# MEDIATION – TRY IT YOU'LL LIKE IT!

Alternate dispute resolution (ADR) and mediation in particular, have come into their own in the last few years as an effective, efficient, and economical way in which to resolve disputes. The primary and best reason for utilizing mediation in connection with dispute resolution is that, simply put, it works.

It has been my experience as a mediator, having mediated over 250 matters from May 1, 2003 through December 31, 2010, that approximately 73 percent of the mediated cases settled on the day of mediation. This does not take into consideration an unknown number of cases that settled within a few days following mediation predicated primarily upon the activity at the mediation itself and the information exchanged thereat. The bulk of these mediations were voluntary.

In a recent study focusing primarily on methodology, Professor James A. Wall of the University of Missouri-Columbia found approximately 89 percent of liability/personal injury claims, other than motor vehicle accidents and medical malpractice cases settled, 69 percent of motor vehicle accident cases settled, 75 percent of medical malpractice cases settled, with 50 percent of employment cases settling.

In short, the overriding reason for utilizing mediation in order to settle disputes is that mediation works. More often than not, mediation facilitates a final resolution of the dispute, which, is acceptable to all parties concerned.

There are other reasons why mediation as a method of resolving disputes, as opposed to a trial, should be utilized. First, mediation is an infinitely quicker way to resolve a dispute compared to trial. Mediation can be arranged at almost any time. Ideally, mediation should be conducted after enough information has been exchanged to allow all parties to intelligently evaluate their respective positions, but before significant expenses in formal discovery are incurred.

Currently, after a lawsuit is filed in St. Louis County Circuit Court, it takes approximately twelve to eighteen months to get to trial. In the Circuit Court of the City of St. Louis, that timeframe is slightly longer. Of course, after trial there are post-trial motions, possible appeals, and possible re-trials.

Conversely, the average mediation can be scheduled quickly with the process itself taking only an average of four to six hours from beginning to end, exclusive of preparation. Mediation, simply stated, is significantly quicker than a trial.

Second, mediation is relatively inexpensive. The approximate cost of a two-party mediation lasting from four to six hours ranges from $2,000.00 to $2,500.00 with the costs usually shared equally by the parties. Assuming a settlement figure can be agreed upon, the cost of the mediation frequently becomes the subject of further negotiation with the "defendant" paying the entire costs of the mediation.

A trial involves filing fees, deposition costs, expert witness fees, and subpoenas. It is reasonable to predict a "typical" two-day trial of a simple automobile accident case, with one expert witness on each side of the dispute, would involve costs equal to, if not significantly in excess of, the costs involved in mediating the same dispute.

Not only is mediation quicker and less expensive than trial, but in a mediation the parties have complete control of the outcome. Unlike a trial, there is nothing that happens in a mediation that is not agreed to by all parties in interest. As we all know, if litigants permit a jury to resolve their dispute, the litigants give up a great deal of control concerning the final outcome of the proceedings. Any trial lawyer who has tried a number of cases before a jury can attest to numerous cases that probably should have been lost but were won, and a like number of cases that were won but should have been lost for reasons that are totally inexplicable.

Anytime you permit others to resolve your dispute, particularly people who in all probability do not want to be there and/or do not want to be involved in the first place, anything can happen and frequently does. When was the last time you tried a case and accurately picked the exact dollar amount returned in the form of a verdict? More often than not, the trial lawyer and/or the clients are "surprised" by the outcome, sometimes happily and sometimes not. This does not occur in mediation because the parties, while not necessarily "thrilled" with the outcome, have assented thereto and can "live" with the same.

It is important to remember that the mediator, an individual agreed to by all participants, does not act as a legal advisor and/or lawyer in connection with the mediation process. The mediator does not act as a jury and he/she will make no

determination as to which party is "right" as to any factual dispute. In the same vein, the mediator will not act as a judge or make any legal determinations. Rather, the mediator will speak with the attorneys and the parties, both together and privately, pointing out strengths and weaknesses in various positions while utilizing other techniques to bring the parties together and exchanging offers and demands with a view towards arriving at an amiable disposition of the dispute.

All attorneys and parties involved in mediation should understand that whatever is said in the mediation process is confidential and cannot be used by any party at any other time for any reason. Consequently, the parties can be honest and frank in their comments without fear of later adverse repercussions. If any party desires that particular information not be communicated to the other party, such confidentiality will be honored.

The mediation process, which is quite informal, generally begins after the contract to mediate is executed. The parties make an opening statement in which their respective positions are set forth. This is for the purpose not only of educating the mediator, but also to allow the parties to hear first hand the positions taken by their adversary and evaluate those positions. After the initial joint conference, the parties generally separate, and the mediator acts as a go between allowing the parties to exchange ideas and, hopefully, monetary offers and demands.

More often than not, particularly in voluntary mediations, an amiable settlement can be agreed upon. At the very least, parties generally leave an unsuccessful mediation with a much better understanding of their adversaries' theories. Usually, something advantageous is learned.

For better or for worse, it takes too long to get to trial; the trials themselves are too long; and the trials are too costly. In the final analysis, the outcome is uncertain. Mediation avoids these potential problems with a trial and should, in the first instance, be seriously considered since mediation and trial are not mutually exclusive. If mediation is attempted and does not result in a settlement, a trial can always be pursued.

In conclusion, it appears that parties have everything to gain and nothing to lose by attempting mediation as opposed to simply proceeding to trial. Mediation – Try It You'll Like It!