PART 1

# Practicing in the 'Age of Mediation'

By Louis C. Schmitt Jr.

I recently attended a seminar where the panel consisted of a number of common pleas judges from several local counties. The subject was civil litigation and what judges want lawyers to know about it. At the outset one of the jurists on the panel questioned whether the seminar was necessary — or even relevant — due to the fact that so few civil matters proceed to an actual jury trial nowadays. Looking back on 25 years as a trial lawyer and more recently as a mediator, I was wondering the exact same thing.

In the past few years the number of civil cases I have tried to a verdict has decreased precipitously. Based on what I am told, many of my fellow civil trial lawyers are experiencing something quite similar. Court backlogs of civil cases have pretty much disappeared. Something must be going on. But what?

Mediation.

Don't get me wrong. I'm not saying mediation is the *only* reason for the reduction in the number of civil trials. What I am saying is that it is a *big* reason. And it's getting bigger.

Judges now routinely suggest that mediation be conducted prior to trial. Many courts are actually requiring some form of pre-trial alternative dispute resolution (ADR), often mediation. It has become a darling of insurance companies. I have found an increasing demand for my services as a mediator, both through my local county court's mediation program and by way of private mediations. It is becoming increasingly clear that mine may very well be the last generation to try a significant number of civil cases and the first to practice in the "Age of Mediation."

The question isn't whether you will mediate if you are a litigator. You will. And clients will expect you to be knowledgeable about the mediation process. So, from a practical standpoint, what do you need to know? The answers to the following questions provide a start.

## Why Mediate?

Because it's cheaper, quicker and a lot less risky than going to trial. Plus it is a private dispute resolution process as opposed to a very public one. And it empowers the parties to resolve their own dispute on agreeable terms. A trial takes that power away from the parties and instead gives it to a judge and/or jury who may resolve

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the dispute on terms distinctly disagreeable to one or more of the parties involved.

### What Qualifications Are Required to Be a Mediator?

There are no private or public requirements one must meet in order to be a mediator in the Commonwealth of Pennsylvania. Having noted that, courts will sometimes require that their own panel mediators possess certain qualifications.

### How Does a Mediator Get Involved in a Case?

Where voluntary mediation takes place outside the court system a private mediator will have to be selected and agreed upon by the disputants. (More on that later.) Where the court requires mediation it also usually supplies access to mediators. Federal courts in Pennsylvania have an approved panel of mediators from which the parties are free to choose. In my home area, Blair County, there is a panel of mediators available, with mediators appointed on a rotating basis. Check with your local court and/or county bar association to see what ADR resources may be available.

### What About the Trial Judge as Mediator?

Parties, counsel and insurers generally view judges as bringing a neutral and

knowledgeable perspective to the mediation process and give the pronouncements of the court great credibility and authority. However, mediating with a judge also poses significant practical — and sometimes even ethical — challenges to both the court and counsel. Accordingly, sitting judges usually do not mediate cases. But there are exceptions. If you are considering judicial mediation, there are a number of issues you should keep in mind.

Judges are burdened. Court dockets are crowded, as are judges' schedules. A judge may find it difficult to come up with the (sometimes significant) blocks of time required to prepare for and to carry out the actual mediation session — or sessions — to good effect.

Mediation will often require private meetings (also known as "caucuses") between the mediator and one party. This poses a practical challenge: You simply cannot control what opposing counsel and/or the opposing party may tell the judge — or show the judge — without you present. And you have to be careful of what you say to or show the judge yourself. Even information provided inadvertently by you to the court may lead to practical or ethical problems.

Parties often ask the mediator's opinion about outstanding legal and factual issues in the case and potential future rulings by the court. But the trial judge-as-mediator may be ethically prohibited from discussing future legal rulings and future factual determinations.

If a party or its counsel for whatever reason perceives the judge as taking sides with an opponent it can lead to disillu-

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sion with the ongoing legal process. If the notion that the judge has taken one side is strong enough — or if there is a sense that the trial court may have pre-judged a crucial issue in the case — counsel may at least have to consider asking for a recusal.

There generally are no rules of evidence in mediation. The judge may learn information through the mediation that would not come out at trial. And information obtained by the court during mediation may consciously or unconsciously affect decisions by the court during the trial.

In the end it's pretty simple: Be mindful of the above issues if you decide to mediate with your judge, and never mediate with the trial judge if the case is to be tried to the court.

### How Do I Locate a Mediator on My Own?

Word of mouth may be the best way to find what you are looking for. Ask around. Talk to your colleagues. Find out who they have used. Contact your local county bar association. Find out whether any of the local judges have referred similar matters to mediators and, if so, to whom.

The Pennsylvania Council of Mediators (www.pamediation.org) is the only statewide mediation organization in Pennsylvania. Its online roster of attorney and nonattorney mediators sets forth contact information, mediation specialties and other general information about its members.

There are private companies that provide ADR services. They usually advertise heavily in legal publications, and many have ex-judges available as mediators. Profiles and the qualifications of the available mediators are usually readily available on the company's website.

A word about locating a mediator through an advertisement or a website: Many excellent mediators advertise and/or have a website. Many don't. If an advertisement or something on the Internet catches your eye, make sure you check into the potential mediator's qualifications. Feel free to contact that individual and request information as to experience and training. Any legitimate mediator will not hesitate to provide it to you. Again, ask around to see if anyone has experience using that individual as a mediator.

### Are There Different Types of Mediations?

Yes. In addition to what would be considered a "standard," nonbinding mediation, there are some procedures that incorporate mediation into a broader — and often binding — dispute resolution process.

*Mediation/Arbitration, aka "Med/Arb"*
This is a hybrid proceeding by which the mediator initially conducts mediation in an effort to resolve the dispute. If the mediation is unsuccessful the mediator puts on his or her arbitrator hat and conducts arbitration, entering an award that is usually binding on the parties. The primary advantages of Med/Arb are that the

parties only have to pay one person to resolve the dispute and the result is binding. However, this process also presents many of the issues listed above that are associated with trial judges serving as mediators.

*Arbitration/Mediation, aka "Arb/Med"*
Here the arbitration takes place first and an award is reached and written down. However, the written arbitration award is initially concealed from the parties, who then proceed to mediate with the same individual who conducted the arbitration. If the mediation does not resolve the dispute, the written arbitration award is then revealed to the parties and is generally binding in nature. The advantages? Again, the parties pay one person for a binding resolution of their dispute. And, as opposed to mediation/arbitration, there is no danger the arbitration decision will be influenced by the mediation proceedings. On the other hand, this particular hybrid may lead to unnecessary time and expense in conducting an arbitration hearing in cases likely to be resolved through standard mediation.

Sometimes the parties will agree — either before or during the mediation — that in the event the matter cannot be settled the mediator will simply render a decision in the case based on information obtained during the mediation and the parties will be bound by that determination. Another variation on the same theme is the so-called "baseball" award, where the mediator selects either the last demand or the last settlement offer as the binding value of the case. The options for a binding determination are limited only by the imagination of the parties and the mediator involved.

## How Do Mediators Charge?

In general, mediators charge in two ways: hourly and by the day or half-day. Some mediators require that all or some portion of the mediation fee be paid in advance. Some also charge a cancellation fee if the mediation is postponed or cancelled within a certain period of time prior to the scheduled session. Expect to reimburse the mediator for travel expenses. The parties usually share the expense of the mediation equally, but this arrangement can be an item for negotiation prior to or at the mediation.

## What Should I Look for in a Mediator?

I have heard it said that "mediators are born, not made." And there is some truth to that. A mediator with good people skills and a relative lack of formal training will often be much more effective than a highly trained mediator who lacks the common touch. Having noted that, there are some things to look for when it comes to a mediator's qualifications.

Most basic mediation courses consist of 40 hours of training, with at least 16 hours devoted to simulated mediation sessions. Your mediator should have completed that training. If your case involves family law issues, your mediator should have advanced training in domestic mediation. Depending on the nature of your case, you may want to seek out a mediator with other types of specialized training or experience. There are various certifications mediators can obtain, but none are official. As noted above, there are no formal requirements to meet in order to be a mediator in Pennsylvania, and as yet there is no licensure of mediators within the commonwealth.

If you are counsel in a situation where you want the insurer on the other side to agree to your mediator, you should propose someone acceptable to — and influential with — the insurer. In my experience, insurance companies generally do not look favorably upon past or present plaintiffs' lawyers as mediators (with some notable exceptions). On the other hand, insurance companies generally do look favorably upon past or present defense lawyers and upon ex-judges as mediators (again, with some notable exceptions).

In my opinion there are certain personal traits that make a mediator effective in a wide range of disputes. A mediator should be a good listener and able to put people at ease. A sense of humor is always helpful. A mediator should have patience. Above all a mediator should possess both the ability to see all sides of a dispute impartially and the ability to empathize with the individual parties involved. I believe these qualities give a mediator the best chance of bringing people together to resolve their own disputes. ✦


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Part two of "Practicing in the 'Age of Mediation,'" which will look at preparing for and participating in an actual mediation session, will appear in the May/June issue of *The Pennsylvania Lawyer*.

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