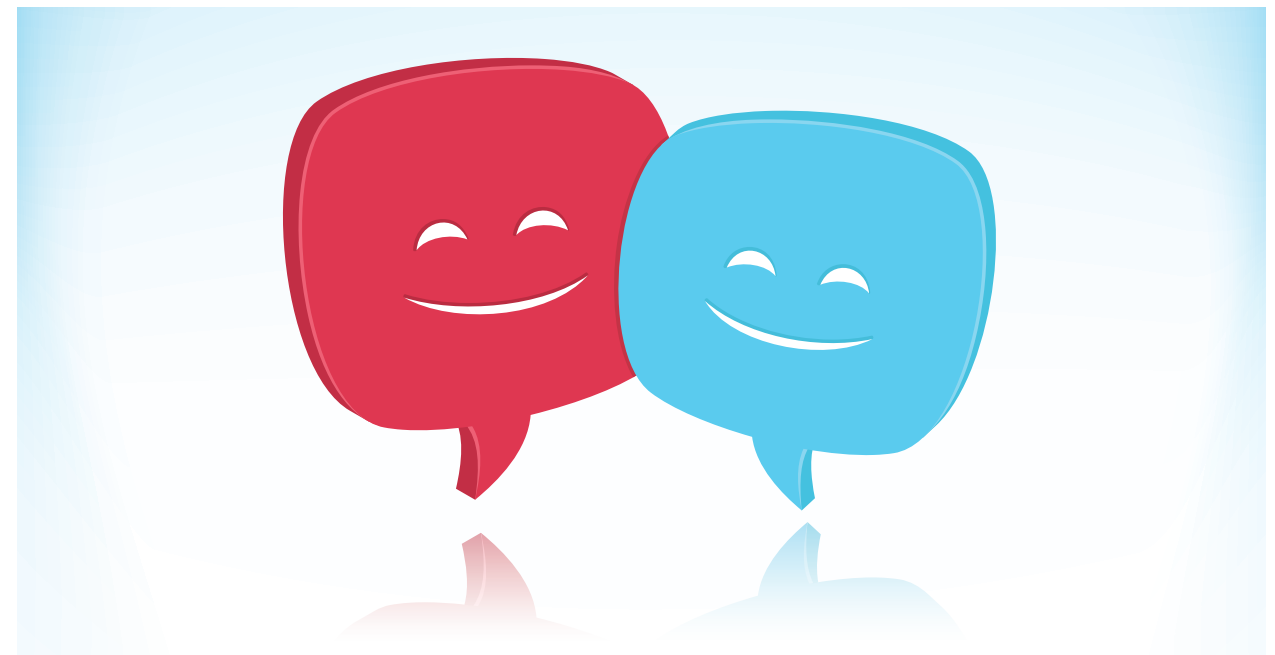
First, a mediator empowers the parties to determine promptly whether there is a reasonable possibility of settlement, without the customary posturing that accompanies typical negotiations. Mediation can be instituted at any time, even prior to the filing of a lawsuit.

Information transmitted to the mediator during the private caucuses is kept confidential by the mediator, unless permission to disclose is otherwise given. Therefore, a party can safely disclose to the mediator information that it would not ordinarily disclose to the other side at an early stage in the negotiation process. Most lawyers would also be reluctant to make full disclosure to a judge pre-trying a case for fear that such disclosure might disadvantage the party in the event settlement negotiations failed. Candor enhances clarity of understanding, facilitating settlement.

Absent mediation, neither side might be expected to reveal its true concerns at an early stage in the litigation. A mediator is able to obtain this information without compromising the negotiating position of either side, because the mediator will keep the information confidential.

Expert Control of the Process

A second advantage in mediation is the opportunity to find a mediator with knowledge and experience on the subject in dispute. In litigation, the parties rarely have an opportunity to select their judge. In mediation, the parties retain sole and exclusive control to select a mediator whom they believe has the necessary background and expertise to assist them in settling the conflict.



Knowledge of applicable legal principles enables a mediator to assist each party in evaluating the strengths and weaknesses of its positions, and to analyze the possible outcomes if litigation continues. Knowledge of business and tax laws will permit a mediator to assist the parties to arrive at creative “win-win” solutions.

Consensus & Confidentiality

A third advantage of mediation is that it is consensual, and the ultimate solution is in the hands of the parties. Clients often fear judges and arbitrators because there is a risk of the unknown. A judge or arbitrator's decision is outside of the parties' control. On the other hand, a mediator has only the power of persuasion and the parties control the outcome.

The mediator can create a casual atmosphere in which creative problem-solving takes place. Clients are encouraged to speak and be a part of the process, a sharp contrast to trials.

Another advantage of mediation is that it is confidential. There are two components of confidentiality. First, the communications between the parties and the mediator in their separate caucuses are kept confidential, unless a party permits the mediator to make disclosure to the other side.

Moreover, the entire process remains confidential. A party can avoid hanging out “dirty laundry” for competitors and others to observe – no public pleadings, depositions, or transcripts. Mediation is generally conducted in the privacy of an office and the parties determine who will be in attendance. Confidentiality can be extremely important in preserving trade secrets and the value of a business while issues are resolved.

Problem-Solving Approach

Mediation focuses on problem-solving, rather than truth-seeking. The mediator's primary focus is to help create solutions, not to assign blame. Mediation does not seek to resolve issues of “right” and “wrong,” but rather focuses on resolving the dispute in a constructive fashion. In litigation, parties concern themselves with winning, which does not necessarily resolve the underlying dispute.

Conclusion

Mediation represents a useful tool that should be considered by every trial lawyer and client. It can be particularly useful in commercial litigation where complex business issues are involved. In such situations the parties, with the assistance of a capable mediator, are able to reach a voluntary settlement that defines their future behavior. Compared to other methods of resolving disputes, such as litigation or arbitration, mediation enables the parties to exert maximum control to resolve their dispute in an informal, confidential, collaborative, problem-solving atmosphere, with the opportunity to focus on and resolve root causes of the conflict that are not framed by the pleadings. Today, no commercial trial lawyer should be unaware of the possible uses and benefits of mediation to resolve litigation.

Hon. Morton Denlow (Ret.) joined JAMS after 16 years serving as a Magistrate Judge for the United States District Court for the Northern District of Illinois. He has conducted more than 2,000 settlement conferences and has tried a number of bench trials in complex commercial cases where the parties have consented to his jurisdiction. He can be reached at mdenlow@jamsadr.com.

