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Commercial mediation grows in 30 years

This year marks the 30th anniversary of JAMS (previously, EnDispute) in Chicago. Complex commercial mediation matured significantly in those three decades. What have we learned and how will commercial mediation impact the practice of law?

Here's what have we learned:

There is no "best way" to mediate. Like transactional counsel and trial lawyers, experienced mediators use a variety of personal styles. While there is no one best way, we learned procedural options that substantially affect the quality of the process.

When to mediate. Key research 30 years ago indicated 5 to 7 percent of Illinois cases went to trial with a seven-year state court backlog. Mediation and arbitration were alternatives to trial. Today, only about 1 percent reach verdict. Arbitration became more common, often preceded by mediation. Upon impasse, the choice now is not as much whether to mediate, but when, because it is a near certainty that the case will settle at some point.

The answer to "when" is simple and occurs much earlier. If parties know enough to negotiate a final resolution on their own, enough is known to mediate. If more investigation becomes necessary, the process is suspended until such information is obtained.

Mediator selection demands serious due diligence. Choosing a mediator is like choosing any critical expert, except that you have to agree with the other side(s). If you choose badly, you have a dissatisfied client. While nonbinding, the process needs to be geared to work the first time.

One concern we hear frequently: "If the opposition likes a mediator, that's bad for me." This is too simplistic. Assuming extensive experience, seek out references and secure objective information. Indeed, being known by the other side may be helpful when the mediator challenges their position.

There is often consensus as to who is effective. Caveats: 1) you have the right to know the mediator's experience with other parties and counsel (too much familiarity can affect objectivity) and 2) one limited reference should not end your inquiry (anyone who is good creates waves).

The second issue involves "subject matter/process" experience. You should get both. Balancing the two, consider that while subject knowledge is certainly helpful, it may narrow focus to a perceived "right" answer. Ultimately, it is substantial mediation experience that brings creativity, perspective and closure to the most difficult cases. Like trying cases and closing deals, the more you do, the better you get.

Design a premediation process. Meetings before the first joint session significantly enhance both the probability and quality of the resolution with two critical steps:

1) The initial telephone conference/meeting with a precirculated agenda to identify and agree upon key logistical elements, including:

a. Potential necessary/limited discovery to be completed before the mediation;

b. Settlement discussions, potential of business as part of settlement (affects who should attend);

c. Mediation participants, particularly those with settlement authority;

d. Documents, factual/legal arguments to be exchanged/sent to the mediator (surprise is not helpful);

e. Information provided for mediator's eyes only;

2) A separate meeting with each party before the joint session to identify nonlegal, nonfactual barriers to settlement and final process design issues, including:

a. Participants' background/role in the case (venting opportunity here rather than with all present);

b. Matters not in the parties' mediation statements that affect the mediation; and

c. Scope of joint session/mediator's role.

The impact of commercial mediation on the practice of law:

BY BILL HARTGERING

Bill Hartgering established EnDispute's Chicago office in 1982, which merged with JAMS in 1994. His practice includes the resolution of more than 1,000 complex matters arising in at least 45 states and foreign countries, and he has trained dispute resolution practitioners, law firms and governments in the U.S., Thailand, Hong Kong, Lithuania and Latvia.

Culture change. While the percentage of cases filed and actually tried continues to decrease, our litigation culture still assumes an eventual trial. This is not a criticism. Counsel may not be able to identify early which case will have to "go the distance." Mediation provides an opportunity to better evaluate the necessity for trial while maintaining control over the outcome.

Mediated deals, joint ventures and salary disputes. Commercial mediation will expand further into nontraditional areas involving primarily transactional lawyers and business clients in a variety of deals, joint ventures and salary negotiations that are near or reach impasse.

The distinction under these circumstances is that the objective is to help parties reach a business deal where the alternative is abandonment of the actual or potential business relationship (rather than adjudication), particularly useful when neither party really wants to end the relationship.

Legislation involving mandatory mediation. Experience where states have adopted mandatory mediation confirms that the critical question regarding the significant expansion of mediation in Illinois is up to the courts and the legislature. Will Illinois follow Indiana, Florida, Texas, California and other states where most cases must be mediated before trial?

The case-by-case experience of judicial referral in the Cook County Circuit Court and other courts around the state has begun to acquaint counsel with the benefits of court-referenced mediation. Further, there are existing proposals to provide counsel an opportunity to opt out or delay the referral in the appropriate case.

Mediation has become a part of the legal culture in those jurisdictions that have adopted mandatory mediation before trial. Roughly the same numbers of cases are being tried, they are simply tried earlier. Courts and counsel in those jurisdictions appear pleased with the results of that policy.

Counsel effectively resolves most commercial disputes without a mediator or the court. Sometimes, however, negotiations fail. Thirty years ago, settlement after impasse was limited to an unassisted process that too often devolved into negotiations crammed into a "who blinks first" process on the eve of trial. Defining the "best" settlement was limited to "well, no one is happy."

After an effective mediation, while not necessarily "happy," lawyers and clients are more satisfied. The process provides an opportunity to explore business solutions or other nonmonetary options and better understand the settlement after a chance to be heard, speak to and hear directly from the other side as well as receive neutral input. Parties make their own deal rather than have it imposed upon them by a stranger or strangers and do so at a far lower level of cost and stress.