

## ADR – Law Firms

# The Case For Mediation In The Defense Of Complex Commercial Litigation

**Frederick D. Berkon  
and Cynthia L. Boland**

**LEADER & BERKON LLP**

Mediation presents a unique setting that can be more effective in resolving a complex commercial dispute than a formal trial or arbitration setting, especially when the case requires piecing together an array of evidence to prove subtle points of defenses. Unlike trial and arbitration, where cases are bogged down in formal presentation of witnesses and exhibits, mediation presents an opportunity to speak to the mediator in private, to persuade him or her as to the weaknesses in plaintiff's case and the merits of the defenses. This private caucus can be invaluable when dealing with a complex matter, where the merits of a defense are not easily and effectively presented through witness examinations and exhibits. There are a number of factors for a defense lawyer to evaluate before making the decision to pursue mediation; most important is whether the defense lawyer can obtain an intelligent and forceful mediator who is motivated to bring the case to a full resolution.

*Frederick D. Berkon is a Partner at Leader & Berkon LLP. He has a general litigation practice which includes complex commercial, product liability and toxic tort litigation. He can be reached at (212) 486 2400. Cynthia L. Boland is an Associate at Leader & Berkon LLP.*



**Frederick D. Berkon**

### **Factors To Examine When Considering Mediation**

The timing of the decision whether to mediate is critical. Through discovery and expert reports, it is necessary to come to a full understanding of the dynamics of the alleged damages. Accordingly, the decision to pursue mediation should not be made until all fact discovery has concluded. Equally important is to make the decision prior to expert depositions, as they can be especially costly and often of little value to a mediator.

In a commercial case, where it becomes apparent that due to the complexity of the case, the judge or jury will not likely grasp a full understanding of

the defenses (especially the more subtle ones), there is a risk of a much higher verdict than is warranted. During motion practice or conferences, a judge may reveal clues as to his or her failure to fully grasp the issues. At that point, a thorough assessment of the strengths and weaknesses of the case in its entirety must be conducted; a candid analysis has to be made of whether the judge (if a bench trial) or jury will be able to comprehend the critical and complex issues simply from hearing witness testimony and viewing documents. The client must be fully briefed on the strengths and weaknesses of each critical issue of the case and the likely outcome of the trial. Accordingly, the client must enter into mediation knowing their counsel's opinion as to the best and worst case scenarios, and the financial ramifications associated with each.

After the necessary analysis is complete and mediation is deemed the proper course of action, the critical next step is to obtain the best mediator available.

### **The Critical Importance Of Selecting A First-Rate Mediator**

If a mediator does not have the ability to keep negotiations moving, the chances of resolution are significantly reduced. It is absolutely essential to obtain a mediator with a professional reputation for intelligence, patience, and fairness. A first-rate mediator should have persuasive negotiation techniques along with the ability to create a strong judicial pres-

*Please email the authors at [fberkon@leaderberkon.com](mailto:fberkon@leaderberkon.com) or [cboland@leaderberkon.com](mailto:cboland@leaderberkon.com) with questions about this article.*

ence. Mediators are often former judges, an accomplished senior lawyer with mediation experience, or a professional mediator from one of the numerous mediation entities (e.g. JAMS/ Endispute or The Feinberg Group, LLP), who have earned respect in the legal community.

It is equally essential that the mediator be motivated by ego and additional fees to obtain a resolution, and that he or she regard his or her position as being an "arm of the court." An effective incentive for a mediator is where an agreed upon significant bonus, in addition to the hourly fees, will be paid if the mediation results in a resolution. Additionally, it is important to ensure that the mediator is willing to communicate to the parties that he or she is, in effect, functioning as an arm of the court at the outset, and is, thus, obligated to go to all necessary ends to resolve the matter. An effective mediator exercising this role might threaten to report parties to the judge for non-cooperation (i.e., insistence on unrealistic resolution amounts), run the mediation for consecutive ten-hour days, or demand that parties bring in their respective CEOs to meet with him or her if the process gets bogged down.

### **Mediation Procedures Vary By Jurisdiction**

While some courts have the right to demand mediation under the laws of the jurisdiction, most are amenable to "urging" the parties to mediate at the request of one or more parties. A request is more likely to be implemented at the close of fact discovery and after all dispositive motions have been made. Courts usually prefer not to conduct a lengthy trial in a complex litigation and will press resisting parties to mediate. In all circumstances, however, even when there is no resistance, a defense lawyer should request that the court issue an order for the mediation. This order will augment the mediator's authority when insisting that there be a resolution.

### **How To Find The Ideal Mediator**

An extensive research effort is necessary to find the ideal mediator. A defense lawyer must tap his network of colleagues for recommendations; first-hand accounts often provide the most reliable and valuable insight. Even if a mediator comes highly recommended from a trusted peer, conducting due diligence

among colleagues and the resources of the local bar for additional information is highly recommended.

Going straight to the mediator under consideration is another good method for obtaining information. Meeting with a prospective mediator can provide a comfort level regarding his or her judicial demeanor, requisite training, experience, and success rate. All parties must be made aware that this meeting will occur. Counsel should inquire whether the mediator has formal mediation training and experience in commercial matters as well as the nature and extent of that experience. If the mediator has been unsuccessful in commercial mediations, explore exactly where the process went off track and what modifications the mediator might make the next time around.

Further, it is critical to generally discuss the overall mediation process and learn what type of techniques he or she will use to bring a dispute to full resolution. Lastly, request references from the mediator, and then effectively interview and vet those references. The number and quality of references can be strong indicators of whether the mediator will be effective for your case. When vetting the references, explore whether the mediator has the intelligence and force to see a complex commercial mediation through to resolution. Be as thorough as possible with this search process because the attitude and conviction of the mediator are the keys to success.

If a mediator fitting these characteristic cannot be found or if your jurisdiction's procedures do not permit parties to select the mediator (whether from a court-appointed roster or privately), serious consideration should be given to abandoning the process as a poor mediator may do more damage than good.

### **How To Be Effective In The Mediation Process**

Prepare a concise brief summarizing the background of the case, the critical issues that need to be understood, and the damages your client is willing to pay at the outset. It is important to emphasize a commitment to the mediation process. Thus, writing in a fair and reasonable tone, rather than an argumentative and aggressive one, will establish credibility at the outset. Secondly, it is most helpful to submit all prior dispositive motions,

court opinions, and briefs. Finally, prior to the start of the mediation, but after the submission of all these papers, privately meet with the mediator to hear his or her initial views on the issues and planned course for the mediation.

To enhance credibility, use a firm but conciliatory tone at the opening presentation. It is important to put forth the strongest points at the outset, while also conceding points that would not likely succeed at a trial. Defenses and arguments should be backed up with documents and deposition testimony. Most mediation facilities are high-tech, equipped with audio-visual equipment and computers at each seat. Documents can be digitized and displayed. It is helpful to highlight or enlarge sections of documents or deposition transcripts. Key videotaped deposition testimony can be played, and for additional clarification, the testimony may appear as a subtitle beneath the video. It is critical to put the best face on the key issues the mediator will have to resolve; it also serves to give the other side a taste of what will come in a trial setting.

Immediately following the presentations, the mediator will typically request to meet with each side privately. Counsel should be prepared with hard copies of all exhibits from the presentation, as this is the best opportunity to clarify any confusing points for the mediator. It is very important to assess where the mediator is having difficulty agreeing with your positions and defenses, so as to strategize and prepare for the first mediation session with these issues in mind.

Each mediation caucus provides the opportunity to speak privately with the mediator and your client about particular issues; this is precisely what you cannot do in a trial setting. At some point during the first day, the mediator will provide a rough assessment of what the case is worth. The amount will likely be much higher than you anticipated. Counsel should inquire as to how the mediator arrived at this figure and identify any issues which have raised doubt or disagreement. Through a first-rate mediator capable of understanding complex issues in a private caucus, it is possible to obtain a resolution number closer to the best-case trial scenario that had been described to the client prior to mediation.