American Bar Association, Section of Litigation
Alternative Dispute Resolution

ARTICLES

Why I Choose Mediation Despite Minimal Chances of Success

By Ian Lane – July 7, 2022

As most attorneys know, the litigation process is often time consuming, costly, and frustrating to both litigants who want resolution and advocates who want to do their best for their clients but have practical business-related issues that they must deal with. One cannot help recalling that old phrase from William E. Gladstone that "Justice delayed is justice denied."

With this in mind, advocates for efficient justice often suggest mediation as the ideal way to resolve civil disputes. It goes without saying, that when a case presents itself as a good mediation candidate, mediation can be the fastest, most efficient, and therefore, most practical means of resolution.

However, in this brief analysis, I hope to make a reasoned argument why mediation is a beneficial option even when the chances of successfully resolving the case are minimal.

Why Choose Mediation When Chances of Success Are Minimal?
As a defense attorney, I often have to justify to my claims adjusters why mediating a case is the best option, even if the chances of success are not great. Mediation, after all costs money, provides the plaintiff's attorney with our defense arguments, and when we are far apart on the valuation of the case, seems pointless. While I understand the reluctance of an adjuster to enter into a fruitless mediation, I have come to learn that even unsuccessful mediations, when undertaken with the right mediator, can move the case substantially closer to settlement.

Mediation Costs
Most parties who mediate like to spend as little as they can to mediate a case. For this reason, many courts offer cost-free mediation to litigants. While court-sponsored mediation has a definite roll to play in settling cases, the cases that tend to settle are those where the resolution is not particularly complicated. With "free" mediation, especially when mandated by a court, the approach by the two sides tends to be perfunctory, and the role of the mediator, often burdened by a significant number of cases to handle, superficial. After all, if there is no cost there is no investment in the outcome.

Private mediation, on the other hand, tends to be costly, and must be justified to both claims professionals for defendants and to plaintiffs and their attorneys as both sides are required to invest in the process. Most of the carriers we work with anticipate spending between $875.00–$1,000.00 for two hours of mediation time (National Arbitration and Mediation Standard Fees and Costs) with $330.00 for each additional hour (per party when there are less than four parties). Rates can be different for more highly sought after neutrals. I advise my claims adjusters to expect a mediation to cost between $1,500.00 and $2,000.00, depending on the complexity of the case and the difficulty of the mediation.

Every adjuster has to justify such an expense, and when there is a not a good record of accomplishment of success, the adjuster's decision to mediate can be called into question. Therefore, there is a risk every time that the adjuster agrees to mediate a case. When confronted with these facts, it is understandable why an adjuster would only agree to mediation when the cost is "reasonable" and the chance of success is "high."

Additional Considerations
However, there are additional factors that should be considered when making the "mediation decision." Among these considerations are the costs of continuing the case. Continuation of a case means the continuing cost of the claims administration of the case, the legal fees for continued analysis and reporting, and of course, the substantial costs associated with preparing a case for trial and trying it in court.

These "costs" are less definite and more esoteric and speculative than a bill for a fixed amount from a designated neutral, but they are likely to add up to substantial amounts the longer a case goes on and will certainly be significantly more expensive if the case goes to trial. In short, earlier resolution usually means less expensive resolution.

Selecting a Mediator
Once the parties agree to mediate a case, the next step is to select the right mediator. All cases require mediators that have the background, knowledge and experience to provide insight and arguments to the attorneys and, often, their clients. Successful mediators often develop reputations for success and become sought after and costly. In such cases, it is important to let the clients know that paying a premium for the mediator who has the greatest chance of settling the case is the most cost effective decision.

Providing Your Arguments to the Adversary
Once parties agree to mediate, an often-expressed concern is that during mediation you provide your arguments to the adversary, jeopardizing your chances at trial by allowing them to prepare in advance should the mediation fail. But remember: the mediator will only reveal what you authorize.

This is where the selection of the mediator becomes most important. During the mediation, the mediator typically will address each party individually. It is essential that the mediator has the skill to know what information is best revealed and best withheld. It is the mediator's job to put the facts of the case in a context that the adversary may not have considered. The way authorized information is presented to your adversary is up to the discretion of the mediator, and you must be confident that the mediator will use this information as, and when, necessary to bring the case to resolution. Many times, well-prepared adversaries have already considered your argument and you are not "giving anything away." As we all know, the true smoking gun is a rare commodity indeed.

A skilled mediator is also able to provide an objective opinion as to the impact of such information on a jury should the case go to trial. By virtue of the mediator's neutral position, the evaluation of the facts and circumstances of the case are more realistically and less emotionally assessed. Only by having all the relevant facts and arguments can the mediator make the most effective case.

Trusting that your mediator has the knowledge and skill to use the information that you have provided to them when and as necessary underscores the importance of selecting the right mediator.

Going to Mediation When Success Seems Unlikely

As one plaintiff's attorney put it to me when agreeing to mediate a difficult case, "No one will ever force me to settle a case. I will never agree to settle unless I believe that I am getting my client a fair and reasonable settlement." When the parties' evaluation of the case, pre-mediation, is significantly different, a mediation may seem like a waste of time and money. However, this is not so.

Even when a mediation is not immediately successful, settlement of the case often happens afterwards as parties and their clients have time to reflect on the mediation discussions. Rejected arguments may gather greater weight, recommendations made by the mediator may become more reasonable, and the prospect of continuing the litigation more daunting.

During good-faith mediation, parties disclose demands and offers that reflect actual risk, argue for positions firmly held, and disclose information that may justify reevaluation of prior positions. When skillfully handled, mediation will reveal the contours of the case and the limits of the parties. When skillfully handled, mediators will use this information to bring the sides to the point where settlement will happen. Trusting the mediator and trusting the process are essential.

Ideally, mediation provides early resolution, lower costs and clarification of the case to each of the sides participating, even if not immediately successful. In short, to paraphrase William E. Gladstone, mediation provides justice expedited, which is justice delivered.

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