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IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

Mandatory Mediation Is Here To Stay

Maximize the advantage of the event

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There was a time when a trial attorney only had to discuss a case when the matter was scheduled for an arbitration or settlement conference late in the course of preparing for trial. Of course, plaintiff counsels talked about the case with the plaintiff and defense attorneys were responsible to their insurance carriers for periodic reports. But outside of those instances, during the lifespan of the litigation, there was little court interference with the litigation process.

Nowadays, a practicing trial attorney feels as though their civil, probate or general equity case has barely been filed when a Mediation Referral Order is sent out from the court under Rule. 1:40. Some attorneys initially view this order's receipt as simply just one more obstacle for the plaintiff or on the litigation path to a jury and/or another hurdle in the life of the defense bar until a summary judgment motion can be filed.

Court-ordered mediation at the inception of a case is now a mainstay in the life of a litigator and, having no real choice, attorneys on both sides need to know how to maximize the advantage of the event.

Foremost, remember that every case filed in Superior Court must go through a complementary dispute resolution event. Once you have gone through mediation, arbitration will be available to you only upon request. For the early mediation, plaintiff counsel must ascertain what information is needed earlier than used to be required and defense counsel must line up defenses far sooner than was ever expected. Early preparation of the case simply means effort at the beginning instead of the end of the litigation. Remember, you do not need interrogatory answers; you just need focused information for your client to make an informed settlement decision.

With fewer than two percent of cases going to actual jury trial, it is only logical that a strong effort to really buckle down and "size up" a case is ordered by the court at the very start of a matter. Indeed, statistics from the Administrative Office of the Courts show that a third of cases referred to mediation are resolved at the session and a striking 10 percent more settle within 90 days of the termination of mediation.

Steps to Follow

First, and most important, review the referral order and actually analyze if the assigned mediator is appropriate for the case. If you determine that the person is not suitable, then make certain to immediately contact opposing counsel and enter into a Stipulation Naming Mediator or make an application to the court for the court to name a new mediator. As per Rule 1:40-6 (b), you have 14 days from the order's date to do so; therefore close attention to this detail is essential. You should also know that under Rule 1:40-6(d), a motion for removal can be filed; however, this must be done within 10 days after entry of the order and is only granted for good cause.

Second, once the mediator issue is squared away, the next step is to determine what information you need and will ask for in the initial conference call. The order requires an informal exchange of information, but this does not mean you have to go to a mediation with the bare minimum. The best way to approach this issue is to ascertain if you need more than an exchange of more specific facts, law and documentation which either supports the complaint or the asserted defenses. If you need more, then ask for it. It is unlikely that a skilled mediator would refuse any item which would make mediation "meaningful."

Most of the time, a mediator

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will ask for a confidential or nonconfidential statement of position, appending any essential papers. This will not only help the mediator to better understand the matter and conduct a better mediation, but it also will focus your attention on the positives and negatives of your case from a factual and legal standpoint.

It is important to remember that a mediator can serve as a case management professional. Just realize that placing the mediator in that position can cost you money in the end. More often than not, that money is well spent, since service as a discovery master will more certainly assure that mediation is worth your time and effort. However, in the more complex case, it may be advisable to ask for a judge to case manage the matter and to return to the mediator when the appropriate time for mediation arrives. In coordination with the judge, this should be an easy task.

Once you've gotten through the initial telephonic conference, the mediation session has been scheduled, information exchanged, submissions to the mediator sent, you should be ready to appear and advocate for your client. You should be able to enunciate why or why not the plaintiff should get the relief requested in the complaint. It is also essential that your client be prepared to hear "both sides of the story" and be ready to speak. Sometimes it is this first real look at a plaintiff which can convince a defendant to settle or not.

The essential resources for dealing with the mediation process are New Jersey Court Rule 1:40- Complementary Dispute Resolution Programs, Appendix XXVI, the Guidelines for the Compensation of Mediators Servicing in the Civil Mediation Program and the Uniform Mediation Act, (N.J.S.A. 2A:23C:1 et seq.).

Be open to the process and listen to the mediator. Hopefully, you have picked or been assigned a mediator who is knowledgeable, well-trained and experienced at mediation. Skillful guidance of the mediator through the session, with or without caucuses, is an essential key to mediation. This is not a settlement event; the goals of mediation should be first, to exchange information and gain a better understanding of the other side's positions and second, to resolve the matter as realistically and advantageously to your client's interests.

Mandatory mediation, with its success rate, is here to stay. Therefore, the more prepared you are for the mediation process, the more you are likely to be included in the successful statistics.■