



DR Currents

A Publication of the Dispute Resolution Section of the State Bar of Georgia Spring 2013

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FROM THE CHAIR

by Taylor Tapley Daly

The Dispute Resolution Section is off to a good start in 2013:

- Ray Chadwick will lead a CLE seminar in Augusta on May 3;
- Our second 2013 edition of the newsletter is before you, thanks to the great work of Bob Berlin, our new editor, and articles by our members;
- Section members met with attorneys from North Georgia Legal Services to understand their need for pro bono ADR assistance and to partner with them and local practitioners in their service area to provide pro bono ADR assistance where possible;
- A CLE to be lead by Hal Gray will be presented in Macon later in 2013;
- The section's annual Arbitration Seminar will be held at the Bar Center in Atlanta on Aug. 9. The seminar chairs are Hunter Hughes and Al Pearson.

ICLE will provide four "lunch and learn" programs for the section during 2013. If your local bar or local ADR group would like to sponsor such a program relevant to ADR issues, please let me know.

I am interested in hearing from members. While a satisfying profession, sometimes being an ADR professional is a lonely job. As chair of the section, my primary goal is to bring together ADR practitioners from across the state to support and expand the profession. I am interested in developing opportunities for members to share best practices and to mentor the newest generation of ADR professionals in our section. I would like to hear your ideas about how the section can expand those opportunities, as well as pro bono and community service projects provided by our membership.

I want to know how the section can help you. Please call me or email me at 404-322-6156 or taylor.daly@nelsonmullins.com. I look forward to hearing from you.



Taylor Tapley Daly is a partner of Nelson Mullins Riley & Scarborough LLP who practices in the areas of commercial litigation, product liability and dispute resolution. A registered mediator/arbitrator since 1994, Daly is a member of the commercial arbitration and mediation panels for the American Arbitration Association. Daly is a frequent speaker on ADR topics, and is active in pro bono. She serves on the Boards of the Atlanta Legal Aid Society and Georgia Appleseed Center for Law and Justice.

FROM THE EDITOR

by Bob Berlin

I have accepted the reins of this editorship from the very capable hands of Adam Sutton. Thank you, Adam, for the great job you did. Best wishes to you in your future endeavors.

So, the *DR Currents* is under new management. Allow me to introduce myself. My name is Bob Berlin and I've been a member of the State Bar of Georgia for 50 years! I have served as a municipal court judge for 25 years, and served in the Georgia House of Representatives. During my career, I've been a licensed pilot, a professional clown, and a marriage and family therapist. Currently, I'm an active neutral and trainer of neutrals. I've been mediating, arbitrating and performing neutral evaluations since the 1960s.

My intentions for the *DR Currents* are to broaden the scope of the newsletter to include articles on negotiation, mediation and arbitration and to introduce you to hybrid process (Med/Arb, Arb/Med, Silver Bullet Mediation, etc.) Because some of you use different processes, I want to make an effort to share contemporary points of view that speak to our section membership. I anticipate each issue to have relevant, related themes. This one will be weighted heavily towards mediation only due to time constraints in the publishing.

Let me hear from you through letters to the editor or whatever form you may choose. What are your thoughts, ideas and/or helpful hints? Additionally, what topics would you like to see in *DR Currents*? I invite full participation of the readership to help focus and direct me in providing relevant reading for the current practice and in formulating the practices of the future.

I look forward to hearing from you!



As president of The New Decision Management Associates, Inc., Robert A. "Bob" Berlin has primary responsibility for Mediation, Negotiation and Arbitration services as well as Lead Trainer. He has experience in handling in excess of 4,200 civil and family law mediations since 1968. He is a graduate of the Walter F. George School of Law, Mercer University, receiving the LLB (J.D.) and was a senior partner in the law firm of Berlin and Hodges, P.C., and was a municipal court judge and in the Georgia House of Representatives. He is an approved mediator for the U.S. Postal Service, EEOC and the FBI. He presently serves on the Advisory Committee of the Training & Credentialing Committee of the Georgia Commission on Dispute Resolution.

MEDIATOR LIABILITY CLAIMS: A SURVEY OF RECENT DEVELOPMENTS

by Robert A. Badgley, May 2013

Claims and lawsuits against mediators and other ADR professionals have become a commonplace. In most cases, the claims are baseless and they are ultimately defeated. Even so, defense costs can be considerable, and even staggering, and the distraction of defending a malpractice claim can work palpable wear on a mediator's business.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity – the kind of near-absolute immunity enjoyed by judges and arbitrators – as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, such as breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it must be repeated, even if mediator defendants ultimately escape liability, they can nevertheless incur significant legal defense bills. Further, where mediators are faced with disciplinary proceedings, the imposition of disciplinary sanctions can be costly in other ways, such as the mediator's reputation. And, of course, it requires time and often money to respond to the disciplinary charges.

The following survey of fairly recent claims should underscore the fact that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong. In broad terms, the majority of claims against mediators result from a party not understanding the mediation process (many claimants allege that the mediator was biased against him or her for the simple reason that the mediator was doing what mediators often do – pointing out the potential weaknesses in the party's case to open the party's eyes to the prospect of losing the case if it proceeds to trial), or from a mediator not making it clear at the outset that he or she is not giving any legal advice to the parties, or from a mediator not disclosing his or her prior relationship with the parties or their counsel.

Family Law

One area where the use of mediation continues to proliferate is family law. The emotionally charged context

of a divorce or a child custody battle produces situations in which, even where a mediator has seemingly done everything right and has taken necessary precautions to protect both parties, he or she is still open to claims.

Post-Mediation Advice

In April 2011, a mediator was sued in Tennessee for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an email, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by email that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save emails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

The wife sued the mediator for \$15 million, under theories of malpractice, breach of contract and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested in January 2011 as a result of the order of protection set in motion by the mediator.

Prior to filing the lawsuit, the wife had filed a grievance with the Tennessee Supreme Court Alternative Dispute Resolution Commission. The Commission gave the mediator a private reprimand. The mediator has filed a motion to strike from the civil complaint references to the ADR Commission proceedings.

In September 2011, the court granted the mediator's motion for summary judgment and dismissed the entire lawsuit. The court reasoned that, if the mediator's statements to the husband had been made in her role as mediator, then immunity applied to bar the claim. If, on the other hand, the statements were made outside the ambit of her role as mediator, then she owed no legal duty to the plaintiff. Either way, the court concluded, the case should be dismissed. The plaintiff appealed, and in June 2012 the appeal was dismissed. The defense of the lawsuit cost more than \$20,000. (2011)

Post-Mediation Murder

In California, a family mediator was sued for the death of a wife stabbed by her husband in the building in which the

mediation session occurred. The divorcing couple had met a week earlier at the mediator's office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator's office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors.

The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defense costs exceeded \$100,000. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

Faulty Settlement Agreement

A California mediator participated in the drafting of a marital separation agreement. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. In any event, the ex-husband was later audited by the IRS, and faces possible tax liability in connection with the deductibility of certain support payments made under the agreement. The ex-husband has threatened suit against the mediator. To date no lawsuit has been filed. (2010)

Commercial Law and Other Contexts

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

Defamation

In a Western state, a mediator has been sued for alleged defamation arising from a construction defect dispute he mediated in 2010. The plaintiff in the defamation suit was one of the lawyers participating in the underlying construction defect mediation.

It is alleged that the mediator berated this lawyer, calling him a "horrible lawyer" and commenting, unflatteringly, on the size of the lawyer's manhood. It is alleged that these comments were repeated by the mediator outside the confines of the mediation proceeding. At a social event shortly after the mediation, the wife of one of the other lawyers at the mediation said to the plaintiff: "You're the guy with the little *****!"

The plaintiff filed suit against the mediator, alleging defamation, false light, intentional infliction of emotional distress and so forth. In April 2013, the mediator filed a motion for summary judgment, seeking dismissal of all counts by reason of quasi-judicial immunity, privilege and the fact that the mediator's statements were opinions, not assertions of fact. The summary judgment motion is pending. (2012)

Subpoena for Deposition

In Ohio, a plaintiff sued her former business partner, and the case was settled by mediation. The mediation occurred in several sessions over a period of years. The plaintiff then filed a malpractice lawsuit against the law firm who had represented her in the underlying business dispute. The defendant law firm subpoenaed the mediation records of the mediator, and sought to take the mediator's deposition.



By way of further background, it appears that the plaintiff had several discussions with the mediator throughout the lengthy mediation process during which she expressed dissatisfaction with her lawyers. The plaintiff asked the mediator whether she had a viable malpractice claim against her lawyers, and whether the mediator could recommend another lawyer to replace her lawyers in the business dispute. The mediator apparently gave the plaintiff at least one name of a possible replacement counsel. Some of these discussions with the plaintiff occurred after the underlying business dispute was settled.

Through defense counsel appointed by the mediator's liability insurer, the mediator invoked mediation privilege as a basis to resist the subpoena. After an exchange with defense counsel in the malpractice suit, the mediator agreed to sit for a very brief deposition in which a very limited scope of questions would be allowed. The final disposition of the legal malpractice suit is not yet known, and to date neither party to that case has made any further demand that the mediator appear at trial.

This matter illustrates that mediators may gain so much trust and credibility that they become all-purpose sounding boards for the litigants who appear before them. This additional role comes with its own set of potential problems, and mediators should keep their roles straight when litigants confer with them outside the strict confines of the mediation setting. This matter also illustrates that mediators should ensure that their liability insurance policy protects them against a subpoena to produce files or give a deposition. Not all insurance policies will provide a defense to mere discovery demands, as opposed to lawsuits seeking damages. (2012)

Another Subpoena for Deposition

In the Midwest, a sex abuse victim's claim against an archdiocese was settled several years ago via mediation. The archdiocese later went into bankruptcy. The victim made a claim in the bankruptcy proceeding to reopen his claim against the archdiocese, arguing that the prior settlement had been procured through fraud and undue influence. The bankruptcy court initially ruled that the new claim could go forward. The archdiocese then subpoenaed the mediator, presumably to give a deposition to confirm that the mediated settlement had proceeded in good faith and without fraud or undue influence. The mediator, whose liability insurance provided coverage for discovery demands, hired defense counsel to resist the subpoena. Through counsel's efforts and those of the archdiocese's own counsel, the bankruptcy court reversed its prior decision and disallowed the new claim by the abuse victim, which had the effect of rendering the subpoena moot. Again, this matter illustrates the importance of having insurance coverage against more than just lawsuits seeking damages. It is not unusual for a party to seek the records

or testimony of a mediator after a settlement comes apart. Even though mediators usually defeat such subpoenas and demands, the attorney fees required to do so can be substantial. (2012)

Conspiracy and Bias

A commercial law mediation involved a dispute among the plaintiff company, another company who asserted cross-claims against the plaintiff and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The plaintiff left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute. The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-appointed mediator enjoys quasi-judicial (i.e., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and was again appealed. The dismissal of the suit was affirmed again, and the plaintiff filed a petition for writ of certiorari with the U.S. Supreme Court. The Supreme Court denied that cert petition in early 2013. Despite the existence of immunity in California for court-annexed mediators, this claim went on on for years and was very costly to defend (more than \$560,000). (2005)



Nondisclosure and Bias

A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The instant case settled at mediation for \$200,000. The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs. (2002)

Conclusion

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.



Robert A. Badgley graduated from the University of Chicago Law School in 1991 and is a partner with Locke Lord LLP in Chicago. Among other things, he represents Underwriters at Lloyd's of London in insurance coverage matters involving professional malpractice claims. Although many of the claims discussed herein are accessible as public records, the author has chosen not to provide specifics because many of these claims involve insureds of his clients and, as a courtesy to such insureds, the author would like to maintain a measure of discretion.

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APPARENT AUTHORITY REQUIREMENTS OF ATTORNEY NOT MET TO PERMIT ENFORCEMENT OF MEDIATION SETTLEMENT AGREEMENT

by John F. Allgood

In *Omni Builders Risk Inc. v Bennett*, A11A1025 (11/29/11), the plaintiff in a discrimination discharge case attended a mediation with her employer. The plaintiff claimed she had been discharged by her employer once she had become pregnant in violation of Title VII. Under the parties' employment contract a mediation was scheduled and attended by the plaintiff, the employer's president and attorneys for each side. During the mediation session the parties orally agreed to settle the claim for \$65,000 in damages with the employer paying the costs of the mediation in exchange for a release of all claims. While the parties were in separate rooms, the mediator prepared a settlement memorandum for all of the participants to sign which included a provision for \$2,000 in liquidated damages for breach of the settlement agreement and four signature lines.

When the written memorandum was presented, the plaintiff and her attorney signed the agreement but only the attorney for the employer signed the document. The defendant's president refused to sign and left the mediation. The plaintiff then sued the defendant, alleging among other things breach of an agreement and filed a motion to enforce the settlement agreement, which the trial court granted saying

the Settlement Memorandum, memorializing the terms of the oral agreement, is an enforceable written contract on its face. Based upon the theory of apparent authority [Omni] is bound by the signature of its attorney... Georgia law dictates that an agreement is enforceable against the client when an attorney of record has the apparent authority to enter into an agreement on behalf of his client.

On appeal the court said that an attorney has apparent authority to enter into a settlement agreement on behalf

of a client where the opposite party is unaware of any limitation on the attorney's authority. The court then pointed out that the principal for the employer attended the negotiation and refused to sign the document that had been prepared. The court concluded, "There was nothing in these circumstances indicating that Dillard's attorney had apparent authority to act for Dillard."

The court said apparent authority is only indicated when the principal's conduct leads a third party reasonably to believe the agent has authority to act for the principal. The court found no such manifestations by the conduct of the defendant in this instance.

The document expressly reflected that Dillard's signature was required, just as Bennett's signature was required. The evidence did not show that Dillard either intended to make Bennett believe that the attorney was authorized to act for him, or realized that his conduct was likely to create such belief.

[Note: The published decision also includes the footnote that the EEOC dismissed the charge after finding that the defendant did not have the required number of employees and was therefore not an "employer" for purposes of Title VII. There was no discussion of mediation confidentiality in the decision.]



John F. Allgood is of counsel with Ford & Harrison, LLP, in Atlanta. A graduate of the University of Georgia School of Law, he has served for more than 20 years as an independent neutral arbitrating cases in commercial, employment, construction and securities law areas. His practice includes mediation in the same areas, as well as, real estate and antitrust matters. Allgood has been selected for The Best Lawyers in America in the area of Alternative Dispute Resolution.

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AESOP'S CROW – A LESSON IN MEDIATING CREATIVELY

by J. Kevin Walters

Many of us who have become mediators participated in hundreds of mediated cases as attorneys prior to committing at least a portion of our practice to the field. We attended mediations as an advocate for our client not with the mindset of a neutral. However, the ability to observe the different techniques and styles of mediators allowed us to form an opinion as to which techniques were most effective. It is understandable that when we then begin to act as neutrals ourselves, we incorporate elements of the resolution techniques that we have observed and liked into our own work. A less recognized advantage of confidentiality in the mediation process is the ability to plagiarize without significant risk of being discovered by the author.

The field of ADR practice is exponentially growing and, as it grows, is becoming more competitive. It makes good sense from a business standpoint, as well as for professional development, that a mediator entering the field exercise their potential for creativity and develop methods of resolution that are unique to them but universally applicable. Branding is a valuable marketing concept that may, in the case of mediators, produce the added benefit of actually improving performance. The familiar recount of Aesop's fable of the crow and the pitcher and its lesson in ingenuity and creativity born of necessity is a useful illustration.

A crow perishing with thirst spies a pitcher and, hoping to find water therein, flies to it with great haste. However, he discovers to his dismay that the water in the pitcher is too low for him to reach. He attempts to upend the pitcher and thereby reach some water but the weight of the pitcher and his weakened condition prevent him from being able to

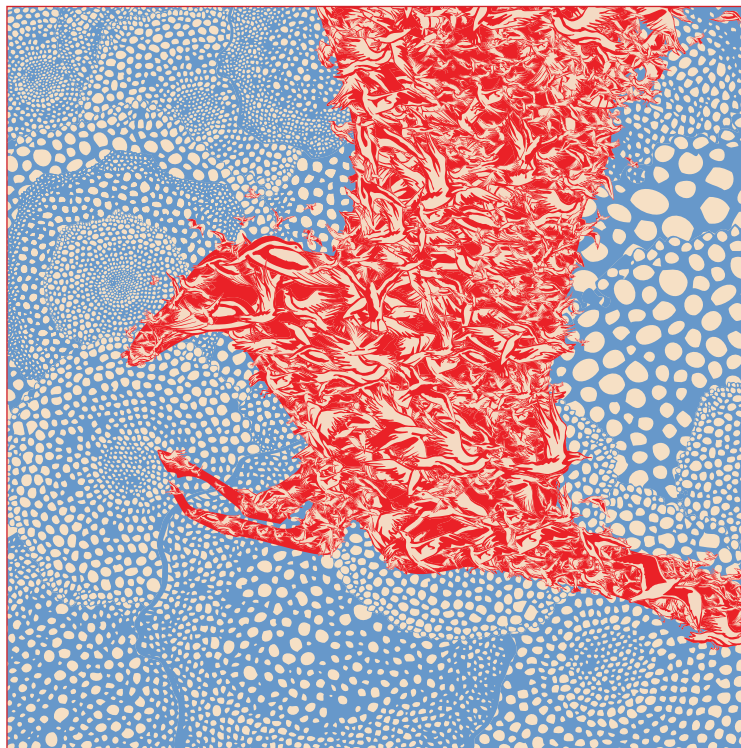
force the pitcher to its side. Languishing, the crow began to gather small pebbles and to drop them one by one into the pitcher. The stones caused the level of the water to rise high enough for him to drink and thus the crow's life was saved.

The ability to “think outside of the box” as a mediator can benefit not only the participating parties but also the success of your practice. Broad statements like this are rightfully annoying as it is something on which everyone can agree but is dismally lacking in instruction. The reality

is that each mediator will have to develop their own unique style. Real-life examples are instructive; however, the limited space available here makes it difficult to recount war stories that may offer ideas in “creative mediation.” Instead, allow me to present two brief suggestions for consideration.

Hear, recognize and record what the parties are not offering or demanding.

Often, there are obvious issues or elements in a dispute that are not discussed in caucus that should raise a question in your mind. Ask yourself, why is this elephant in the room being ignored? For example, in a contract dispute the name of an executory to the contract may not be mentioned or discussed openly. It may be that a glaring right or superior position is willfully not being demanded or exercised. Write down the unspoken issue and strategically place it in your cache of useful information. Ask probing questions in caucus to gain an understanding of what has occurred. You may be surprised to learn that the unspoken demand or condition is the true barrier to settlement, that the parties want it resolved, and that they want you to aid in that resolution.



Learn what possible resolutions the parties have discarded prior to mediation.

Learn if there were resolutions discussed or offered between the parties prior to litigation that have been discarded due to frustration. You may become aware of prior discussions revealed in an errant comment or blurted out by an angry party during a caucus. Relocation possibilities in a divorce action, prior agreement on payment in a contract dispute, etc. that were cast aside as other issues took precedence and drove the parties away from agreement on the most important issue. Discover and write down the prior terms and capitalize on that knowledge by asking appropriate questions. Investigate and consider reopening the discussion. Many times you may guide the parties to resolution on terms that they initially desired and fulfill the ethical requirement of self-determination.

There are many more avenues available that, with a small expenditure of time in the information gathering stage of mediation, will save a great deal of time, effort and expense in the long run. Explore your ability to recognize and identify nonstandard solutions. Speedy, efficient and inexpensive resolution of disputes can often be accomplished with creativity, one small step at a time.



J. Kevin Walters is a practicing attorney with Wallace Miller III, LLC, in Macon and is registered as both a general civil and domestic mediator. He is a graduate of Regent University Law School, Virginia Beach, Va. He is a member of the team of mediators at Miles Mediation in Atlanta. Walters is licensed to practice law in

Georgia, Texas and Indiana, and has litigated and mediated cases in all three of these jurisdictions. Walters is a scholarship recipient and graduate of the Trial Advocacy College held at the Indiana University School of Law (2004). He has served as a lecturer at the Indiana Wesleyan Graduate School of Business on the subject of the enforceability of non-compete agreements. His background and experience include medical malpractice, insurance law, complex business and contract litigation, aviation law, products liability, vehicular accidents, railroad and motor carrier accidents, corporate law and governance, international transactions, nonprofit entities and local government law. Walters is a barrister of the William A. Bootle American Inn of Court and has served as a panel attorney for the Aircraft Owners and Pilots Association for 13 years (2000-present).

Endnotes

- 1 Georgia Supreme Court ADR Rules, Appendix C, Chapter 1, Ethical Standards for Neutrals.
- 2 Ga. CONST. art.VI, §9.

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THE RELATIONSHIP BETWEEN MOTIONS AND SETTLEMENT

by Jerry Wood

An attorney in mediation says, “I don’t think we will be able to reach an agreement today because the court hasn’t ruled on my motion to _____.” In making this statement, the attorney assumes that there is a relationship between a pending motion and the likelihood that the case will settle in mediation. Is this true? Is there a relationship between pending motions in a case and the likelihood that the case will settle in mediation?

A recent empirical study,¹ affirms this assumption. The mediation settlement rate for cases with pending motions was only 19 percent, while the settlement rate for cases in which the court ruled on all motions before mediation was 81 percent. When no motions were filed before mediation, the settlement rate was 75 percent. Cases with motions pending at the time of mediation were 11 times less likely to settle in mediation.

The implication for judges is quite clear: rule on the pending motions before sending cases to mediation. Of course this is not always practicable, and sometimes the costs associated with disposing of motions are nearly as great as trying the case. But by ruling on pending motions, judges can increase the likelihood of their cases settling in mediation by 1,100 percent!

For mediators, the implications are a bit more subtle. While litigation and mediation are separate and distinct processes, this study points out that they are not mutually exclusive. The entire dynamic of a dispute changes when a party files a motion. The filing party now operates from a position of entitlement. If a response is filed, the opposing party also moves to a position of entitlement. From these respective positions, it will be difficult for the parties to realize a mutually beneficial resolution because they will attempt to claim value rather than create value in negotiations. Each party will be unwilling to consider a resolution that requires a perceived concession of valuable property rights and each is likely to adopt a competitive, rather than a collaborative or compromising, negotiation strategy.

If the court rules on the motions, the entitlement issues are put to rest, and the mediator can focus on helping the parties identify where their best interests lie in light

of the court’s ruling. The mediator will need to be prepared to deal with certain psychological transaction costs on both sides. For example, the prevailing party will want to negotiate from the perspective of having been justified, and the losing party will want to negotiate from the perspective of having been treated unfairly or perhaps from a need for vindication. The mediation process has proven to be very effective in dealing with these types of barriers, and it is certainly not surprising if mediation settlement rates jump when cases are in this position. Experienced mediators will help the parties reevaluate the risks involved in litigation, redefine case value, explore the new probabilities of trial outcomes, narrow the range of settlement negotiations and move the parties to a less competitive negotiation style.

If the court does not rule on the motions, the entitlement issue is still on the table. The intensity of the dispute escalates and positions harden as the parties dig in to defend their positions. The likelihood of reaching a mediated settlement drops precipitously before the mediation even begins, but by filing motions, the parties have at least identified in advance the major barriers to



negotiation, giving the mediator an opportunity to devise strategies to deal with them. Strategies for dealing with overly optimistic parties and for reality testing take high priority early in this type of mediation session, and resolution options that go beyond the four corners of the motions need to be explored to see whether there are mutually beneficial trade-offs to be made.

Even if motions were not filed before mediation, the mediator should find out whether either party plans to file motions in the event that the case does not settle in mediation. The difference in settlement rates between cases in the study in which no motions were filed, 75 percent, and cases in which the court ruled on all pending motions, 81 percent, indicates that some parties in the research sample were probably holding off on filing motions until after mediation. Too often motions are not filed before mediation, and one or both parties mediate from a hidden agenda that creates invisible barriers to settlement. The bargaining strategy employed by the party with a hidden agenda may be more competitive than the situation appears to warrant and may frustrate negotiations. An informed mediator can help bring the issues to the surface.

Mediators need to know whether motions were filed, whether the court ruled on any of them, and whether motions are anticipated to be filed. The strategy for mediation will be different for each situation. The likelihood for settlement

increases when the mediator recognizes the type of barriers to reaching resolution involved and employs appropriate strategies to mitigate them.

We can see that while litigation and mediation are separate and distinct processes, they are not mutually exclusive. As we continue to study this complex relationship, we will no doubt find ways to improve the effectiveness of each while respecting the integrity of both.



Jerry Wood is the director of the Fulton County Court's Office of Alternative Dispute Resolution. He formerly served as chief magistrate of Floyd County, where he designed and implemented the first court-connected mediation program in the Rome Judicial Circuit. He earned his B.A. from Shorter College, J.D. from Stetson University College of Law and Master of Judicial Studies from the University of Nevada, Reno. He was also awarded the Certificate of Judicial Skills in Dispute Resolution by the National Judicial College. Wood has presented numerous continuing education programs in the United States and Canada and has published several academic articles on mediation. Wood can be reached at jerry.wood@fultoncountyga.gov.

Endnotes

- 1 Naman L.J. Wood, *Can Courts Increase Mediation Settlement Rates? Of "Coase" They Can*, 26 *Ohio State Journal on Dispute Resolution*, Number 4, 683 (2011).

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PROGRESSION OF COURT-ANNEXED ADR: A PROGRAM ADMINISTRATOR'S POINT OF VIEW

by Linda McClain

I have had the privilege of serving as the administrator for the Cobb County Superior Court's ADR Program for the past 20 years. The Cobb County Local Rule of Court for Court-Annexed Mediation went into effect on Jan. 1, 1993. My, how things have changed! In the early stages of our program I was adamant that I deserved combat pay for coming to work most days. I heard complaints that mediation was a waste of time and money, that our office had no business telling lawyers how to manage their cases and my personal favorite was a local attorney that told me to quit sending him notices . . . he only threw them away.

Thankfully, over the years, ADR has become an accepted part of the practice of law. Law offices now call us *asking* for a case to be referred to the program and individuals are scheduling and/or completing mediation voluntarily because they feel it is the best thing to do for their clients. One of the most common statements I hear from new attorney/mediators is that they want to leave litigation behind and focus their practice on mediation and conflict resolution. I'm sure many of you reading this article never thought in your wildest dreams 20 years ago that you would be a member of the Dispute Resolution Section of the State Bar.

Although many things have changed, one has not: ADR programs are all different due to the fact that they are designed to meet the specific needs of the jurisdiction they are going to serve. This is wonderful and a curse at the same time. For example, our program, designed to meet the needs of Cobb County, may not necessarily work for the citizens and legal community of Valdosta in

Lowndes County. The judiciary of each particular area has the discretion to create a program that will meet the needs of their citizens, thus increasing the probability that the program will be a success. Unfortunately, for both attorneys and neutrals who work in a variety of different jurisdictions, you have to learn several different sets of rules within which to run your practice.

The best advice I can give to any individual, whether they are starting out in their legal practice or interested in becoming a neutral within the court system is: first, contact the Georgia Office of Dispute Resolution. This is the agency responsible for statewide guidelines and where all neutrals, working within any court program, must be registered. Second, contact the individual court programs within which you want to work. Speak with the program director and find out how that particular program is run. You will find variations on how cases are referred to ADR, whether it is voluntary or mandatory, a wide variety of payment structures as well as qualifications and training requirements that may be higher than those set out by the Georgia Office of Dispute Resolution.

I can't mention the progression of ADR without pointing out the obvious. Without judges who were willing to "take the heat" in the beginning, the field would not have developed to the stage it is today in the court system. Due to our progressive judges, dedicated attorneys and neutrals passionate about finding a better way to resolve disputes, I feel Georgia has become a leader in ADR. I would like to thank all of you for your dedication to the field and the promotion of alternative ways of settling disputes. I can only imagine what ADR will look like in another 20 years.

