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40 years of Commercial Mediation: What Have We Learned?

By BILL HARTGERING

This year marks the 40th anniversary of the JAMS Resolution Center in Chicago. Complex, multiparty mediation has matured significantly in those four decades. It's a good time to ask the following questions: What have we learned? How has mediation impacted the practice of law?*

There Is No Best Way to Mediate

Like transactional counsel and trial lawyers, experienced mediators utilize a variety of personal styles. While there is no one best way to mediate, we have developed procedural options that substantially affect and enhance the quality of the process.

When to Mediate

Research for our business plan 40 years ago demonstrated that only 5% to 7% of Illinois cases went to trial. There was a seven-year state court backlog. We determined that mediation and arbitration could effectively reduce that backlog. Today, only about 1% of civil cases reach a verdict. Arbitration has become common, and many matters are resolved by mediation.

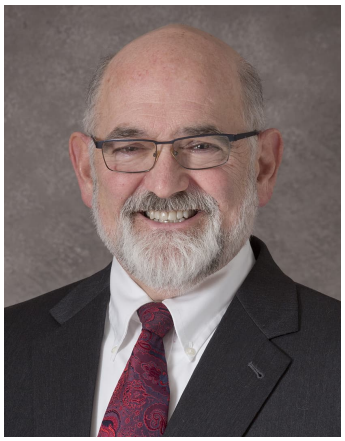
With many disputes, the question now is not whether to mediate but when: before filing a lawsuit, after discovery, immediately before trial or after trial. Simply stated, parties can choose to settle the vast majority of cases on their own.

The answer to "when" is generally as early as possible, particularly if the parties have an ongoing business relationship. If the parties to a dispute want to negotiate a final resolution on their own, and decision-makers are prepared to participate, they are ready for mediation. If more investigation is necessary, the process can be put on hold until such information is obtained.

Mediator Selection Demands Serious Due Diligence

Choosing a mediator is like choosing any critical expert, except that all sides must agree. If chosen poorly, parties will be dissatisfied. One concern used to be heard frequently: "If the opposition likes a mediator, that's bad for me." This is too simplistic. Assuming a mediator has extensive experience, clients and counsel will often seek references and objective information about that mediator. Indeed, if a mediator is known by the other side, that may be helpful when the mediator challenges its position.

There is often consensus as to who is effective. There are two considerations: One, you have the right to know the extent of the proposed mediator's experience with other parties and counsel (too much familiarity can affect objectivity). And two, one less-than-stellar reference should not end your inquiry (many who are good create waves).



Bill Hartgering

The second issue involves subject matter experience and process experience. You should seek a mediator who has both. While subject matter expertise is certainly important, it may narrow the focus to one perceived "right" mediator. Ultimately, substantial mediation experience brings creativity, perspective and closure to the most difficult matters. Like trying cases and closing deals, the more you do, the better you get.

The Pre-Mediation Preparation Process

Meetings before the first joint session significantly enhance both the probability and quality of the resolution with two critical steps:

1. An initial telephone conference/meeting with a pre-circulated agenda to identify and agree upon key logistical elements, including:
   - potential discovery to be exchanged before the mediation and the agenda for a potential limited joint session;
   - prior settlement discussions and the potential of business settlement (which may affect who should attend);
   - mediation participants, particularly those with settlement authority and personal knowledge of critical disputed facts;
   - documents and factual/legal arguments generally to be shared with all parties and sent to the mediator (surprise is not helpful); and
   - a description of the disclosure process if the information is to be provided for mediator's eyes only.

2. Separate (by phone or in person) meetings with all mediation participants from each party before the mediation to identify non-legal, non-factual barriers to settlement, including:
   - participants' background and role in the

case (giving them a venting opportunity beforehand, which may reduce or focus venting later on);
- matters not in the parties' mediation statements that affect the mediation; and
- an agenda for a potential joint session and the mediator's role.

The Impact of Commercial Mediation on the Practice of Law

While the percentage of cases that go to trial continues to decrease, litigation culture still assumes an eventual trial. This is not a criticism. Counsel may not be able to identify early which case will have to "go the distance." Mediation provides an opportunity for the clients to better evaluate the necessity for trial while exercising control over the outcome.

Commercial mediation has expanded further into nontraditional areas directly involving transactional lawyers and business clients in a variety of deals (not in litigation), joint ventures and salary negotiations that are near or reach an impasse.

The opportunity to help parties reach a business deal where the alternative is the abandonment of an actual or potential business relationship (rather than the adjudication of legal issues or facts) is particularly useful when neither party really wants to end the relationship.

Several states, including Indiana, Florida, Texas and California, now require that matters must be mediated before trial or arbitration.

Closing Thought

Counsel effectively resolve the vast majority of their matters without a mediator or the court. Sometimes, however, negotiations fail. Forty years ago, private settlement after an impasse was limited to an unassisted process that too often devolved into negotiations that ultimately ended with "who blinks first" on the eve of trial. Defining the "best" settlement was too often limited to "well, neither side is happy."

After an effective mediation, while they may not necessarily be "happy," lawyers and clients are generally more satisfied. The process provides an opportunity to explore business solutions or other creative non-monetary options, better understand the settlement after a chance to be heard, speak to and hear directly from the other side and receive neutral input. Parties are able to make their own deal rather than have the outcome imposed on them, and they can do so at a far lower cost and with much less stress than litigation.

(*This article does not reference the tremendous impact of virtual proceedings, which has been thoroughly described in other recent articles.)

Bill Hartgering, a founding member of JAMS, established EnDispute's Chicago office in 1982, which merged with JAMS in 1994. His practice includes the resolution of over 1,500 complex matters arising in 45 states and several countries, and mediations with sitting judges, co-mediators and experts. Representative matters include employment, franchise, health care, construction, complex inheritance, the environment and public issues of first impression. Prior to JAMS, Bill's law practice involved real estate, employment and insurance-related litigation, representing plaintiffs and defendants.