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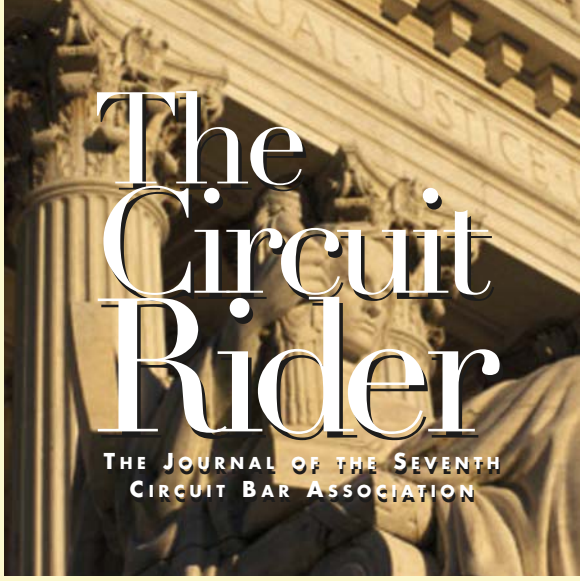
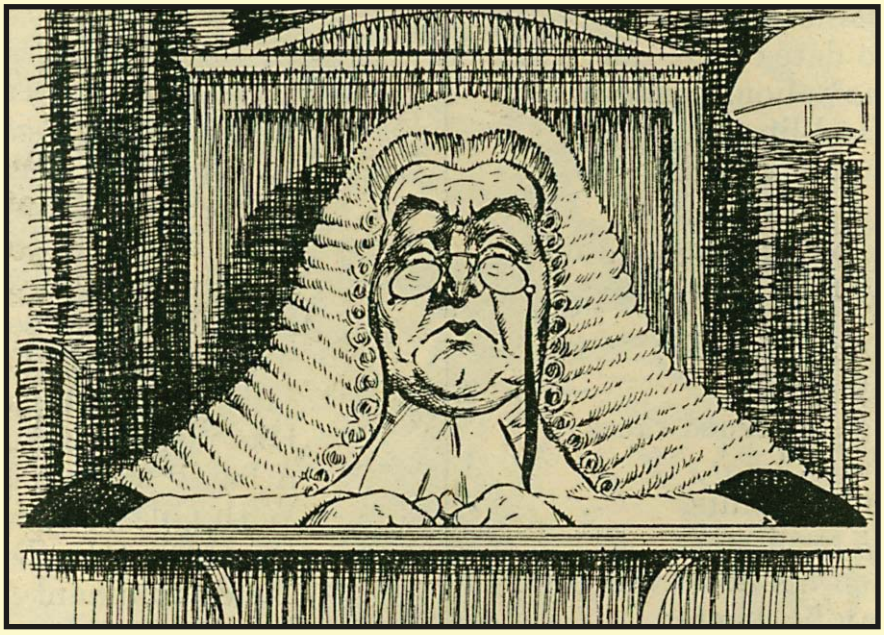


Views from the Bench
(and Other Equally Important Nonjudicial Musings)



The Circuit Rider

In This Issue

Making *the* Case *for* Mediation

*By Hon. Arlander Keys (Ret)**

Due in part to the steady increase in the filing of civil cases in the United States courts — both federal and state — and the resulting delays in achieving dispute resolution, many have come to the realization that there is a better, speedier and more economical way to resolve legal disputes than through traditional full-blown litigation. The exponential growth of private mediation to resolve disputes reflects an important change in the legal culture. While counsel and client may desire to have their day in court, the fact is that a very small percentage of cases filed in court advance beyond the discovery or dispositive motion stages of litigation. This is especially true in personal injury, labor and employment, civil rights, breach of contract cases and more. It makes perfect sense, then, for the parties, through counsel, to seek early mediation of such cases rather than engaging in cost-prohibitive discovery, followed by motion practice and/or trial, with its uncertain outcome. In this regard, there is no inconsistency between being a zealous advocate for the client's position and approaching opposing counsel about seeking private mediation in a manner that avoids the costs of litigation — or further litigation — and which also provides the parties with certainty of outcome. At first blush, the idea of conferring with opposing counsel about early resolution might be considered counterintuitive to the manner in which counsel are accustomed to doing because of the perception that it might be interpreted as a sign of weakness in counsel's case. However, such efforts, in the long run, usually result in an outcome that is in the best interest of the client, which is, of course, counsel's primary objective. While there are numerous benefits to choosing private mediation over litigation, only five are highlighted below:

1. Time and Cost Saving

These two benefits are discussed together because they are closely related. In litigation parlance, time is money. Considering the current caseloads of our courts, with their emphasis being on hearing and resolving discovery disputes, dispositive motions, conducting trials and considering and ruling on

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post-trial motions, it would be unrealistic to expect trial judges to be able to interrupt their busy schedules and to set aside the amount of time necessary to devote to settlement negotiations with parties in the typical case. Even in those instances where judges are more proactive in encouraging parties to attempt voluntary resolutions, with the assistance of the court, many times their heavy caseloads dictate that such settlement attempts cannot be scheduled until several months down the road. This results in the loss of valuable time, during which the settlement positions of the parties might harden or change due to interim developments, such as the obtaining of additional evidence through discovery. In this regard, the advantage of private mediation is that, typically the mediator is available to meet with the parties as soon as the parties are ready. This is particularly important where there is an underlying case pending in court and a dispositive motion deadline or trial date is looming. Experience has shown that, even in those instances where litigation has not yet ensued, but where there is a strong likelihood of such action, counsel would be well-advised to consider private mediation rather than expose the client to the prospect of litigation. The costs involved in prosecuting and defending civil cases cannot be overstated and, in many cases, exceed the value that the parties have placed on the case. However, because of the reluctance of parties — counsel and clients — to acknowledge and consider the relative strengths and weaknesses of the client's position and those of the opposing party, without the assistance of a neutral third party, many of these cases are needlessly litigated and the attendant costs (discovery, motion practice, trial and appeal) are prohibitive for both parties. Therefore, counsel should avail themselves of every opportunity to seek mediation, considering the costs of going forward with litigation and its uncertain outcome.

2. Confidentiality

One of the undesirable aspects of litigation is its public nature. The public has a right to know what is occurring in its courts. What is alleged in a complaint, answer and counterclaim, and the evidence presented in support of and against those pleadings at the pleading, motion and trial stages, all become part of the public record. Many of these pleadings and much of the evidence presented in support of and in opposition to them, may contain scurrilous or at least embarrassing allegations that one would not want to be aired in public, for various personal or business reasons. The final outcome of the litigation also becomes public, including a settlement agreement approved by the court, unless the settlement terms are placed under seal by the court, which is not automatic. Unlike litigation, the entire mediation process is confidential as to all participants, including the mediator, all of whom typically sign pre-mediation agreements committing not to disclose anything communicated during the process to non-participants. It allows the parties to speak freely, often in private with the mediator, without concerns that what they disclose to the mediator — and even to each other — might later be used against them in the current or later litigation. Most states and the federal government, by statute and/or case law, encourage the use of private mediation by providing for and enforcing the confidentiality provisions of mediation agreements, including the protection of mediators from having to give testimony regarding the mediation when they are directed to do so by subpoena.

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3. Experienced Mediators

Many clients, especially in personal injury, civil rights and labor and employment cases, having read or seen media reports of huge court settlements or jury verdicts in cases similar to theirs, sometimes have unrealistic expectations about what they can expect if they proceed through the court system. In such cases, counsel would do well by the client by seeking mediation with someone with a great deal of experience with the court and jury system, to provide a reality check to the client. Experienced mediators — many of whom are retired judges with many years of service on the bench — are great resources for counsel and clients in providing a dose of reality to their expectations as to the costs going forward and as to what is likely to occur if they proceed with litigation.

4. Flexibility in Settlement Terms

In reaching privately mediated settlement agreements, the parties maintain the ability to agree to terms that an administrative agency or court might be reluctant to or refuse to agree to or approve because of policy reasons. Such settlement agreements, negotiated through private mediation, might be more palatable if executed at the pre-litigation or very early stage of litigation. Further, mediation affords the client, who has the most skin in the game, the opportunity to become intimately involved in the give and take of the negotiations and a feeling of involvement in the ultimate outcome of the case. The importance of the feeling of control by the client over the final outcome of the case should not be minimized.

5. Finality

One of the advantages of private mediation is that the parties may obtain a resolution that, while perhaps not perfect, is one that they can live with, within a relatively short period of time and without the anxiety and uncertainty inherent in litigation. With the decision to litigate, a victory for either side at the summary judgment or trial stage will not necessarily resolve the matter, as appeals may add even more time and expense to that already expended in the case. On the other hand, when parties agree to resolve their disputes through client-involved mediation, the matter is likely to be resolved, with finality, faster and more economically.

Conclusion

Considering the advantages of mediation over litigation, enumerated above, counsel are encouraged to forego their natural inclination to engage in litigation and to seriously consider seeking private mediation, after appropriate investigation; to do so may be in the best interests of the client in appropriate cases.