Is Mediation the "New Trial" and are Lawyer Advocates Ready?

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This article will discuss the changes and challenges for lawyers resulting from the increased use of mediation instead of trial to resolve lawsuits. The mediation process is flexible, dynamic, and offers advocates varying approaches and opportunities to resolve their clients' lawsuits, thus contributing to the continued decline of civil lawsuits.

Background

Mediation traces its origins back to Greek and Roman civilizations. However, it was not until the 1990s that mediation programs were introduced at the state and federal levels in Ohio. Gradually, private mediators began to assist lawyers in resolving their lawsuits. As part of this growth of mediation, legislation was enacted including the Uniform Mediation Act (UMA), effective in Ohio on October 29, 2005 as codified in Ohio Revised Code §§2710.01 to 2710.10. The UMA attempts to provide uniform laws governing mediations and recognizes the parties' rights to self-determination and participation at mediations. The UMA also provides protection from disclosure of mediator's communications and outlines the mediator's duties.

Decline in Trials

There has been a noticeable decline in the percentage of the cases resolved by trial, part of which is a result of the growth of mediation. A national study noted an 84% decrease in federal trials for the period 1962 to 2002, and a similar decline in state court trials.[1] Another study found that only about 3% of civil cases were resolved by trial.[2] Interestingly, there is also a growing preference for mediation rather than arbitration in resolving some lawsuits.[3] The preference for mediation is based on several advantages of mediation: the parties' abilities to control the mediation process resulting in a higher satisfaction rate among disputants and the perceived cost and time efficiencies of mediation. Moreover, in the commercial setting, mediation can better address the relationship issues between businesses and resolve disputes in a mutually acceptable fashion.

Also worth noting is a recent study by several professors at the Wharton School of Business in 2008 that found that there was a high incidence of decision-making errors by both plaintiffs and defendants in deciding whether to go to trial rather than settle litigation.[4] The study found that plaintiffs erred more than defendants in favoring trial over settlement, but that both sides erred less when attorneys involved in the cases had training and experience in mediation. Such results could lead one to question whether trial is a superior option to settlement and underscores the importance of dispute resolution training for attorneys.

Different Advocacy Skills for Mediation

Whether or not one agrees with this mediation trend to resolve disputes, it is clear that mediation has assumed a greater role in resolving lawsuits than trials and arbitrations. An advocate's role in resolving their client's lawsuit by mediation requires a greater use of negotiation and communication skills than the traditional trial lawyer advocacy skills. Simply stated, mediation involves a series of conversations among the parties, their lawyers, other third persons, and the mediator in an effort to reach a mutually beneficial settlement. A trial is a much more regimented procedure focusing on the respective lawyers presenting evidence and argument in an effort to persuade a neutral decision-maker, such as a judge or jury, and often results in a winner and a loser.

Trial lawyers need to reevaluate their litigation skills to assess whether they have the necessary skills to represent a client in mediation as effectively as in a trial. This assessment initially requires a lawyer to acknowledge that the mediation process involves a different set of communication and integrative negotiation skills than trial advocacy. These different skills are readily apparent when comparing the mediation process to trial procedure. Although most trial lawyers have benefited from attendance at intense trial advocacy skills seminars, relatively few trial lawyers have attended comparable mediation advocacy skills workshops. Part of this disparity in attendance is due to the scarcity of such mediation advocacy programs as well as lawyers' failure to recognize their need to acquire these different skills. Unfortunately, too many lawyers believe mediation only involves the giving of an opening statement, staking out a settlement position, and having the mediator "do their job" in private caucus.

How to Improve Mediation Advocacy

The current state of mediation advocacy, in part, has prevented the maturation and development of mediation to its

full potential in resolving disputes. It is apparent that lawyers representing parties at mediation need to acquire advocacy skills pertinent to mediation. To be fair, many mediators would also benefit from additional training and experience in the mediation process. In that regard, the American Bar Association Section of Dispute Resolutions formed a task force on improving mediation quality, which issued its final report in 2008. The report makes numerous recommendations for mediators and mediation users, including the need for more education and training for users of the mediation process and mediators, and the importance of preparation for mediation by both the mediator and users. The ABA Task Force Final Report is available on the ABA website at www.abanet.org/dispute and is an excellent summary of the issues relevant to improving the quality of mediation.

Since mediation is informal and can be structured to address the needs and interests of the parties, training for mediation advocates needs to include a broad and diverse subject matter. An effective mediator advocate should assess their skills and knowledge in the areas of integrative negotiation, mediation (current law and process), communication (e.g. interpersonal, verbal and nonverbal, active and empathetic listening, face-saving), risk (aversion and analysis), decision-making, cognitive biases and errors, dealing with emotion, and conflict management, as well as ethical issues relevant to the mediation setting. By reviewing articles and studies on these and related subjects and attending appropriate training, mediation users will further improve their understanding of mediation.

The learning curve for mediation advocacy is no different from trial advocacy. The reality is that most advocates are just beginning the journey leading to skilled mediation advocacy. I concur with the recommendations of the ABA Task Force about the need for training for mediation advocates but would also strongly encourage mediation advocates to be proactive in their mediations. For example, mediation advocates should talk with the mediator before the mediation to customize the mediation process to address their specific issues of the case. Furthermore, advocates should strive to deliver their message as a series of conversations with the participants and not as a trial argument to a jury. In addition, mediation advocates should strive for active participation by both the client and the opposing party at the mediation because such participation will usually benefit the mediation. These approaches are just a few examples of how a mediation advocate can affect the quality and effectiveness of the mediation.

Conclusion

By acquiring and elevating their mediation advocacy skills to the same level as their trial advocacy skills, lawyers will be able to provide the mediation advocacy demanded by their clients and the current market. In fact, skilled mediation advocates who can efficiently settle lawsuits for their clients should be more marketable based on the continuing client pressures on billable hours and the development of new billing practices including flat fees, benchmark arrangements, and success fees for positive outcomes. ?

[1] Marc Galanter, The Vanishing Trial; An Examination of Trials and Related Matters in Federal and State Courts, 1. Journal of Emperical Legal Studies, 459 (2004).

[2] Langton and Cohen, Civil Justice Survey of State Courts (2005), Civil Bench and Jury Trials in State Courts.

[3] Stephen N. Subrin, A Traditionalist Looks at Mediation and It's Here to Stay and Much Better Than I Thought, 3 NEV. L.J. 196 (2002-2003).

[4] Randall L. Kiser, Martin Asher, and Blakley McShane; Let's Not Make a Deal; An Empirical Study of Decision-making and Unsuccessful Settlement Settlement Negotiation; Journal of Empirical Studies, Volume 5 Issue 3, 551-591 September 2008.