Beyond Battleaxes & Crossbows

Minimizing Litigation Trauma in the US through Mediation

Written by Richard Lutringer, Esq.
Schiff Hardin LLP in New York

The U.S. civil litigation system can be compared to medieval warfare. Imagine that two bordering countries had a dispute over water rights, but no methods existed to resolve the dispute other than battleaxes and crossbows. The "weapons" of litigation, like those of war, have the effect of unleashing powerful forces in the quest for a one-sided victory. Just as better ways of resolving disputes in the international arena have emerged over time, this article discusses how, in the realm of private civil disputes, the use of a mediator can minimize collateral damage while achieving positive results in record time.

One of the most striking differences between litigation "weapons" in the United States and Germany is U.S.-style pretrial discovery, a combination of the Spanish Inquisition in a law firm conference room ("deposition") and a wide-ranging review of the other party's files ("document discovery"). It is not unusual for dozens, if not hundreds, of boxes of letters, internal reports, memos and drafts to be delivered to the other side for page-by-page review, hunting for the proverbial "smoking gun". In the new area of electronic records, computer memories can be searched to find information on each party's servers, pc's and laptops. The time of executives preparing for and participating in depositions, or reviewing old email correspondence and boxes of paper prior to delivery to the other side means less time to devote to their real jobs, not to mention the costs of experts and lawyers.

Arbitration

Although arbitration (the use of one or often three neutral parties to make a non-appealable binding decision) avoids formal court proceedings, including jury trials, and has the advantage of confidentiality, it generally does not reduce the costs and time involved and, of course, must be contractually agreed to in advance by all parties. Additionally, under standard AAA rules to which many U.S. arbitrations are subject, pre-hearing discovery is permitted. A recent survey of general counsel of major U.S. companies indicated that most saw no significant differences in the total cost or time required between arbitration and litigation.

What is mediation?

Mediation ("Streitschlichtung" in German), is a non-binding process to resolve disputes using a third party mediator who facilitates negotiation between the parties. The mediator, unlike a judge or arbitrator, has no authority to make a decision or impose a solution, but can only assist the parties in reaching agreement through his or her experience, negotiation skills and an understanding of the mediation process. The basic elements of mediation are a) a mediator as neutral third party, b) a dispute that has been reduced to specific issues, c) participation by the parties themselves (as opposed to merely lawyers), d) confidentiality and e) speed. And by "speed" is meant lightning speed compared to arbitration or litigation. Resolving cases that have been pending for months or years in one or two days of mediation is not unusual. In some cases an agreement expressly provides that before either side may take a dispute to court or arbitration the parties must first attempt mediation to try to settle the issues. Mediations are usually started, however, after a litigation has been commenced when one of the parties (or the judge) requests that mediation takes place. It can also be used prior to litigation between unrelated parties or even within a partnership, a workplace or anywhere disputes and misunderstandings arise.

Mediation minimizes the time and expense of litigation and arbitration.

In many cases involving private parties, the use of a mediator not only reduces time and expense, but also permits a form of settlement that would not be possible in either a court or arbitration award. Court remedies are generally limited to the payment of money or compelling or preventing a specific action. Mediations allow more flexible resolutions, tailored to the interests of the parties.

Statistics show that over 90% of cases, will in fact settle prior to the actual courtroom trial, often a year or more from the start of the litigation. Even a winning defense can drain the energy of the executives and the budget of the defendant company. There is often little to lose and much to gain from a mediation at the ear-

liest stages before much of the litigation budget is expended. Even if unsuccessful in reaching a settlement at that time, face-to-face discussions can help each side understand the arguments and positions of the other side, and lead to more fruitful settlement discussions later.

Who are mediators?

Mediators have had special training in the art and science of mediation and most have had years of experience as a lawyer, judge, CPA or other profession (professional engineers, for example, often serve as mediators in construction dispute cases and insurance professionals in insurance coverage disputes).

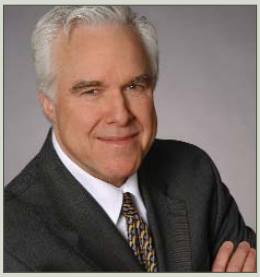
What happens during a mediation?

The mediation proceeding itself is normally held in a conference room and generally lasts at least several hours. The mediator gives an opening statement informing the parties of the ground rules of the mediation, emphasizing his neutrality, that the proceeding is voluntary and that confidentiality protects anything that is said in the mediation. Each party in turn then has an opportunity to present the background of the dispute. After each side has explained its position, the work of the mediator begins in earnest. By summarizing the positions of the parties and the use of questions to each party to be sure that each side is aware of the other side's position and the strength of its own position (usually discussed frankly in a private caucus), the mediator can isolate the key issues and help each side realize what will likely happen if the case actually goes to trial, the "Best Alternative To a Negotiated Agreement" (BATNA), a concept devised by Professors Fisher and Ury in their seminal work *Getting to Yes*. Often during a mediation a party will hear for the first time a description of the case by someone other than its own lawyer.

Advanced tools used by the mediator often include sophisticated formulas for dividing assets among competing parties, such as partners in an ongoing business or heirs to an estate, as well as computer-assisted decision tree analysis that can quantify the probability of success of each side's claims and defenses. It is not unusual for both attorneys to tell the mediator confidentially that they are convinced that they have at least a 75% chance of winning. Such misapprehension on one or both sides is due to the common human tendency to overvalue one's own position, a tendency documented in numerous academic studies. Actually, even "100%" certain cases are generally not more than 80% certain to achieve a positive result in trial or arbitration due to such factors as overworked judges, less than competent arbitrators, unavailable witnesses and ambiguous documents. In litigation, of course, incorrect legal decisions can be appealed, (demanding more time and expense, of course) an alternative that does not exist in arbitration.

The "magic" of mediation is that parties to a bitter and complex dispute can actually resolve it quickly and easily when removed from the combative atmosphere of litigation. The parties themselves, after knowledge of the then available facts and interests of each side, can make realistic judgments based on probabilities and interests in the same way they do in their daily business lives. At any stage of a dispute, mediation can significantly reduce the time and expense of litigation or arbitration and can often lead to a continuation of a long term relationship. ■

About the Author



A New York City based lawyer and mediator, **Richard Lutringer** is counsel to **Schiff Hardin, LLP.** Since completion of his legal studies in the U.S. and Germany, he has practiced as an international corporate lawyer representing public and private European companies with respect to their U.S. business. As a mediator he is on the roster of approved mediators of the New York Supreme Court and the United States District Court, Southern District of New York.