

Mediation 120: Experts in Mediation

by Nancy Neal Yeend

The legal world is buzzing about the “vanishing trial,” and with good reason. Only about three percent of all civil lawsuits filed in state courts, and less than two percent in federal courts, ever get to trial, according to the Department of Justice. Many cases are disposed of through summary judgment or settled before trial, and a growing number are referred to some form of alternative dispute resolution (ADR). With this change in the legal landscape, does the need for experts decrease? The answer is a resounding “No.” The need for experts is growing.

The request for seasoned experts increases with the demand for ADR. With over 15 different ADR processes to choose from, mediation and arbitration are the most popular. Mediation is a facilitated negotiation, and is one of the few ADR processes where the parties retain control over the outcome. Whereas an arbitrator decides the issues, the mediator has no power to force a settlement. Mediation enjoys significant popularity for three reasons: (a) participants decide for themselves if they want to settle, and if so, under

what terms and conditions; (b) greater confidentiality; and (c) the expeditious nature of the process.

Each side of the dispute may retain its own expert, or—in the most economical scenario—both sides may retain one mutually agreed-upon expert.

Historically, experts were used more frequently in divorce and family mediations than in other types of civil matters. That situation is changing rapidly with the significant growth in employment and intellectual property mediation. In particular, intellectual property cases in the 21st century tend to involve extremely complex issues and mind-boggling technical elements, where experts can provide valuable background information and explain concepts.

Mediation is a relatively uncontested market for experts. According to a 2004 article in the *Harvard Business Review*, the real opportunities await those who “create blue oceans of uncontested market space.”¹ Authors of the article, Kim and Mauborgne, define red oceans as existing, highly competitive mar-

kets; and blue oceans as new, uncontested markets. Experts who provide services to the mediation market will benefit.

Hurdles Exist

Attorneys understand the benefits of using an expert in trial, but not all recognize the benefits of using an expert in mediation. Mediator Carol Webster Millie points out that “Failing to recognize the value of an expert, as an integral part of the mediation process, places the parties at a distinct disadvantage during negotiations.”² Overcoming the first hurdle of “We have never used an expert in mediation before” is straightforward. The reality is that including an expert can help expedite the mediation process, produce more creative solutions, and change the negotiation dynamics from fighting over who gets how much of the pie, to expanding the pie, and in some cases even adding more pies! Parties who enter a dispute with a win-lose perspective often find that mediation changes that perspective to win-win, which is what mediators mean by adding more pies.

1. W. Chan Kim and Renee Mauborgne, “Blue Ocean Strategy,” *Harvard Business Review*, October 2004.

2. Carol Webster Millie is a member of Silicon Valley Mediation Group in Los Altos, CA and mediates employment, partnership and technology issues.



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Considering that the expert can help facilitate a speedier resolution and “add more pies,” the second hurdle, paying the expert’s fee, does not appear to have merit either. In cases where an expert is brought into the mediation, especially when both sides agree on a single expert, the fee can be insignificant compared to the amount in dispute. Unlike other civil cases, divorce mediations consist of multiple sessions lasting for short periods of time. In those situations the expert may not be in attendance for all sessions. In other mediations the expert may be on telephone standby, and is “conferenced in” at the appropriate time. This avoids travel or other expenses associated with their participation. The average civil mediation, however, consists of a single session and lasts a day or less, so the number of hours an expert is in attendance is small. Even in large, complex cases lasting a few days, the cost of an expert can be more than offset by the savings derived from an earlier settlement, avoiding the significant cost of a trial.

Early Involvement

Experts can provide a value-added benefit when involved from the very beginning: the strategic planning session. Areas for developing the “blue

ocean” include providing insight during the selection of a mediator, helping to reduce tension between counsel and client, and fostering amicable negotiations.

SELECTING MEDIATORS: In many cases, the lawyer who hires an expert in the mediation process can only scrutinize the resumes of mediators who have been recommended by others, searching for the amount and type of mediation training they have taken, fees and expenses they charge, disclosures of any financial or professional relationships with any of the parties, and experience with similar types of cases. That may not be enough. Experts who have previous experience in litigation or dispute resolution, and have observed the way mediators work and perform, are in a position not only to recommend mediators who are familiar with the subject matter, but also to identify those whose mediation style would be most appropriate for the type of case and individuals involved.

CLIENTS: In those instances when attorneys over-promise the outcome, or clients fail to comprehend all the risks and caveats the lawyer outlines, the expert is invaluable. The ability to view the situation objectively, from a disinterested perspective, provides the realistic approach that enables the attorney and client to work together more effectively.

Some attorneys retain complete control over their clients, even preventing their clients from talking during the joint mediation session. Clients who are treated as potted plants frequently refuse to settle even when an exceptional offer is presented. Their resistance stems from feeling powerless. People who

have not shaped their own destiny regain control by saying “no” to decisions made by others.

Attorneys and their clients do not always use the same criteria when making decisions.³ Typically, attorneys use the law—what is the client entitled to under the law. The client’s criteria may be preserving the relationship with the former business partner, or minimizing their tax exposure, or adhering to an industry custom. Experts appreciate what is important to the client, and may be able to bring the client into the discussion, or at least impress upon the attorney the importance of the client’s needs, thus improving the likelihood of an amicable settlement.

NEGOTIATIONS: The expert’s role at trial is defined in very narrow terms: answer questions accurately and truthfully, and say no more. In mediation, where both sides to the dispute agree on a single expert, the role of the expert changes dramatically. In that scenario the expert works collaboratively with all the parties, providing information, clarifying complex issues, and generating ideas and settlement options during the mediation session. These contributions help the participants develop a creative and amicable solution to the dispute.

If each side retains its own expert, the mediation process may benefit exponentially. Since mediation is based on the premise of achieving conciliation rather than finding blame, experts are typically not used to make the case for one side or the other. Rather than having dueling experts, as is so often the case in trial, experts in mediation expand their previously restricted roles and provide significant value-added service to the negotiations.

3. For a more detailed discussion of section criteria and how to conduct a pre-mediation case assessment, refer to “Mediation 101: Understanding the Magic,” Nancy Neal Yeend, *The Value Examiner*, May/June, 2005.

The logic an expert uses to support a point is often persuasive when negotiating a settlement during mediation. Michael Kaplan, CPA, CVA, CFFA, points out that the “expert retained by one side in a partnership dispute may be the best person at the mediation table to explain the numbers provided by the other side’s expert.”⁴ Experts speak the same language, and can help the mediation participants negotiate a better settlement concerning very technical issues.

In addition, if the expert has participated in similar cases, he or she can share options generated in those cases that the present negotiators have not considered. Experts in mediation typically build on suggestions offered by others and facilitate better-negotiated outcomes. This consideration of alternatives, expanding the pie as it were, is what enables the parties to develop more creative solutions, tailored to meet their unique needs.

It is evident that involving an expert in the pre-mediation strategic planning phase, as well as including the expert in the face-to-face mediation session, brings many benefits to the client. The expert’s subject matter understanding, involvement with similar types of cases, and negotiation experience enable parties to develop creative, cost-effective solutions—thus conserving resources. At present, this mediation market is not crowded, and provides opportunity for experts to create their own “blue ocean.”

BENEFITS OF INCLUDING AN EXPERT IN MEDIATION

Experts provide a number of benefits that help insure a successful

outcome in mediation. The earlier you are brought into the mediation process as an expert, the greater the chances that you can help “expand the pie” and promote an amicable and expeditious settlement. You should be able to articulate for attorneys these benefits of bringing you in *early* as an advisor and consultant in the mediation.

It goes without saying that experts bring an objective viewpoint to a case in which the parties (and even some lawyers) might feel too passionately about their point of view. An expert, by definition, has experience in a particular field or with specific subject matter. They often have years of experience with trial, litigation, and dispute resolution; and provide that insight to the mediation negotiations. According to Michael Kaplan,⁴ “Involving the expert may help with the client’s understanding of the case and ultimate outcome.” Of the many benefits derived from involving experts in mediation, the three most important (frequently overlooked by attorneys) are: serving as an information resource, bringing objectivity to emotionally charged negotiations, and becoming a settlement catalyst.

Information Resource

First, with little or no formal discovery conducted prior to most mediations, an expert may provide pertinent information needed to negotiate a settlement. Information is the negotiation currency used during mediations. For example, in a construction case, the parties and counsel may focus on who is to blame for the stone veneer spalling from the exterior of a building. An expert may shift the focus from

blame to a way of correcting the situation, and for much less cost than the parties anticipated. Once the focus moves from blaming to solving, the parties are often more willing to participate in finding a “fix” rather than finding a scapegoat.

Objective Outsider

Second, clients are typically emotionally involved with their case. Although lawyers are presumed to be less emotionally involved, there are times when they are not. Long-standing professional disagreements or personality differences between opposing counsel may bubble to the surface during mediation, where the rules of conduct are looser than in court. Although the mediator will try to maintain a civil environment, the expert is typically emotionally detached and brings objectivity to his or her client’s side of the table. For example, in an employment case the employee may be extremely angry about being terminated. Based on previous dealings, the attorney for the company questions the integrity of the former employee’s counsel and the veracity of the claim. With this mix of personalities, emotions and suspicions, it may be the expert who re-focuses the mediation participants on the financial implications of the termination package with its stock options and pension plan valuation.

Settlement Catalyst

Third, experts are often extremely valuable resources during the pre-mediation planning phase: helping with the case analysis and anticipating areas of resistance that may come from the other side. Both in the planning phase and at the

4. Michael G. Kaplan, CPA, CVA, CFFA, of Woodland Hills, California, serves as an expert in both trials and mediations.

actual mediation, experts may serve as settlement catalysts. Experience with similar cases enables the expert to generate options perhaps not thought of by others who are gathered around the table. According to family mediator Hedy McAdams⁵, the expert not only suggests settlement options, but also “helps the mediator and the parties troubleshoot the various options—looking at both their practicality and tax consequences.” She further points out that parties involved in high-asset divorce cases are unlikely to get legal review of the settlement without involving experts in the mediation process. **VE**

Additional Resources

NACVA and the Center for Economic and Industry Research (CEIR) can give you access to a selection of supplementary sources to support your analysis. The following sampling can be obtained in greater detail by contacting us at nacva1@nacva.com and ceiranalyst1@C-E-I-R.com, respectively.

NACVA Resources:

National Litigation Consultants' Review (monthly; call NACVA Member Services at 800-677-2009.

How to Win Any Argument (Robert Mayer); call NACVA Member Services at 800-677-2009.

Web sites:

- Institute for Conflict Management www.adradvantage.com and (310) 892-4268

- Dispute Resolution Center www.austin-drc.org and (512) 371-0033
- Mediation Training Institute International www.mediationworks.com and (888) 222-3271
- “Popularity of arbitration spurs increase in providers,” *Kansas City Business Journal*—July 25, 2005: <http://kansascity.bizjournals.com/kansascity/stories/2005/07/25/focus7.html>

NACVA Educational Courses:

- **“Mediation and Negotiation Skills: Tips, Tricks and Tactics”**
NACVA Consultants' Training Institute: 10/31/05 (Jersey City)
<http://www.nacva.com> and NACVA Member Services 800-677-2009.

Closed-end Funds

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has professional interests in non-financial areas of business and relies on his or her stockbroker for investment advice and research. Thus, substantially all costs in this category are off-loaded to the stock brokerage firm.

While public, closed-end funds have expenses associated with shareholder reports, stock transfer and registration, and public exchange listings, SIFLPs incur none of these costs. On the other hand, state taxes in some states (e.g., Florida intangible tax at about 10 basis points) is higher than for public, closed-end funds (two basis points).

Conclusion

Minority interest discount is up to about 25 percent of the discount of a public, closed-end fund's discount to net asset value, excluding the affect

of an annual state tax on investment value.

It is readily apparent that normalized operating expenses for SIFLPs are much lower than the 1.1 percent of total assets average for 18 public, closed-end funds shown for 2001. I have found that as a general rule, for cases in which the general partner in the SIFLP utilizes the services of a stock brokerage firm, the normalized annual operating expenses are up to about 25 percent of the 1.1 percent average of total assets for the public, closed-end funds. The percentage may be higher than 25 percent for states that have an annual tax on investment assets (e.g., Florida intangible tax). Thus, if the average minority interest discount is 10 percent for public, closed-end funds, the minority interest discount will be about 2.5 percent for a SIFLP, and higher if the state has a tax on investment value. In either case, the precise amount of the minority interest discount (dis-

count-to-net-asset value) will depend on the estimate of normalized operating expenses; acceptance of the average OEMIDCR from public, closed-end funds; and the degree of diversification of the SIFLP. **VE**

Additional Resources

NACVA and the Center for Economic and Industry Research (CEIR) can give you access to a selection of supplementary sources to support your analysis. Contact us at nacva1@nacva.com and ceiranalyst1@C-E-I-R.com, respectively.

Web site:

- (Closed-end Fund Association) Annual Reports, Custom Fund Searches, IPOs, Performance Reports, Free Booklets, Recent Distribution details

The Center for Economic and Industry Research has additional perspectives on closed-end fund analysis, from a wider array of sources. ceiranalyst1@c-e-i-r.com or 801-401-3099.

5. Hedy McAdams has mediated divorce, custody and other family related matters for over 15 years in Palo Alto, California.