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Verdicts & Settlements

Alternative Dispute Resolution

Piece and Harmony

Many mediations begin with the parties airing their concerns and end with one party walking out. To avoid this scenario, divide the matter into smaller portions.

BY ELEANOR SOUTHERS

From the days of the mandatory settlements conference in the judge's small office with counsel balancing files on their laps, the ways to settle cases have multiplied with astonishing speed. Today, there are more avenues open to litigators to get a fair hearing and end up with positive results that take less time and money.

Attorney are partnering with the legal community to find ways to represent clients in the crowded court system. Thinking about mediation in new ways can produce satisfactory results for all parties.

Often, one side wants to retain the litigation option or believes certain legal issues are best decided by a judge or jury. If this is the case, the process still takes place, but those concerns can also be addressed.

Often, the mediation begins with the parties airing their complaints and concerns. Hours later, after much emotional stress, one party walks out. Some issues may have been resolved, but these resolutions may be lost in the storm of beginning to position the parties for trial.

The problem with stopping a mediation once it has begun is that the rhythm of the settlement process is broken and sometimes it can be difficult to get back. This is especially true in emotional cases. It is possible to salvage these cases, however, by recognizing that some lawsuits need to be resolved in a piecemeal fashion.

No one can sustain prolonged periods of bombardment without rebelling. Dividing the matter into smaller portions makes the situation seem less threatening and can produce positive results.

For example, if the issues in a wrongful-termination case center around legal problems of a worker's compensation action for stress, an Americans With Disabilities Act question, an employment contract and the emotional content of the plaintiff's damages, tackling all of these concerns by recommending mediation may present more problems.

"Mini-mediations" before the actual process of global settlement talks begin can be convened with counsel, in person or by telephone, to decide if the entire matter should be mediated. In these sessions, it could become apparent that resolving certain issues by other means, such as summary adjudication, law and motion with a private judge or engaging an expert witness, would be useful.

These techniques are already in use, especially with complex litigation such as construction defect cases. Sometimes, associate or assistant mediators are used to resolve peripheral issues and clear out some defendants so that the head mediator can handle core issues.

This same approach can be applied to simpler lawsuits, with dramatic results and great savings of time and energy. It enhances the mediation by overcoming the litigator's fears that important issues will not be addressed legally and also reduces the time spent in the initial session.

Also, since substantial time has already been invested in planning the actual mediation, including which issues to address, counsel is firmly committed to the process. Fewer issues than initially expected will need to be cut from the mediation as the parties continue to explore the options of settlement or adjudication.

When mediation is suggested, even the most aggressive litigator should consider what issues can be settled. Counsel must put aside the temptation to put everything before a jury and consider the alternative of settling everything that possibly can be settled without further expense to the client. Even if a private judge is warranted, it can be a limited proceeding since he or she will probably be deciding only a few issues.

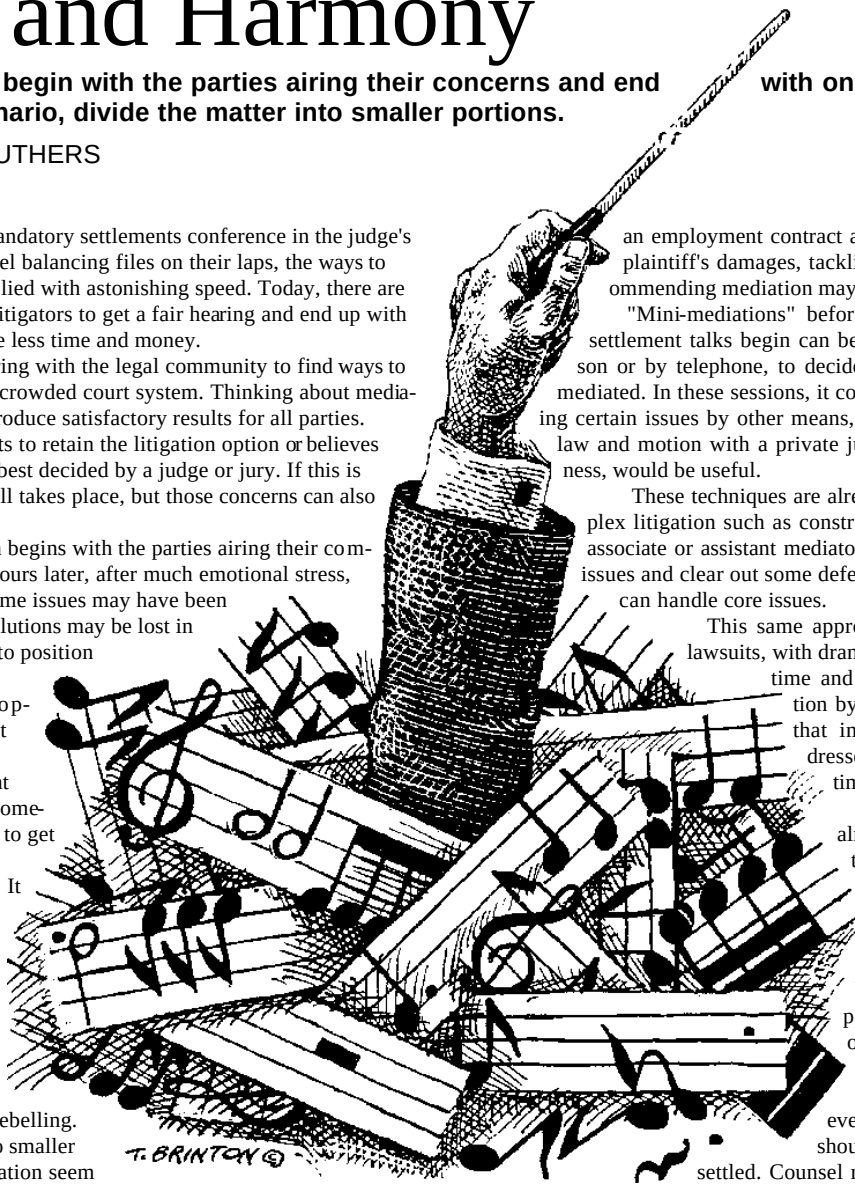

Illustration by Tim Brinton