A Case for Mediation

National Association of Certified Valuators and Analysts

What do You Have to Lose?

Since only a fraction of the cases filed go to trial, it seems prudent to explore settlement sooner rather than later. It is not rocket science, and statistics support the claim that the earlier a case settles the lower the expense to achieve that settlement. If this is not enough to encourage someone to consider mediation sooner rather than later, then perhaps recent court statistics will. Although the trend over the past few years has shown a decline in the total number of filings, the cost and length of time to resolution has increased. Whether the cases are more complex, e-discovery is running costs up, or other factors are at play, it is more expensive and it does take longer to get a resolution. Even if there is a "win" at trial, the appeal process averages some two to three years, and in some jurisdictions even longer. This article makes the case for mediation in the current legal environment.

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Benefits of Mediation

Some say that attorneys get so involved in process, discovery, motions, and briefing that they lose sight of the client

needs. What is important to the client and what influences their decision to continue litigation? There are as many decision factors as there are client personalities and case types. The primary factors are: economic (cover expenses or offset future losses); vindication (I was right and you were wrong); finality (is it over); confidentiality (prevent copycat cases or protect shareholders); and control over the outcome.

Economics: What is the litigation going to cost? How can award amounts be controlled? Will the award cover expenses? In personal injury or wrongful death cases, the client may need medical expenses covered, or compensation for lost wages. Clients need to have conversations that address these issues. Mediation is an appropriate forum for identifying financial issues, and using integrative solutions, like structured settlements. Of course, early participation in mediation also reduces the chance of costly discovery abuses, especially those associated with e-discovery.

Vindication: Some clients are mad and want a "pound of flesh." This decision-making factor typically stems from a person feeling that they have been wronged. The entire situation is the other person's fault, and they want that person to suffer as they have suffered. Mediation often helps resolve these cases, because the discussions are confidential, and the "wrong doer" can admit fault and offer a heart-felt apology. No one is going to admit liability or wrongdoing during a trial. It is amazing how admitting "I was wrong." or "it was all my fault." helps bring about settlements during mediation.

Finality: As mentioned previously, even if a person "wins" at trial, there is a very high probability that the decision will be appealed. Not only does an appeal cost more money, the timeline becomes even longer. With mediation, the probability of having all the terms of the settlement completed is nearly 100 percent. Individuals involved in litigation often become stressed by the process, and stress over extended periods can have significant health consequences. Heart disease, stroke, diabetes, and even cancer can result from stress. When cases resolve in mediation, they are over—finished.

Confidentiality: A cornerstone of mediation is confidentiality, and for this reason, people are more willing to settle. Not only are the negotiations confidential, but also the parties can agree to keep the terms of the settlement confidential. This cannot only reduce so-called "copycat" litigation, but also may prevent negative impact on a corporate image or its stock values. Cases involving intellectual property, mergers or acquisitions, and similar issues are more likely to settle during mediation, if for no other reason than it is confidential.

Control: Most people prefer to make decisions for themselves, rather than being told what to do, so mediation is again the ideal forum for resolving differences. The disputants can design a settlement that meets their individual needs and the unique aspects of their case. Courts are not in the business of designing creative solutions. They can tell the disputants to do something or stop doing something. They can tell people to pay something or they do not have to pay anything. Creative settlements are far more likely when the disputants design the terms of the settlement. Policies and procedures may be modified, perhaps the plaintiff becomes a consultant to the defendant, so similar situations do not arise in the future. Buildings and parks have been named after one of the parties. Former partners have started working together again. The list of creative possibilities is unlimited. Remember, mediation is the parties' last opportunity to control the outcome.

Additional Thoughts

If a client is offered the option of settling today for a certain amount, verses the option of a potential amount later, most people will take the sure thing now, as opposed to some possibility later. While mediating in Florida for some three years, this author personally experienced early settlements on a grand scale. The state mandates mediation, which means that essentially every civil case must try mediation, and early in the process. Mediation is so ingrained that pre-suit mediation is now the norm. Mediation held prior to filing produces settlement rates of over 90 percent. Even when the small percentage of cases are filed, they must mediate within 120 days of filing, and the results from those mediations are greater than 85 percent.

Even with all the evidence, some still not only resist mediation, but also avoid even mentioning it to the other side. The primary reason given for not suggesting mediation is that “it is a sign of weakness.” Providing guidance to a client is not a sign of weakness—not to mention the ethical obligation of informing ones client of alternatives to litigation. Suffice it to say that those attorneys, who advise their clients to try mediation, demonstrate the highest standards of professionalism and wise counsel.

Perhaps the real question that needs to be asked is, “What do you have to lose?” Seriously exploring settlement and participating in mediating early in the process, improves settlement rates; litigation costs are controlled and even reduced. In addition, because of the confidential nature of the process, terms of the settlement are more creative and therefore more likely to be fulfilled. This, in turn, means that the case is closed and the parties can move forward with less stress. Of course, there is that one important benefit, client satisfaction rates improve!

Nancy Neal Yeend is an experienced, nationally recognized dispute management strategist and mediator handling civil cases for nearly 30 years. She has served on trial and appellate mediation panels, and has served as faculty at the National Judicial College for over twenty years. She co-founded Silicon Valley Mediation Group in Los Altos, California, and has recently opened a new office in Portland, Oregon: TES, The End Strategy.
Ms. Yeend can be reached at (503) 481-2986 or by e-mail to nancy@TESresults.com.