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When Is Mediation a Good Choice for Your Client?

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As general practice lawyers, we employ a variety of professional skills in helping our clients to handle their legal challenges. Among other things, we research, interpret, write, negotiate, argue and advise. It is safe to say most of us have grown comfortable with this skill set. We operate in a sphere of influence, the foundation of which is legal authority from many sources, including federal and state statutes, municipal ordinances, regulations, bylaws and years of judicial precedent.

Litigation is essentially our ultimate tool, offering clients a path, albeit an uncertain one, to achieve their objectives. Your engagement letter most likely covers the scope of work you are undertaking for your client and that may or may not include the possibility of litigation. Some - times the prospect of litigation simply looms and decisions are made to avoid litigation. If our client is sued, we take the first steps responsive to the litigation process to defend them and their interests.

Conversely, when we believe we have exhausted all settlement possibilities, we bring suit on behalf of our clients. When we submit to the structured protocols of litigation in the courts, process thereafter is essentially predetermined and controlled by the rules of procedure and the calendars of the courts. The only near certainty is that a substantial investment of time, money and patience will be required to see a case through litigation and post trial disposition. Understanding this, litigation has the capacity to incite fear and dread in reasonable people.

Can you get your clients what they seek without the time, money and stress associated with litigation?

In its very broadest sense Alternative Dispute Resolution (ADR) is an “alternative to problem solving by power, the courts, violence or any other form in which one party’s inherent advantages rule out a fair settlement.”[1] ADR has evolved in the legal field to offer non-litigation alternatives to disputing parties. Generally speaking, ADR refers to one of many methodologies during which a neutral person helps parties resolve their case without a trial. The methodologies most often used include negotiation, arbitration and mediation, processes that have been employed in various forms since the time of ancient civilizations.

Commercial arbitration was utilized in the early Dutch and British colonial periods in New York City. Born of distrust for courts and lawyers, the colonists set up their own informal arbitrations to resolve community conflicts. It wasn’t until the 20th century that ADR was advanced as a litigation alternative.[2] In 1920, Congress passed the Federal Arbitration Act, one of the most important aspects of which was to give courts the power to enforce arbitration awards. In the ensuing decade, over a dozen states passed arbitration laws. In 1926, the American Arbitration Association (AAA) was formed to provide guidance to arbitrators and parties and to this day is the organization that promotes business arbitration in the US.[3]

Most lawyers engage in some forms of negotiation. Many have had experience with arbitration, a quasi-judicial proceeding presided over by a neutral third party who acts as finder of fact and ruler of law, and who, like a judge, issues a decision that may or may not be binding. As lawyers, we often have input into the selection of an arbitrator. The process can be attractive as it promises cost and time savings, as well as other efficiencies. It may be faster, less stressful and more private than court proceedings. It is common for many contracts to include arbitration clauses designating it as the agreed upon conflict resolution mechanism.

Like arbitration, mediation engages a neutral person who facilitates negotiations between or among parties to a dispute. Unlike arbitration, however, mediation is a voluntary and more flexible process. A skilled mediator can manage the process such that parties move away from entrenched positions and become able to articulate their underlying interests, needs and priorities, and eventually, move towards a jointly acceptable resolution. While there are many styles of mediation, "facilitative" and "evaluative" are perhaps the two most utilized styles. A skilled mediator can manage the process such that parties move away from entrenched positions and become able to articulate their underlying interests, needs and priorities, and eventually, move towards a jointly acceptable resolution.

Generally speaking, facilitative mediators do not offer advice, recommendations or opinions to the parties. Evaluative mediators on the other hand, may intervene, point out strengths and weaknesses of the parties' arguments, make recommendations and provide opinions on what might happen should the dispute go back to court. Unlike an arbitrator, a mediator may never reach the substantive merits of the case. S/he guides the process however enabling parties themselves (either with or without counsel) to craft their own resolutions. Mediation can be very hard work for the parties and mediator but it has the capacity to achieve disputing parties' goals with a comparatively small investment of time and money. Some lawyers believe mediation is the same thing as case settlement. This is not true, although case settlement often results from successful mediation.

Like arbitration, the origins of mediation in this country may be found in the history of labor law. In the late 1890s, mediation was instituted for collective bargaining disputes "as a tool to avoid unrest, strikes and the resultant economic disruption."[4] In 1913, the US Department of Labor appointed a panel called the "Commissioners of Conciliation" to deal with labor management issues. These commissioners became the US Conciliation Service in 1917 when Congress appropriated funds for it under the Department of Labor. In 1926, the Railway Labor Act (RLA) rejected arbitration in favor of mediation for resolution of collective bargaining disputes. In 1934, Congress created the National Mediation Board to administer the RLA and two years later extended the RLA to cover the airline industry. In 1947, that entity became the Federal Mediation and Conciliation Services (FMCS), operative today, to facilitate employment negotiations.[5]

Mediation can be started at any stage of a case, whether before or during trial or throughout the appellate process. In all states, parties can seek mediation and choose any mediator before a case is filed in court.[6] For example, in California state courts, mediation is encouraged at the outset of a case by a procedural requirement found in a court rule requiring plaintiffs to serve a copy of its court ADR package upon each defendant, along with the complaint.[7] Local civil rule 4 requires parties to utilize some form of ADR prior to trial in all non-criminal and non-juvenile cases.[8] In most states, parties retain the freedom to choose mediation any time after filing a complaint.[9]

If parties choose arbitration for the security of a proceeding that feels quasi-judicial and retains an aura of fairness and impartiality, under what circumstances might parties choose mediation? First, look at your client's situation through a conflict resolution lens that is broader than the courts. Rise above the details and foundations of established legal positions and attempt to discern what other issues and dynamics may be present in the dispute. While lawyers are not social scientists, we are all familiar with the strong opinions and feelings of our clients that often have no outlet in litigation. Evaluate these dynamics to help inform your own decision as to whether mediation may serve your client's interests. What is most important to your client? How can you help him/her achieve that?

The following questions may be helpful when considering mediation on behalf of your clients:
1. Are you willing to work from an exploration of ultimate interests rather than entrenched positions?
2. Are you confident of your client's ability to articulate those interests?
3. Can you establish a role for yourself that supports this process?
4. Are you willing to accept that there is no single truthful or right outcome?

If you have considered these questions and respond mostly in the affirmative, you may wish to speak to a mediator about how he/she may be able to help you and your clients.

Although many states recommend qualifications for mediators, no state has requirements for the practice of mediation. In any state, a mediator can practice in private settings without being licensed, certified, or listed.[10] RI Gen. Laws § 9-19- 44, which governs mediator confidentiality, requires only that mediators have a minimum of 30 hours of mediation training.[11] Mediators need not be attorneys, although many are. Only in the District of Columbia is a mediator required to be an attorney to mediate civil court cases other than family disputes.[12] You can certainly find a mediator who has some knowledge and expertise in the substantive area of your client's dispute, although subject matter expertise is not a requirement for mediation to be a success. Mediation is being utilized in many forums in Rhode Island from the municipal through the Supreme Courts. Many, though not all, of these practitioners are current and former trial lawyers and former judges. People with backgrounds in diverse fields, however, including psychology, finance, education and art are also doing excellent mediation work in RI. Locally, the Center for Mediation and Collaboration Rhode Island (cmcri.org) and the Rhode Island Mediators Association (rimediators.org) can help you to locate a capable mediator. Currently, the Rhode Island Bar Association does not have a section for practitioners of ADR, however the American Bar Association does offer a section membership for ADR practitioners. Membership includes many resources for mediators, including a list of members, a monthly magazine, seminars, and a useful library of webinars addressing issues of theory and practice. The Judicial Arbitration and Mediation Services (JAMS), founded in 1979, is a resource for all those seeking neutral ADR practitioners. It is the largest private provider of ADR services, including mediation and arbitration.

Despite its efficiencies, there are reasons mediation may not be chosen as a dispute resolution mechanism. Significantly, there is sometimes a financial disincentive for lawyers. Proceeding in mediation may deprive lawyers of fees they might otherwise be able to earn in the traditional litigation process. This conflict can be a significant impediment to the recommendation and selection of mediation as a litigation alternative.

A related problem for lawyers may be defining a role for yourself in mediation. Unlike judicial or even quasi-judicial proceedings, the mediation process does not prescribe an established role for counsel. Mediators determine the extent to which they want counsel involved. Any perceived

surrender of control can be problematic for many attorneys who see their role as zealous advocate eclipsed by the mediator. In my experience, however, mediators are eager to get counsel on board with their process and will work with counsel to establish procedures that allow attorneys to ultimately advise and assist their clients prior to any ultimate resolution.

If trust in a mediator is an issue for you or your client, consider that Bernard Mayer, a leader in the field on conflict resolution, believes that "mediators change the dynamic of the conflict in four ways:"[13]

"First, mediators bring a different structure to the conflict. People will present their cases differently in front of a third party and mediators usually set a structure for communication, giving each party time to talk.
Second, mediators bring their commitment, vision and humanity to the interaction. Mediators have faith in mediation as a form of conflict resolution and their optimism that an agreement can be made affects the process.
Third, mediators bring sets of skills. Since mediators deal with conflict daily, they learn skills such as reframing and analysis to identify issues and options. This often has a comforting effect on the parties involved.
Fourth, mediators bring sets of values and ethics. This helps set a foundation that hopefully brings trust, respect and comfort to the parties and the process."[14]

These four mediator dynamics have a unique capacity to move conflicts in the direction of resolution. Parties want an opportunity to be heard and validated. There is more to all of us than the elements of the dispute, and calling all of who we are into play is the untapped potential of mediation.[15] If a mediator successfully earns the parties' trust such that parties become vested in the process and honestly express their interests (rather than sticking to simply legally supported positions), they move to a unique and constructive place, where the swift and complete resolution of a conflict that satisfies their most important priorities, is possible.

END

NOTES

1 Jerome T. Barrett & Joseph P. Barrett. A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT, xiv (2004).

2 Michael McManus & Brianna Silverstein. "Brief History of Alternative Dispute Resolution in the United States." Cadmus 1.3, 101 (2011).

3 Id. at 105.

4 Id.

5 Id.

6 Mediation Training Institute International, State Requirements for Mediators. Eckerd College, 15 May 2016.

7 Cal. R. Ct. 3.221(c).

8 Cal. R. Ct. 4.

9 Mediation, supra.

10 Id.

11 RI GEN. LAWS 9-19-44.

12 Mediation, supra.

13 Bernard S. Mayer, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE. (2000).

14 Id.

15 Daniel Bowling & David A. Hoffman, BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (2003) citing Lois Gold, "Mediation and the Culture of Healing."

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