Building on the Past and Looking to the Future: How Mediation Has Evolved to Become a Standard, Instead of Alternative, Form of Dispute Resolution

by Greg Hoole and Paul Felt

When Paul Felt started practice, the primary and almost exclusive method of resolving disputes was the traditional adversarial process, which sometimes culminated in a negotiated settlement (often on the courthouse steps on the morning of trial), and other times left the parties relying on a judge or jury to determine their fate. The process of resolving disputes was, and still is, extremely costly, time-consuming, and unpredictable. The time that it takes a case to finally make its way through the litigation process and to trial led David Porter, Microsoft Corporate Vice President of Retail Sales, to quip: "Litigation is the basic legal right which guarantees every corporation its decade in court."

Greater interest in alternative forms of dispute resolution began in the seventies. Parties, particularly sophisticated parties that were familiar with the risks associated with protracted litigation, were willing to try these various alternatives to save time and money. As lawyers and their clients became more familiar with these alternative processes, the popularity of alternative dispute resolution, and particularly mediation, took off.

The key benefits most commonly attributed to mediation include:

Self-determination and risk-avoidance

Lack of control and predictability are two of the greatest sources of stress and frustration in litigation. Mediation puts control of the outcome back into the hands of the parties. While mediation requires compromise, most parties recognize, as British poet George Herbert observed, "A lean compromise is better than a fat lawsuit." Parties in mediation wisely give up what they think might be their best day in court to avoid what they realize could be their worst.

Early resolution

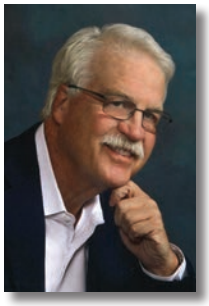
As the proverb says, "The wheels of justice grind slowly." Saying this is one thing. Experiencing it is something different entirely. The average client is dismayed at the time it takes to get to court. This dismay is often only exacerbated when an appeal follows the long-awaited judgment. Mediation presents an opportunity to resolve disputes, sometimes before they are even filed, and virtually always before the litigants begin quoting another familiar legal maxim: "Justice delayed is justice denied."

Cost savings

Related to the benefits of early resolution is cost savings. There are at least three different types of cost savings afforded by

GREGORY N. HOOLE is a mediator and arbitrator at Hoole & King, where he also manages a full litigation practice.

PAUL S. FELT has mediated cases in Utah since the 1980s and is now working very hard at improving his golf handicap during retirement.



mediation. The first and most easily quantified is financial cost. The financial costs savings afforded by mediation are obvious. Court systems around the globe are charging more and more just to file a case. We may have thought our filing fee increase a few years ago was steep, but it still does not compare to the UK, where it can cost up to £10,000 just to file a civil complaint. Less obvious but likely even more significant than financial cost savings are the savings in opportunity costs. For a business or even an individual to be able to focus on its core competencies instead of being distracted by litigation is priceless. Finally, there are savings in psychological costs. The least quantifiable of the three savings, the emotional taxation of litigation, may be the single biggest factor affecting your client's quality of life and avoiding it may be the biggest personal benefit afforded by mediation.

Creative remedies

Renowned American psychologist Abraham Maslow noted, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Abraham H. Maslow, The Psychology of Science, 15 (1966). Because courts typically are limited to awarding money damages as a remedy, everything in litigation quickly becomes exclusively about money. However, money damages may be far from the most effective way to redress a particular wrong. In mediation, the available remedies are limited only by the mediator's and the parties' imaginations. Often a remedy can be fashioned that will at once be far more advantageous to the plaintiff and far less damaging to the defendant than a typical money damages award.

> *"[T]he mediation process itself has evolved as the scope of cases being mediated continues to grow."*

Confidentiality

Next to self-determination, confidentiality is the hallmark of mediation. The strictly confidential nature of the process allows parties, particularly defendants, to fashion remedies in a particular case without worrying about setting unwanted precedent. This, in turn, helps plaintiffs recover compensation that fairly reflects the facts of the case at hand.

Relationship preservation

One of the most overlooked benefits of mediation is that it can help preserve relationships, business and personal, that would likely be destroyed through years of heated litigation. Because it is a collaborative rather than adversarial process, and because mediation isn't inherently a win-lose process, important relationships can often be salvaged that would otherwise be lost.

Greater client satisfaction

Most people like choosing their own fate. Correspondingly, most people feel better about the decisions they come up with rather than those imposed on them by someone else, like a judge or jury. Thus, even though compromise is at the heart of every mediated solution, the solution is the client's, and they generally never look back.

As litigators and parties have become better educated about these benefits, mediation has grown from an obscure litigation alternative to being a central part of the standard litigation process. Whereas suggesting mediation at one time was perceived as weakness, parties are now expected to address mediation.

In fact, changes in Utah law have made mediation mandatory in most cases. The Utah Code of Judicial Administration was amended in 2012 to more fully implement Utah District ADR Program into civil cases. The rule now states, in relevant part: "Upon the filing of a responsive pleading, all cases subject to this rule shall be referred to the ADR program, unless the parties have participated in another ADR process, such as arbitration, collaborative law, early neutral evaluation or a settlement conference, or unless excused by the court." Utah R. Jud. Admin. 4-510.05(1)(A). Rule 4-510.06, the rule identifying the actions exempt from ADR rules, reveals that the vast majority of civil cases are subject to the ADR program. *Id.* at 4-510.06.

Federal courts are also in line. Rule 33 of the Federal Rules of Appellate Procedure was entirely rewritten in 1994 to introduce settlement efforts into pretrial conference. The Tenth Circuit's corresponding local rule endows the circuit court mediation office with the power of the court requires counsel to participate in all scheduled mediations, and gives the mediation office the power to sanction violations of the rule. 10th Cir. R. 33.1. Today, the court refers almost all private civil litigation cases between represented parties to mandatory mediation.

Utah's Appellate Mediation Office was created in 1998. Michele Mattsson, the court's Chief Appellate Mediator, in a phone

interview, noted that today, like the Tenth Circuit, the Utah Court of Appeals refers most private, represented party civil litigation cases to mediation.

Businesses, too, have begun mandating the use of mediation by their counsel. According to the Harvard Business Review, some of America's largest corporations have decided that "winning" lawsuits is too expensive.

> These companies evaluate lawyers, contract managers, and paralegals not merely on lawsuits won or lost but also on disputes avoided, costs saved, and the crafting of solutions that preserve or even enhance existing relationships. The legal departments use quantified measures and objectives to reduce systematically the number of lawsuits pending, the amount of time and money spent on each conflict, and the amount of financial exposure.

Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARVARD BUSINESS REVIEW (May–June 1994).

Finally, the mediation process itself has evolved as the scope of cases being mediated continues to grow. For example, pre-mediation conferences have become much more common, particularly with respect to cases with more complicated legal issues or fact patterns. Pre-mediation conferences provide opportunities to resolve logistical issues, address concerns, identify strategies, and customize the format as the case may dictate. For instance, a pre-mediation conference can help the mediator determine whether it would be good for a client to hear the other side's perspective of the case in an opening statement, or whether giving one themselves would help the client feel like they have had their "day in court." Conversely, a mediator could determine after a pre-mediation conference that opening statements would not be helpful to the resolution process.

In short, mediation has evolved over the past few decades to become a standard, not alternative, means of dispute resolution. As parties, counsel, and court systems continue to benefit from the many advantages mediation offers over traditional litigation, the role of mediation in our system of justice will continue to become more deeply established and valued.