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Judges Disclose How They Prep Complex Cases For Settlement

BY JULIETTE FAIRLEY | JUNE 1, 2016

From employment-related class action suits and racial discrimination cases to movie studio executives in dispute with producers over a film in the entertainment industry, mediation is becoming the preferred way to avoid costly litigation.

The average intellectual property case costs between \$475,000 and \$500,000 to litigate compared to mediation where costs do not usually exceed \$100,000, according to a World Intellectual Property Organization survey.

JAMS is the largest private alternative dispute resolution (ADR) provider in the world with more than 300 full-time neutrals, resolving more than 12,000 cases per year in hearing locations throughout the world in nearly all areas of law including business and commercial cases.

Based on past results, JAMS takes pride in the fact that almost all of the cases mediated, even the most complex, are successfully resolved.

Two prominent neutrals, Retired Judge Carl West and Retired Judge Richard Kramer, weigh in on how to manage these cases so that they are prepared to settle outside of court in mediation.

What is the process for managing and settling complex cases?

Judge West: What's essential is to talk about the expectations of the parties participating in the mediation and purpose of the mediation. In more complex cases, mediation efforts can extend over a long period of time. The parties need to decide whether they want to seriously position the case for settlement discussions, and if so, how the mediation effort will further that goal.

Judge Kramer: First, I determine what the issues are, streamline the resolution of them, watch the behavior of the litigants then make judgments as to what might be really going on. I test some of my judgments to

see if they are helpful or whether they exacerbate the problem.

Judge West: The best strategy is for each side to take the time to determine their expectation and goals. If they haven't, I will work with them to identify their expectations and how best to achieve them.

What are indicators that a case is complex?

Judge West: They have a number of attributes. The common denominator is a substantial amount of money or an intangible issue that needs to be resolved in order for the parties to get out of the litigation. A complex case may also have multiple parties, many competing interests, and novel factual or legal issues that must be identified and resolved if the case is to be settled. All of those interests have to work together with the mediator to develop an approach to the management of the parties, issues and ultimately the mediation effort. Another characteristic of a complex case is presence of novel or unique questions of law or fact that drive the dispute between or among the parties.

Judge Kramer: These are cases that need more intensive judicial supervision due to the nature of the issues, the number of parties to the litigation, the amount of money at stake, the complexity of the fact issues and the like.

Judge West: I advise narrowing down the issues so you can evaluate the case. Experts can help to evaluate damage and liability issues. Sometimes allowing experts to work through the more technical issues will help to bring the parties together.

What are some of the obstacles to preparing to settle a complex case?

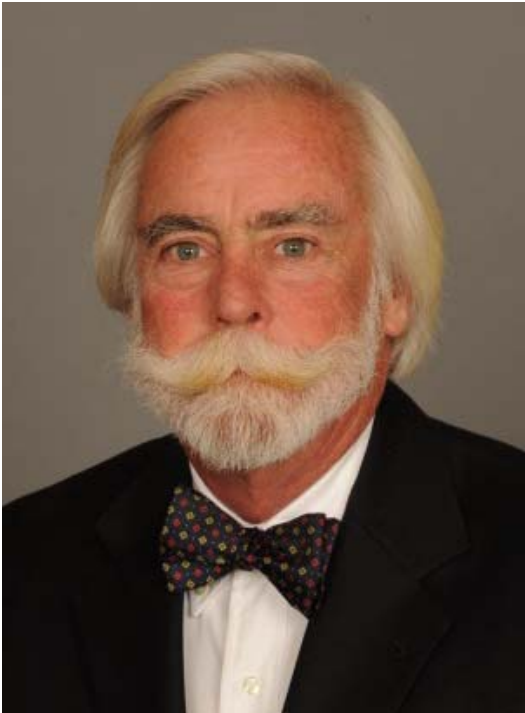
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Hon. Richard Kramer (Ret.), JAMS mediator and arbitrator

mation, fear, greed or bluster. The solution is to determine what's getting in the way of a rational business decision.

Judge West: There's generally, at the first level, a challenge to getting information on the table that both sides need to evaluate. There may be discovery issues and levels of cooperation that are lacking to facilitate mediation. My job is often to facilitate the exchange of information necessary to support a successful mediation effort and to help the parties get necessary information on the table to move forward with the mediation. Sometimes, there are personalities that come into play or there could be a history or emotional elements between the parties that need to be overcome to objectively mediate the case. There also could be business



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consequences to the dispute. If you have an ongoing relationship, you may need to consider how a settlement will impact the relationship or if the ongoing relationship is an impediment to resolution.

Judge Kramer: If you get adverbs, adjectives and vitriol, you are alerted to the problem being that the parties are not getting along or it could be a failure to communicate. The process of settling is dynamic. You watch what's unfolding and react to it.

Judge West: I suggest identifying the significant issues that drive the case or dispute and focus the discovery on those issues before mediation. Once the parties and the mediator have their arms around the significant legal and factual issues, the case is prepared for an effective mediation in which the mediator can help the parties focus resolving the case.

What one thing do complex cases have in common?

Judge West: In larger scale litigation, every case at some point early on was involved in a mediation or ADR process. When early efforts to resolve a case fail, the parties will often engage in a second round of mediation

efforts as the case approaches trial or some other potentially dispositive event. I get a lot of cases that had early mediation and want to try again. Because of the cost of litigation, parties are motivated to find an alternative to litigation that is economical and efficient. Getting people together for a serious mediation effort is often the best way out of litigation. ADR or mediation is not going away because litigation costs are not dropping. They are steadily rising and, as a result, mediation is going to remain a growth industry. Hopefully, we are becoming more efficient at resolving sooner rather than later.

What sequential approach do you employ towards a settlement?

Judge Kramer: My job is to spot the problems and work them out and sometimes it is sequentially. I am constantly looking at what the problem is and what I can do to help it.

Judge West: We get extensive mediation briefs on larger cases in which lawyers put forth the best case scenarios. They need to explain to their clients that the "best case" described in their brief will not be what will come out of a mediation. Lawyers need to make sure their clients understand that a successful mediation will require compromise. When both parties are prepared to compromise, when they recognize that there is another side to the story, then we are on our way to a settlement. Often having parties exchange mediation briefs will provide each side with a better appreciation of the risks of remaining in the lawsuit.

What can each party do to position the case for settlement?

Judge Kramer: You need the authority to settle and the right person in the room to evaluate it. When you are judge, you can order that. When you are engaged in ADR, you cannot order anyone to do anything but you can explain that it's the best way of doing things. Face to face is good if you can get a senior person with settlement authority to see what's going on as opposed to being contacted by phone by a lawyer who may articulate things in a way that may not be helpful to settlement.

Judge West: The parties and their counsel

need to have the necessary information to permit them to effectively evaluate their exposure or likely recovery. This often means recognizing the significant factual or legal issues that fuel the case and making an honest effort to consider and evaluate the risks associated with the issues.

Judge Kramer: Putting it in writing will memorialize it and gives me the time to think about it before session. If it's a settlement conference, identify the problems, explain what you want the person who is presiding to do about it and why this is the solution relative to what the other side is saying. Don't tell me what the other side is trying to pull. Don't use adjectives and adverbs. Come with an open mind that perhaps this settlement process could work and perhaps the mediator can add something to the process. The right attitude is important.

What are your favored processes that have helped parties prepare to settle?

Judge West: I require a mediation briefing the issues driving the case. I arrange a pre-mediation conference call with lawyers for three reasons. First, we discuss their briefs. Second, to assess where they are in relation to the other side and third, to make sure they both have their goals defined before engaging in the mediation process. I look to determine whether their goals are compatible and if not, to find ways to bring them together. It is important for the parties to come to the mediation with the same goals or at least compatible goals.

Judge Kramer: Parties spend too much time trying to convince the mediator or justice the virtue of their position. You are trying to compromise not win a fan. Convincing the judge that you are right won't work because settlement judges don't think like that. If you solidify your position, it makes it hard to be flexible and the lawyer is often showing off for the client which doesn't help. Cases fall into whether a statute is unconstitutional or whether the government has done something right or wrong. When preparing for a settlement in a complex case, seek out an economic rational resolution because there usually is one.

Juliette Fairley has written about law and the legal profession for Inside Counsel, Bloomberg Big Law Business, MainStreet, California Lawyer and other publications.