Eight Benefits of Mediation

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Editor's note:
This is the first in a three-part series

In 1926, long before the explosion of litigation in our society, Justice Learned Hand remarked in a lecture to the New York Bar, "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." [1] His comments echo Abraham Lincoln who famously stated: "Discourage litigation. Persuade your clients to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and waste of time." In short, litigation is costly, intrusive and time consuming. Most attorneys and judges agree that it is an inefficient and taxing method to resolve the majority of disputes.

That said, in some circumstances, litigation has its advantages, and there are times when cases should be litigated. Litigation, and not settlement, can establish a legal precedent. This very public process also brings a measure of accountability for parties that violate the law and the rights of others. Sometimes it offers a trial by jury. And, at least in theory, the blindfold over the eyes of Lady Justice serves to remind us the judicial system is supposed to treat people fairly, without regard to their position in society, and equalize the power between parties. However, an unequal distribution of resources between the parties — even with a fair, impartial court — works against this noble ideal.


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Mediation in Idaho, outside the family law arena, can be traced to its nascent beginnings in 1992, when Governor Cecil D. Andrus formed a task force "to coordinate and foster the development and use of alternative dispute resolution....".[2] While progress has been made over the course of those 20 years, commentators describe the current alternative dispute resolution process in Idaho as in a state of stasis, which needs an infusion of energy and resources. [3] Because of the shortcomings of litigation, Idaho lawyers should commit to resolve more Idaho lawsuits through an alternative dispute resolution process. Of course, as attorneys, our first response is informed by our training, and we instinctually frame a dispute for court adjudication. To temper that instinct, it is helpful to review eight benefits of a mediated process.[4]

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Mediation gives the parties more control over the outcome and who decides their dispute

A judgment creates a winner and a loser, as opposed to a voluntary compromise between the parties. The parties retain control to make the decisions that affect them when they chose mediation. They have the power to change the procedural ground rules, and customize the process to make it work under the circumstances their unique dispute presents.

Mediation can also lessen the risk of unexpected outcomes. This can be especially important when a jury is asked to decide complex and technical matters. Further, the parties can select a mediator who has the disposition and approach that they believe will bring the parties to a settlement. It also allows the parties to hire a mediator with subject matter expertise that the court may not process.

Mediation creates an opportunity for a creative solution

A real benefit of a mediated settlement is the opportunity to engage in creative problem solving. Outside the courtroom, where the parties control the result, they have a far wider array of options to resolve their differing interests and issues. It often cannot address the parties' underlying concerns. A court must look to the past, apply the law to the evidence, and determine who was at fault. A court judgment can order money damages or injunctive relief. Yet there are many things beyond money that can resolve a lawsuit. These might involve an apology, a future business contract, a referral, or any number of possibilities besides a money settlement.

One of the most creative mediations I participated in arose in the context of a wrongful death medical malpractice case against a veteran's hospital. The patient lost his life from an overdose of anesthesia. As part of the settlement, the defendant agreed to construct and dedicate a memorial in the hospital garden courtyard, as a tribute to the man that lost his life. The patient's family took great solace in that they were able to create a daily reminder for the physicians of the hospital to vigilantly exercise great care in their work. This result could not have been obtained from a court judgment.

A mediated settlement brings certainty

Even if a party is successful in obtaining the judgment it seeks, it still must be enforced to obtain the relief ordered. This can result in another round of litigation. Parties tend to honor their agreements when they explicitly negotiate and agree to the outcome. This is why a negotiated agreement is often more lasting than a litigated result.

The possibility that the losing party may appeal the judgment brings further uncertainty into the equation. When the parties enter into a voluntarily settlement, they have decided to resolve the matter and move forward with their life or business. While the mediated outcome will be a compromise, it becomes a "knowable fact," upon which other decisions can reasonably be made. There is also less chance that the settlement will generate more litigation, which an adjudicated result often does.

A mediated settlement can be confidential

Litigation is a very public process. The parties' dispute is an open book often concerning private matters and highly charged issues. In a business context, trade secrets or other confidential proprietary information may be revealed, might harm a businesses' reputation. A mediated process offers the parties privacy. Idaho adopted the Uniform Mediation Act in 2008, which provides strong protection to ensure that matters discussed in mediation are confidential and protected from disclosure.

Mediation can reduce collateral damage to the parties

Litigation is not for the faint of heart. A "scorch the earth, take no prisoners" approach might win a lawsuit, but it certainly will not lessen the damage, or rebuild the impaired relationship between the parties. Litigation can result in winning the battle, but not the war, when viewed from the higher perspective or context. Parties often have to deal with one another after the ink on the judgment is dry, and interact as businesses, colleagues and families. This may seem near impossible, after the parties have fought publically, and drawn a line in the sand. As Justice Learned Hand aptly noted, only death and sickness can cause more dread than a lawsuit. The emotional costs are high, even for the winners.

Mediation will save the parties time and money

A primary reason that less than five percent of cases go to trial is the sheer expense of the process. The pretrial attorney fees and costs arising from discovery, depositions, transcripts, motions, briefs, research, experts and witnesses can be staggering, even before the case arrives on the courthouse steps. On a practical level, few parties can afford to crank up the litigation machine and keep it running. Mediation is far less expensive, and the cost of a mediator is typically shared between the parties.

Likewise, litigation can be very slow and time consuming. This has a direct impact on increasing the cost to adjudicate a dispute. Court dockets are crowded, in Idaho and across our country, as courts are instructed to handle more cases with fewer resources. In many situations, the slowness of the litigation process, which may take years to conclude even in the absence of an appeal, makes little sense for the parties. Individuals and commercial entities are often better served by a mediated resolution, which allows them to move on, past the dispute.

Mediation can provide a fresh assessment of the case

Mediation also allows each party to better understand the strengths, and especially the weaknesses, of their case. If an evaluative mediator is selected (as opposed to a mediator who is facilitative in style), the mediator can be asked to provide each side their opinion of the value of their case, and the likelihood of the success on the merits. The mediator offers an invaluable, neutral perspective. They bring to the table their own trial and litigation experience and perspective on how the court might respond to the witnesses and evidence of the parties. This reality check can also be a real benefit to counsel, and bring an objective voice to the process.

Mediation can narrow the issues

In the event the parties feel the dispute needs to be litigated, and they can afford to do so, then mediation can also be worthwhile in narrowing the issues between the parties. When mediation is used in this fashion, the parties can then present the court with a more fully developed case. Reducing ancillary issues through mediation, rather than motions, can help the court focus on the real issues of the case.

In sum, mediation can be used to increase the efficiency of the dispute resolution process. It also has the potential to result in more innovative outcomes, with a greater likelihood that the parties will find some measure of satisfaction in the process.

The rest of this series will give more practical how-to pointers. Part II will address Preparing Your Client for Mediation and Part III focuses on Participating in a Mediation — a Guide for Idaho Attorneys.

About the Author

Deborah A. Ferguson *specializes in civil mediation, outside the family law arena. She has 26 years of complex civil litigation and trial experience, and was an Assistant United States Attorney litigating hundreds of civil cases for the Department of Justice over the past 20 years. She recently attended the Straus Institute for Dispute Resolution, at Pepperdine University School of Law and completed advanced training in mediating the litigated case. She is on the roster of certified mediators for the United States District Court of Idaho and all Idaho State Courts. Deborah A. Ferguson served as the President of the Idaho State Bar in 2011.*

Endnotes

1 Aptly, this comment was made during a lecture entitled "The Deficiencies of Trials to Reach the Heart of the Matter". L. Hand, *Deficiencies of Trials to Reach the Heart of the Matter,* in 3 "Lectures On Legal Topics" 89, 105 (Association of the Bar of the City of New York, 1926).

2 Exec. Order No. 92-7, 1992 Idaho Sess. Laws 1594.

3 Maureen E. Laflin, *Dreamers And Visionaries: The History Of ADR In Idaho*, 46 Idaho L. Rev. 177, 228 (2009).

4 For purposes of this article, the focus will be on mediation, and not other forms of alternative dispute resolution, such as arbitration, or early neural evaluation.

5 Idaho Code 9-801, et.seq.