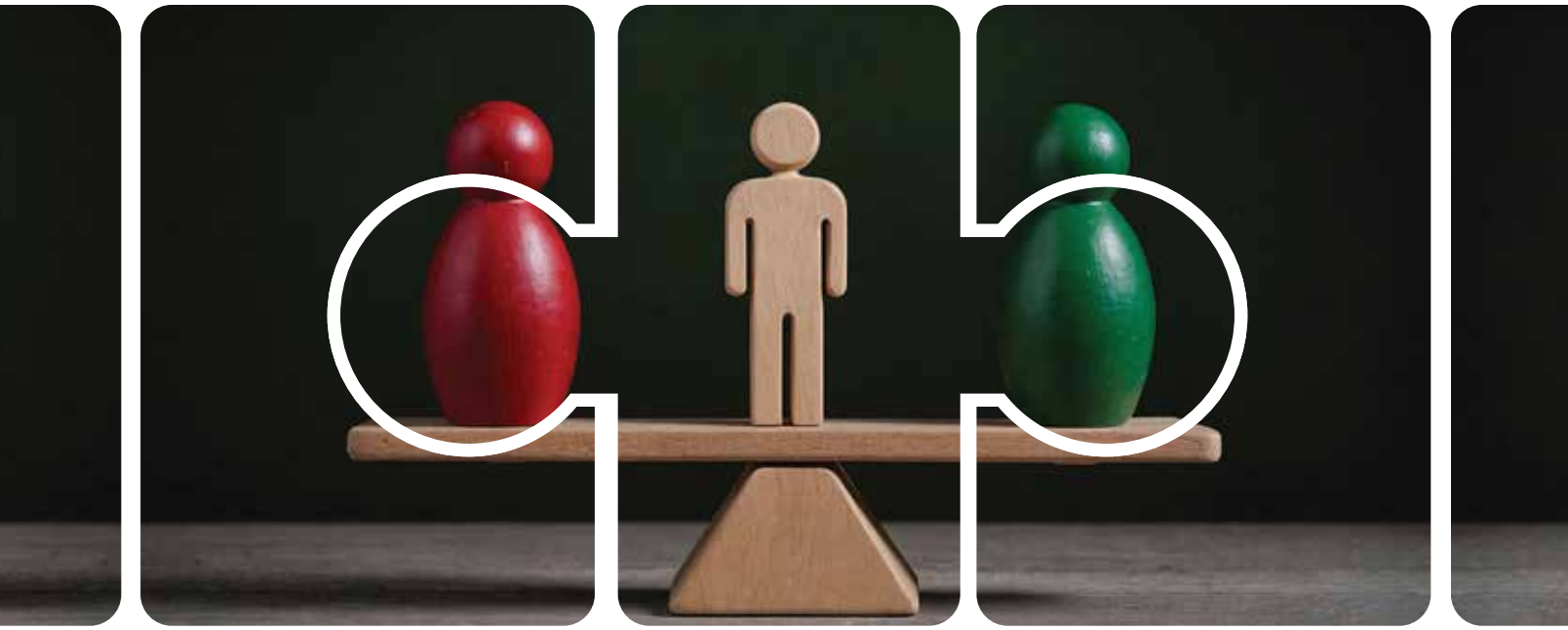

When Is the Right Time to Hire a Mediator?

ENGAGING A MEDIATOR EARLY CAN HELP LAWYERS RESOLVE LAWSUITS OR NARROW THE TRIAL ISSUES.

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Traditionally, mediation is used as a mechanism to settle cases, often when trial is imminent. Mediation can be utilized earlier, in a way that is more beneficial for the parties involved. Selecting a mediator early in the lawsuit can be effective in controlling costs and helping identify issues and evidence that will make settlement more likely at mediation.

Trial lawyers and judges have distinct roles in a lawsuit. Trial lawyers focus their efforts on the emerging battle in the courtroom. The judge presides over discovery, pretrial, and trial to entry of judgment. Scheduling orders set out pretrial deadlines, all coordinated with the trial setting. Many courts include mediation in the scheduling order, often after discovery is completed. Mediating late in the process frequently results in the parties having no effective dialogue until substantial time and money have been spent on the case.

The Seventh Amendment provides the right to trial by jury, but statistically, only roughly 3% of lawsuits go to trial.[1] Most of the rest settle. With this reality in mind, alternative dispute tools like mediation can be utilized by parties more productively and effectively early in the case.

First, a mediator can help the parties identify the points of proof and controversy that underlie the dispute. Think about how often time is wasted going down rabbit holes in litigation. This runs up costs and is counterproductive to resolving disputes. A mediator can help parties identify the issues most critical to settlement and thereby enhance the prospects for early resolution. Sometimes, these may be the same issues that influence the outcome at trial, which will narrow the focus of litigation. Other times, parties may have different interests when discussing settlement. Parties to a business dispute may consider solutions that involve an ongoing relationship. Personal injury plaintiffs and defendants may have negotiating options available in settlement discussions that are not outcomes they can achieve at trial. By assisting the parties at this stage of the case, the mediator can help focus their discussions and identify and facilitate an exchange of information and evidence that is most relevant to the parties' interests.

Additionally, the mediator's confidentiality may help the parties communicate regarding elements of proof that are being withheld for reasons of strategy, privilege, or trade secret, under circumstances that do not compromise the parties' ability to shield such items from formal discovery.

When you have a trusting relationship with opposing counsel, you may be able to cut through the noise of a case and "get to the heart of the matter" on a phone call. Unfortunately, these interactions are increasingly rare. A skilled mediator can establish a communication channel with the parties that achieves this connection while being protected as confidential under the umbrella of mediation.

Further, as you gather information from discovery, the mediator can be brought back in to address changes in direction resulting from information that is learned. When the mediator has been kept informed about the case, he or she

can maintain a relationship with the parties as the discussions evolve toward successful resolution.

How often have we experienced a mediation that failed, only to have the case settle after further discovery, and then further negotiations or even a second mediation? There may have been no lack of will or good faith at the first mediation, but rather a shortfall of communication and information. Had the parties been able to conduct the first hour or two of the mediation at a critical point earlier, they would have known what was needed to help the case settle. By engaging the mediator early and viewing mediation as a process that ends with the "settlement mediation," the parties can work with that mediator to arrive at the mediation with the critical issues having been identified and all relevant information exchanged and evaluated by every stakeholder.

Finally, when disputes arise over discovery, particularly if related to preparing for a "settlement mediation," a mediator has the benefit of confidentiality and access to quickly address solutions that all parties find workable.[2] Contrast this to filing motions and briefing and potentially waiting weeks for a hearing and ruling from the court. The mediator can craft streamlined solutions critical to resolution of the case without jeopardizing other interests of the parties (e.g., "attorney eyes only" view of limited documents for settlement purposes only). And, because the mediator is not a judge, the only outcomes the mediator can negotiate are agreed ones.

Texas law contemplates this expanded scope of mediation.[3] Texas law supports the entry of a court order, or an agreement of the parties, for appointment of a mediator at any stage of a lawsuit. Once a mediator is appointed or agreed to in a case, that mediator has the ability to assist the parties in focusing the issues in the case, resolving discovery disputes, and laying the groundwork for settlement discussions in advance of the final "settlement mediation." Interactions with the mediator will be protected by the same veil of confidentiality as mediators have during "settlement mediations." By retaining a mediator early in the lawsuit, the parties can promote judicial economy, reduce litigation costs, streamline litigation, and enhance the prospects for settlement.

Engaging a mediator early in the lawsuit can help lawyers fine tune their lawsuit in a way that either resolves the case or narrows the issues for trial if settlement cannot be reached. Being aware of the broader scope of mediation can provide you potential creative, efficient, and effective solutions for resolving your case short of trial. **TBJ**

NOTES

1. Lynn Langton and Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Department of Justice (Oct. 2008), https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf.
2. *What Case, Statute, Regulation, or Standard of Practice has had the Biggest Impact on the Field?* Dispute Resolution Magazine (Jan. 2022), 24-25. ("Mediation confidentiality has tended to have a great impact on the contours of mediation practice.").
3. Tex. R. Civ. P. 166 permits the court to schedule a conference at which all issues may be identified, reviewed, limited, and agreed. Section (p) broadly expands the power of the trial court to consider "(s)uch other matters as may aid in the disposition of the action. Of equal significance, the official comment to the 1990 change states, "To broaden the scope of the rule and to confirm the ability of the trial courts at pretrial hearings to encourage settlement." The paragraph following section (p) gives weight to "agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreement of counsel…" The Texas Alternative Dispute Resolution Act ("Texas ADR Act"), Tex. Civ. Prac. & Rem. Code § 154.021(a)-(c) gives the court and parties flexibility in designing a dispute resolution format that is suitable for the parties and the case.

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