

## Perspective

## Expert Analysis

# From Judge to Mediator and Arbitrator

BY HELEN E. FREEDMAN

**A**fter 36 years as a state court trial and appellate judge, including eight in the commercial division and 21 managing mass torts, I anticipated a seamless transition to becoming a neutral. After all, I had tried, conferenced and settled thousands of cases. To be sure, I realized I would lack the hammer of the imminent trial alternative, so I took several courses in mediation, some of which involved role playing. But ultimately I thought it would just come naturally. After three years as a neutral, I can report that while my judicial skills prepared me in some ways, they presented obstacles in other ways.

Let me start with the role of arbitrator. I was told that arbitration is faster, more efficient and less costly than litigation. Overall, that is true. But often lawyers who litigate also arbitrate. So, when I'm presiding over preliminary conferences, particularly in commercial cases, I often hear about extensive document discovery requests, issues concerning obtaining electronic discovery, claims that five or six depositions are necessary and that the parties need at least 10 months to



prepare for a hearing. Sounds awfully familiar! I think: How can I reconcile these demands with the cost-efficiency that arbitration advocates tout?

In order to make sure the process proceeds expeditiously, I focus on each case in a way that I could not as a judge. Typically, before the preliminary conference, I review counsel's submissions and send a preliminary request email asking parties to confer, review discovery requests, determine if they anticipate any motion practice and select potential dates for the arbitration. At the preliminary conference, I try to limit discovery to essentials and restrict the num-

ber of depositions, invoking JAMS rules for expedited or employment arbitrations. Then I issue a preliminary conference order that reflects the rules that will govern the arbitral proceedings.

When I was a judge overseeing a commercial case, invariably one or several parties moved for summary judgment or partial summary judgment. Case law prohibited me from declining to entertain such motions. By contrast, in arbitration proceedings, the filing of summary disposition motions, the summary judgment equivalent, require permission of the arbitrator or agreement of the parties under JAMS Rule 18.

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If a party requests permission to make such a motion, I ask for a letter setting forth reasons. An adversary opposing the motion may respond.

With respect to discovery rulings, the judicial and arbitral process are similar. As an arbitrator, however, I am inclined to support reasonable limitations both on time and scope. So, although I have had to sit with parties and make rulings on particular discovery requests and privilege assertions, I try to focus on efficiency, cost and fairness. The scope of e-discovery must always be kept in perspective—otherwise arbitration will be totally unaffordable. (I urge parties to keep a copy of Charles Dickens' "Bleak House" available at all times!)

As a judge, it was always my practice to require parties to pre-mark exhibits, and I do so as an arbitrator. However, as a judge I reviewed in limine requests before the trial began, particularly where there was a jury, and ruled to the best of my ability prior to trial. Since there are no jurors in an arbitration, pre-hearing decisions are less important. Although I am inclined to follow the federal and state rules of evidence as they come naturally, I know that admitting hearsay or marginally relevant evidence will never be the basis for overturning an arbitral award.

Most court cases settle, and as a judge, I almost always urged and often participated in settlement. A significant number of arbitration cases also settle, but my role as an arbitrator is quite different from my role as a judge. For example, where appropriate, as a judge, I could ask if the parties have considered settling, but as an arbitrator I cannot get involved in settlement because even a suggestion can lead to a request for disqualification on the ground of bias. The only exception is when all parties ask the arbitrator to get involved or, under JAMS rules, all

sign a "med-arb" consent form. Even then, it is usually better to send the case to another neutral if mediation is warranted. The danger of perceived bias from some off-handed remark, or some questioning of a party or counsel during the mediation, can lead to a claim of bias if the case does not settle.

Mediation or neutral evaluation requires certain skills that are not automatic, even to a veteran judge. As a judge, I rarely had more than half an hour to sit and talk with lawyers about their cases and attempt to resolve them. Unless the parties sat down with an outside mediator or

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counsel were able reach a resolution on their own, resolution often came only after motions were decided and discovery occurred. Mediation is different. Often it occurs before a lawsuit has even been filed. It is always confidential. Typically, the fact that parties have sought for and are paying for the process indicates some commitment to achieving a resolution and a desire to avoid the publicity and cost of protracted litigation. However, particularly in complex commercial cases, it is often not a quick process and requires a type and level of patience that judges are not accustomed to.

As a mediator, I first hold a pre-mediation telephone conference with counsel where I learn the nature of the case, whether a lawsuit has been filed, and whether there has been discovery or settlement discussions. Then I request copies of pleadings and pre-mediation statements in which each side sets forth their factual and legal

contentions. The statements may or may not be exchanged, and ex parte follow-up phone calls are permissible.

Unlike most settlement conferences in court, parties themselves are present at mediation. Each party comes to the table convinced of the merits and worth of their case. Except when the level of hostility is very high, it is useful for the parties and their lawyers to listen to each other in a joint conference. While hearing the other side may raise dander, it is up to me, with the help of counsel, to moderate an overreaction.

Finally, sometime a bit later in the process, the mediator must clarify to each party how their adversary feels and where the risks of proceeding to litigation lie, while still trying to bring the parties together. As one experienced mediator said, "[I] am facilitative until about 4 p.m., and then I become evaluative." As a former judge, it is tempting to be evaluative early on and raise all the risks of litigation, but that is not how mediation works. The parties must actively participate in the process before the mediator uses evaluative techniques to bring them to what we call "Yes."

In these three years, I love recognizing the ways I've grown and learned to become a better mediator and arbitrator. It's so helpful learning from my colleagues and even from my clients.

