The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020
PHILADELPHIA, JANUARY 12, 2019
An ALM Publication

The Journey From Bench to Arbitration and Mediation: Retooling, Not Retiring

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BY PATRICIA MCINERNEY

In July I retired from the Philadelphia Court of Common Pleas in the middle of my 23rd year on the bench and transitioned from the life of a trial judge to that of an arbitrator/mediator. The phrase "retooling, not retiring" to describe this transition was coined by a friend and colleague who preceded me in making the transition from the bench to the world of alternative dispute resolution. It is an apt description. While the types of cases we deal with may be the same—we have not retired from resolving disputes—the approach, the venue and our function are very different. Just as when we were trial judges, we are still neutrals, but now we operate in a different arena. The cases and controversies we deal with are no longer assigned to us as part of a court system; they come to us solely at the discretion of the claimants, respondents and their respective lawyers. Whether participating in an arbitration or a mediation, the parties are much more in control of the process.

If the parties elect to take their dispute out of the court system and proceed before an arbitrator, our role as the arbitrator, and the hearing we conduct, would not be that different were we to conduct a bench trial. However, in an arbitration, the parties have the added benefit of "judge shopping." The lawyers and parties will be able to choose the person or persons they want to decide their dispute. In addition, unlike the open records requirements of the courts, confidentiality can be assured. Furthermore, the entire litigation process can be streamlined by employing cost-cutting measures tailored to the individual case. In short, the parties are freed from the procedural restrictions of the court system.

When cases come to us "trial ready," meaning referred out from a court, therein lies one of the differences between the role of judge and arbitrator. In that type of arbitration, most questions of law usually will already have been decided by a court and perhaps have helped ready the case for arbitration (or mediation). The situation is not the same when the case originates as an arbitration. Then of course the arbitrator will be again functioning just as the court in a bench trial.

Patricia McInerney, JAMS

Contrasting arbitration with mediation, the transition from judge to mediator is freeing. Having presided over hundreds of trials and participated in a corresponding number of settlement conferences, I believe the mediation process is more rewarding. Trials have a winner-take-all format, which in the starkest terms usually leaves one side elated and the other deflated. Presumably, the case would not have gone to trial if each side had not felt it would prevail, or at least believed it had a good enough chance at doing so to forego settling the case. Unfortunately,

one side will have miscalculated, and whether it is a total miscalculation in terms of the verdict or a partial miscalculation in economic or other terms, therein lies the usefulness and value of mediation. Mediation provides parties the opportunity to take control of their dispute and attempt to resolve it on their own terms.

This is, again, where the retooling aspect comes in, as there is much less necessity to deal with issues of law and no need to be resolving issues of first impression. As mediators, we have traded briefs for mediation statements. The intellectual challenge of reading well-written opposing briefs and then, after much study, research and contemplation, deciding an issue or motion and authoring an opinion is not the role of the mediator. If called upon, we may have a prediction to share as to the outcome of a point of law, but for the most part, we must retire what was one of the most challenging jobs of a judge. Ultimately, we must trade it for the satisfaction of helping litigants resolve their differences in a less adversarial manner.

From the perspective of the trial judge-turned-mediator, I see the advantage of being able to delve into a case and work with the parties to resolve their dispute without the concern that my impartiality could be compromised. Because while trial judges routinely conduct settlement conferences, they must always be mindful of and are often constrained by the fact that if the case does not settle, they will still be required to try the case, so they must be able to maintain the confidence of the lawyers and litigants as to their ability to be fair and not to have prejudged one side or the other. That knowledge limits and defines the scope of any attempts at settlement. As a mediator, however, I believe we are never tasked with ultimately deciding the case. It is not an exaggeration to say it is liberating to remove that tension and the arm's-length distance that must necessarily remain in the court context.

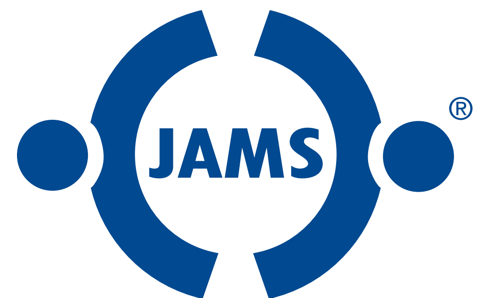
And, of course, it is totally different to have the parties "own" the process, to have the parties choose to come to mediation and select the mediator, to be able to express their positions and focus on nothing but presenting their side of the story. There is no point in mediating if both sides are not willing participants in the process. That might work for some court-ordered and court-run mediation programs, but that is not true mediation. To have a successful mediation, everyone needs to be prepared and invested. Mediation takes time and patience, as grievances are aired and positions are dealt with. The construct of a judge overseeing a process wherein the parties are legally required to come to the table is retired and retooled, with the mediator serving as the facilitator of a resolution between willing parties.

As a judge, as much as I loved trying cases, I was always pleased when a case settled, because that was the best outcome for the parties. They would leave the courtroom having achieved some measure of compromise and with the relief that closure—legal, financial, personal and emotional—provides. However, that result often was accompanied by the realization that it should have or could have happened much sooner if the parties had only gone to mediation. And, as for the cases that went to verdict, that an all-or-nothing outcome could have been avoided.

Judges, for the most part, are not able to personally interact with the parties. We learn about them only through evidence and testimony. Mediation is obviously much more interactive. Lawyers and judges are natural problem-solvers, but the means and methods of solving problems through a trial are very different than they are in mediation.

Interacting with the parties is the norm for mediators. And while not every case resolves on the first attempt at mediation, participating in the process allows the parties to make progress in one form or another. The process still moves forward. That is always beneficial, and I find myself very much embracing this retooling stage of my judicial journey.

Patricia McInerney *joined JAMS after a distinguished 23-year career on the bench. McInerney presided over numerous high-profile cases and served as supervising judge of the Commerce Court in the Philadelphia Court of Common Pleas, which is a specialized civil program that handles business-to-business disputes.*



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