

## Where Mediation Fits In a Litigation Practice

Dispute Resolution

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As increasing numbers of individuals and institutional clients become familiar with alternative dispute resolution as a way of resolving an ever-wider array of disputes outside of the traditional adversary process, lawyers throughout New Jersey are finding themselves fielding tougher questions from prospective clients regarding their commitment to arbitration, mediation, summary jury trials, mini-trials and a variety of other ADR processes. Of these, the one that has witnessed the most explosive growth and sparked the greatest interest over the past decade is mediation.

Unlike arbitration (which is a process in which each side present its case at a hearing to a third-party neutral or panel of neutrals), mediation is a voluntary, confidential, nonadversarial process in which the parties submit their dispute to an impartial person – the mediator – who acts as a facilitator of communication between the parties.

By exploring with the parties a variety of options for maximizing their interests, the mediator is able to assist them in achieving a comprehensive and mutually acceptable resolution of their dispute. Although the mediator sets the tone and controls the agenda of the mediation, and often suggests to the parties creative ways of resolving their dispute, no determination is made by the mediator and no settlement terms are imposed upon the parties.

Instead, the parties themselves are encouraged to become active participants in determining both the scope and the

substance of their settlement. Thus, mediation is a far less formal process for resolving disputes than either litigation or arbitration, and a considerably more interactive approach from the parties' point of view.

Contrary to popular belief, mediation does not replace the need for independent counsel. In fact, many commercial and employment disputes that find their way to mediation do so after counsel already have been consulted by the parties and after the issue has been considered.

In certain commercial and employment disputes, counsel to the prospective parties actively participate in presenting the parties' respective positions (whether orally or in writing) to the mediator, with the parties typically present.

Even in matrimonial disputes, which are far more likely than other types to wind up in mediation prior to the engagement of independent, the mediating parties are encouraged to consult with independent counsel following the commencement of mediation.

Independent counsel in matrimonial mediations advise clients with respect to their legal right and responsibilities, and, at the conclusion of the mediation, assist the parties in reducing the memorandum of understanding prepared by the mediator (which embodies the terms and conditions agreed to by the parties) to a formal settlement agreement to be signed by the parties and filed with the court.

Thus, the concern that mediation will obviate the need for independent counsel is unfounded. Rather, mediation calls into practice new skills and new responsibilities as attorneys try to assist their clients both during and after the mediation process.

Finally, although the parties stand to realize greater financial savings the earlier mediation is attempted, mediation can be a helpful time-saving and cost-saving toll at any point in the dispute.

### **Why Mediation Works**

Research indicates that parties who submit their disputes to mediation tend to report far greater satisfaction with both the process and the end result of mediation than is the case with litigation. (1) The reasons for this are obvious, regardless of the dispute's subject matter.

Through mediation, the parties are able to resolve their dispute in a fraction of the time and at a fraction of the cost of protracted litigation. Perhaps more important, the parties experience a greater sense of control over the outcome of their dispute and the shaping of their own destinies, and therefore are less likely to contest the result that they, themselves, fashioned than one foisted upon them by a judge, jury, arbitrator or other trier of fact in an adversarial proceeding.

These factors account for the extremely low incidence of post-settlement motion practice following mediated disputes, compared with post-judgment motion practice following litigated proceedings. (2)

The disputing parties are not the only ones who stand to benefit substantially from the practice of mediation. Among those who also benefit are attorneys who

recommend mediation to their clients or elect to represent their clients through the mediation process. Those attorneys benefit by cultivating a reputation among clients for being open-minded, practical, cost-sensitive, reasonable and committed to saving their corporate and individual clients substantial time, money, energy and adverse publicity.

The bench and the public also stand to benefit from having disputes settled early through mediation, because this alternative process eases the institutional and societal burdens wreaked by overcrowded court dockets and skyrocketing litigation costs.

In fact, newly promulgated Rule 1:40-4 of the New Jersey Court Rules (which provide that "the court may require parties to attend a mediation session at any time following the filing of a complaint"), Rule 1:40-5 (mandating that all matrimonial motions involving genuine and substantial custody and visitation issues undergo mediation) and Rule 1:40-9 (permitting judges to refer matters to private mediation providers or to another non-court-administered dispute resolution program) together can have a profoundly positive effect.

Although mediation is not a panacea for all disputes, even in those instances in which mediation does not result in a prompt and comprehensive settlement, the process can narrow the disputed issues.

That benefits the parties financially and in other ways and, by extension, benefits the bench, the bar and society as a whole. Accordingly, there is little to lose and everything to gain from attempting mediation.

## Where Mediation Can Succeed

Each dispute is different in its substance, timing, parties, interpersonal dynamics, and each suitability for mediation should be evaluated independently based on all of the factors attendant to it.

Notwithstanding the above, disagreements involving one or more of the following factors are more likely to be good candidates for mediation:

- Situation in which the parties are prepared to temporarily set aside their differences in order to work together, with a skilled mediator, to achieve the most mutually beneficial and satisfying resolution possible under the circumstances
- Cases in which mediation is attempted earlier, rather than later, in the dispute resolution process (even though mediation can be helpful at any stage of a dispute).
- Instances in which the cost of litigation is likely to be prohibitive or higher than the disputants expect.
- Situations likely to entail a significant time commitment on the part of the disputant or their counsel if litigated.
- Cases in which the parties to a dispute either want or need to continue interacting with one another, whether a personal capacity (such as with divorcing parents) or in a business or professional capacity (such as with corporations and their subsidiaries, retailers and their wholesalers, merchants and consumers, or employers and their employees, all of whom stand to benefit greatly –financially and other wise – from maintaining a positive

working relationship following the resolution of the dispute).

- Instances in which it is a priority for one or more of the parties to resolve the dispute in a confidential setting, with a minimum of adverse or unwanted publicity.

In order to keep pace with the ever-growing demand for mediation in New Jersey, several non-profit organizations now make available to the public information on the mediation process, as well as on referral sources.

One such organization is the New Jersey Association of Professional Mediators (800-981-4800), whose objectives include advancing the professional practice of mediation and the training of qualified mediators throughout the state; educating the public, the bench and the bar on mediation practices and developments in the field; and making available, free of charge, lists of private professional mediators throughout New Jersey who have been accredited by the association.

Another established information source is the American Arbitration Association, at the telephone number (908) 560-9560. In addition, there now exists a proliferation of for-profit mediation services, a number of which use retired judges to serve as mediators.

Also indicative of the increasing demand for (and supply of) mediators statewide is the expanded press coverage of developments in the area of mediation. Rarely a week passes without a legal or lay periodical carrying an article or column pertaining to mediation and ADR.

These efforts and others underscore the extent to which mediation has come to be recognized

as one of the most popular – and viable  
– alternatives to the traditional  
litigation process.

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### **Endnotes**

(1) Joan. B. Kelly, “Mediated and Adversarial Divorce: Respondents’ Perceptions of Their Processes and Outcomes,” *Mediation Quarterly*, No. 24 at 71 (1989)

A separate study, being funded by the National Science Foundation, titled “Group Value Verses Self-Interest Concerns in Fairness Judgments” calls for detailed surveys of divorcing couples both prior and subsequent to their divorce in order to gain further insights into the attitudes and beliefs available to them for resolving their disputes, and their perceptions of the benefits already enjoyed or yet to be obtained through mediation

(2) See Kelly in note 1.