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The Value of Mediation: A Network Spotlight on US District Judge Alfred J. Lechner, Jr.

Interviews and Profiles

Litigation and Dispute Resolution

Alfred J. Lechner, Jr.

US DISTRICT JUDGE

Q. Judge, you have had a unique and very accomplished career and have seen the legal profession at several levels, including private practice as a trial attorney, state and US District Judge, in-house position as head of global litigation for a Fortune 50 company, law professor, and now as an arbitrator and mediator. I'd like to talk to you about your experience with mediation as a form of alternate dispute resolution. First, what are the advantages and disadvantages of mediation? Is it fair, and what attracts you to it?

First of all, mediation is controlled by the parties. It's faster than either arbitration or litigation. It is

much less expensive than either, and, unlike litigation in federal or state court, mediation, like arbitration, is private and confidential. The mediation process is relatively informal, simple and much more flexible than either arbitration or litigation. Moreover, it is usually agreed at the commencement of the process that what is said during the mediation cannot be used at trial, or for any other purpose. Also, settlements arrived at in mediation have a higher rate of compliance than awards or judgments resulting from either arbitration or lawsuits.

The disadvantages of mediation include the facts that the mediation process does not always result in dispute resolution, it lacks procedural and constitutional safeguards, legal precedents are not usually relevant, and there is no formal discovery process available to the parties.

From my experience, mediation is fair because it is controlled by the parties. Either party can walk away at any time with relatively little or no consequence. Moreover, settlement is reached if, and only if, the parties agree to settlement and agree to the terms of the settlement. As a consequence, fairness based upon procedure concerns, and the evaluation of the facts and law, fades to obscurity. The only question for the mediator and the participating parties is whether the dispute can be resolved. Accordingly, if agreement is reached it is usually the result of an acceptable compromise.

I enjoy the opportunity to work with trial lawyers, and their clients, in a mutual, unstructured effort to satisfactorily resolve a dispute. Having been a judge, a trial attorney, and also the client, I have a unique perspective to work in this environment that facilitates an appreciation of the position of those involved.

Q. In your experience, what skills are required for an individual to be an effective mediator? Are these skills different from what makes a successful trial lawyer?

The ability to listen and not become an advocate for or identify with any of the parties is key. In this regard, there is a parallel with being a judge: As a judge, you cannot have a bias in favor of or a prejudice against any party. A mediator cannot be effective if he or she allows any bias or prejudice to enter the mediation process. It is key that the trial lawyers and their clients have confidence in the mediator to act as a fair broker to effect a resolution of the dispute. This “honest broker” effort comes fairly easy to anyone who has been on the bench for any appreciable period of time. The distinction being that a trial lawyer is ethically required to have a bias in favor of his or her client, that is to represent his or her client as an effective advocate.

Q. What is your opinion about early mediation? Is it helpful to a case and should it be considered at the onset or is it better to wait until the case is more fully developed?

Early mediation can be beneficial. It seems to be more so when it is voluntarily undertaken by the parties rather than when it is ordered by a court. Nevertheless, it is fair to say that in either situation it is beneficial to at the least take the measure of your opposition. But keep in mind that even if the matter is ordered to mediation by a court, a successful resolution remains solely within the discretion of the parties.

Moreover, even if an early mediation is unsuccessful (regardless of whether directed by a court or initiated by the parties) it forms a foundation to address mediation at a later point whether that be after the resolution of a Rule (12)(b)(6) motion, written discovery, oral discovery, or an unsuccessful Rule 56 motion.

The point being that even after an unsuccessful court ordered mediation session, which usually lasts

a few hours or possibly a day, the seeds of a relationship are planted, which can be especially beneficial as the evaluation of the case progresses from stage-to-stage.

Q. What about submissions to the mediator? What is the best way to convey your position to the mediator? Do you find it useful to have a thorough submission or should it be succinct? Also, should a party be frank about settlement limits in the initial submission or wait until in-person discussion?

Submissions for mediation are crucial. They should not be taken lightly, nor should they be prepared at the last moment. Even if mediation is court ordered at an early stage, it is important for trial counsel, and his or her client, to effectively explain to the mediator the efficacy of their side of the case, as well as the goals. Even if the initial meeting is unsuccessful, there may be a follow-up mediation session, with possibly the same mediator, and first impressions are important.

Every good mediator will spend time preparing for a mediation session regardless of whether voluntarily arranged by the parties or directed by the court. The only way that a mediator can prepare is by reviewing the submissions from the parties. And, this is where experienced trial counsel can be very effective. The submission for the Mediator is the first impression and needs to be an effective presentation of the facts and the law. It's important for the mediator to know the strengths, and the weaknesses, of your case — and this is where it may be counterintuitive. While trial counsel may decide to withhold the weaknesses from the initial submission, at some point it will probably be necessary to address them with the mediator, if settlement or other resolution is actually sought.

I have found that it is most effective to give to the mediator the position of each of the parties well in advance of the mediation session. A mediator is, and should be, interested in only one thing: resolving the dispute. He or she is not interested in who pays, how much is paid, or whatever else may be necessary to resolve the matter. The mediator is interested in "brokering" a deal to a successful conclusion. Accordingly, an advanced look at the case, as well as the respective positions of the parties, is crucial. Additionally, at some point it may well be appropriate to disclose the "bottom line" for the settlement of the dispute; this is better done at some point during the actual mediation.

Q. What role do you see in-house counsel play in mediation? How can in-house counsel effectively assist the mediation process?

From the perspective of a trial lawyer, input from in-house counsel is essential. In-house counsel needs to be frank with his or her trial attorney as to the basics: whether he or she (the client) is actually interested in mediation, how interested, and whether in-house counsel will be an effective member of the team on behalf of the client involved in the mediation. All too often it happens, especially with court ordered mediation, that the parties appear and are simply present during the mediation rather than being active participants with an eye toward resolving the case. This is not usually the situation when the parties voluntarily arrange for and enter into a mediation.

In-house counsel is, more often than not, the conduit to the CEO and/or the board concerning where the client is with regard to the dispute. From personal experience as in-house counsel, I know the importance of advising trial counsel exactly where the client is and wants to go with either court ordered mediation and/or arranged mediation. In this regard, in-house counsel has to act as a bridge between trial counsel and the client. In sum, effective participation by in-house counsel is essential for successful mediation, especially when it is recognized that mediation may take more than one session and the position of the client may change or involve as the mediation progresses.

Q. What are some do's and don'ts for in-house counsel?

In-house counsel should take, and understand, mediation to be an opportunity, regardless of whether it is court ordered or voluntarily arranged. The opportunity is, at the very least, getting to know the opposition and possibly the position of the opposition. In addition, as with many things in life, what an individual or client may want at a particular moment may change with time. A case that a client may have no interest in resolving, at least initially, may become a case (for reasons known only to the client) that is later sought to be resolved, and resolved quickly. Having the foundation laid to communicate with the other side facilitates such discussions when circumstances change.

In-house counsel should be involved in the drafting of the statement to present to the mediator. The reasons for this are obvious. Trial counsel and in-house counsel (read the CEO and/or the board) need to be on the same page. There needs to be a discussion of not only strategy but interest with regard to resolution of the matter and that needs to be made plain to trial counsel.

In-house counsel should tell trial counsel not only to appear at a court ordered mediation to assuage the concerns/directions of the judge, but also to be an effective part of the mediation team. In-house counsel need to be prepared to talk to the mediator if so requested. To do so in-house counsel need to work with trial counsel and focus on the mediation during the mediation session.

Q. What are some of the steps in-house counsel should take to prepare for productive mediation?

In-house counsel need to keep his or her boss, the general counsel, the CEO and/or the board thoroughly informed. It is important to remember that the case does not belong to the trial attorney — the case belongs to the client. Accordingly, in-house counsel must thoroughly understand and be familiar with the facts of the case. This includes not only the good facts, but also the facts that work against the client — the problems. If the mediator is pre-selected through the court ordered mediation program, in-house counsel should become as familiar with the mediator as soon as possible by appropriate due diligence prior to the mediation session. If the parties can select the mediator, in-house counsel should work with trial counsel in selecting and vetting possible candidates before offering their choice(s) to opposing counsel. And, again, in-house counsel need to be part of the "team" with trial counsel not only during the mediation session but also during preparation for it.

Q. Have you seen instances where an in-house counsel was able to bring value to the mediation by suggesting an out-of-the-box/creative settlement idea during the mediation session?

Yes, I have seen examples where in-house counsel brought value, not only by being an effective member of the mediation team, but by effectively representing the client, and thoroughly knowing what the client wants. While candor with the mediator is essential, it seems to be universally recognized that neither side starts a mediation session by offering their best or bottom-line deal. Positions need to have room to develop and evolve during the course of a mediation session. In-house counsel can assist a mediator in understanding the client and the client's interests, as well as opportunity, to resolve the matter. And, this can be effectively accomplished by the client through in-house counsel. In addition, in-house counsel know the strengths and weaknesses of those may who assist or hinder the client at trial — all of which are necessary to know when evaluating an opportunity to resolve the matter.

Q. What are some of the most important skills to look for in a mediator?

Experience, availability, expertise, and the ability to listen are key attributes a party should look for in a mediator. It's important to assess whether the person upon whom the client agrees to be a mediator can, in fact, be impartial and not have a bias in favor of either side (or prejudice against the other side). Rather, is he or she committed to the session as someone who is looking to do one thing: facilitate the resolution of the dispute. Also, even if you find a candidate who you assess to be an experienced mediator with appropriate expertise, neither he nor she will be of any value if he or she is not available. You will find there are some mediators in specialized areas who are "booked" 8, 9, and 10 months out, even more than a year out. As with most things in life, timing is essential. When the parties are interested in mediation, finding a mediator who is available is one of the first things to consider.

It is important to keep in mind that the parties control the mediation. If an individual who was seen as identifying with a point of view or an industry does act as a mediator, his or her view on the mediation is not controlling. I've seen situations where an individual identified with a particular point of view was still effective in operating as a mediator to bring the parties together because of that experience. Again, this is a distinction that separates mediators and judges. The latter will make decisions which will control the case; the former are there to facilitate a resolution while not making decisions that control the case. In point of fact, a mediator cannot make any decisions about the case. If a party is not satisfied with the procedure or a suggested resolution, the mediation is over. It is as simple as that. While the mediator may run the session and work to resolve the matter, the parties control what happens. There is no settlement unless the parties say so.

Other important attributes of a mediator are the ability to communicate and get along with parties and their representatives, the ability to be flexible, and the ability to understand that he or she is there solely for the purpose of resolving the dispute. A mediator should not have any interest as to who pays what to whom. In fact, this is the area where a party should see a basis to reject a candidate to act as a mediator. If it is perceived that a proposed mediator will have an interest in anything other than the resolution of the matter, look for another candidate.

Judge Alfred J. Lechner, Jr. served as US District Judge, District of New Jersey and Superior Court Judge, State of New Jersey. Judge Lechner specializes in securities, class action, corporate, and general business litigation, as well as intellectual property and employment litigation. Judge Lechner has worked as a trial attorney before and after his service as a judge, and was the head of Global Litigation for a Fortune 50 company. He now serves as an arbitrator and mediator, and also conducts neutral evaluations, mock trials, and arbitrations and mock motion and appellate arguments. He has conducted internal corporate reviews, as well as internal corporate investigations. Judge Lechner can be contacted at judge.lechner@gmail.com or through Fed Arb at www.fedarb.com.

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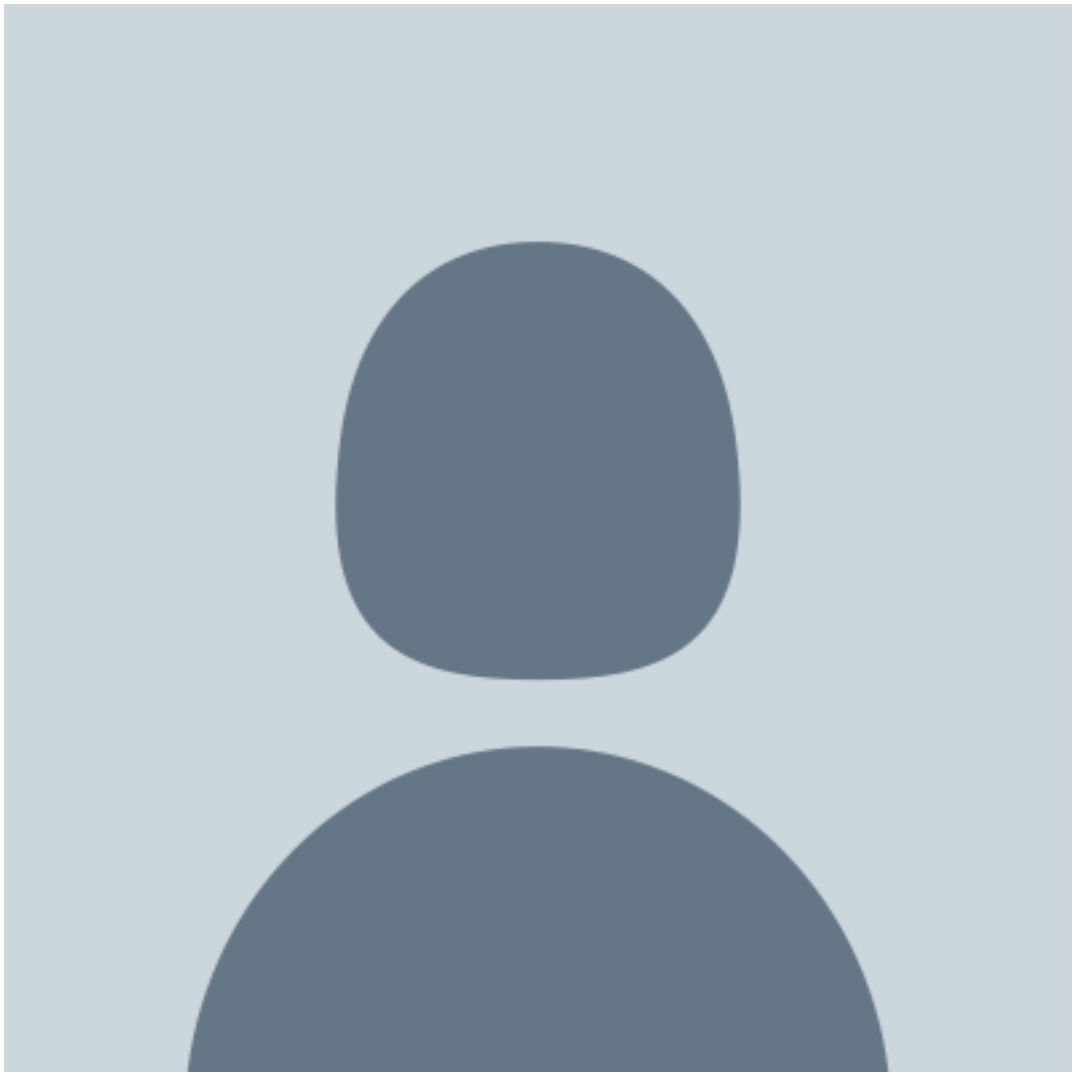

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