

ALTERNATIVE DISPUTE RESOLUTION

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IN THIS ISSUE

The Alternative Dispute Resolution Committee and the Business Litigation Committee are proud to co-sponsor a Major CLE program at the 2011 Midyear Meeting in Pebble Beach, California. Please join us on Tuesday, February 22, as our panel of veteran trial lawyers examines, in a “case study” format, how time-tested trial skills were effectively used at the mediation of two actual cases—a products liability case and a complex business dispute—to achieve favorable outcomes in difficult and complex cases.

Overcoming The Vanishing Trial: A Trial Lawyer’s Skills Are More Vital Than Ever to Success at Mediation

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The Alternative Dispute Resolution Committee serves all members who use mediation and arbitration to resolve disputes, as well as those who have become mediators or arbitrators in their own practices. The Committee publishes newsletters and is developing as a global resource for our international members, corporate counsel and insurance executives, to offer expertise on negotiating and drafting alternative dispute resolution provisions and on the effective use of alternative forms of dispute resolution.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Although fewer and fewer cases are disposed of by a jury, the skill set required for effective resolution of civil law suits remains unchanged. Despite the reality of the “vanishing trial,” this article will explore how the continued development and application of a trial lawyers’ “underlying skills” remains critical to obtaining the best possible result at mediation.

I. THE “VANISHING TRIAL” IS A MODERN-DAY REALITY

In 2004, the American Bar Association’s Litigation Section commissioned “The Vanishing Trial” project to explore whether (1) the “number of trials [is] declining,” (2) “the trial is an endangered species,” and (3) “we [should] care.”¹ With a resounding “yes,” the project concluded that “[t]he vanishing trial may be the most important issue facing our civil justice system today.”²

The concept of the “Vanishing Trial” finds overwhelming support both statistically and anecdotally. Reported statistics demonstrate that the decline in civil trials has been “steep and dramatic.” For example, in 1962, the federal courts tried 5,802 civil trials, representing 11.2% of all civil cases disposed of that year. By 2002, although the number of federal civil case filings increased fivefold, the number of cases disposed of by trial “plummeted” to just 1.8% (4,569).³ As of 2009, this trend downward remains unchanged, with an astounding 276,684 federal civil cases filed, but only 1.2% (3,342) disposed of at trial.⁴

¹ Patricia L. Refo, “The Vanishing Trial, 30 *Litigation* 1, 2 (Winter 2004) (“Refo”).

² Refo, p. 4.

³ Refo, p. 2.

⁴ Table C-4, Annual Rpt. Of The Admin. Offc. Of U.S. Court (2009). Of those federal civil cases, a meager 2,287 were jury trials.

Anecdotally, leading trial lawyers acknowledge the same phenomenon. Indeed, current IADC president Joe Ryan recently lamented that “[t]he civil jury trial ... is rapidly going the way of the dodo.”⁵ The American College of Trial Lawyers determined that “[o]ver the past four decades, the civil justice system ... has witnessed, simultaneously, a litigation explosion and trial implosion.”⁶ Although unintentionally, modern cinema has even captured the concept on stage in this scene from the courtroom drama “A Few Good Men”:

SAM:

Commander, Lt. Kaffee’s generally considered the best litigator in our office. He’s successfully plea bargained 44 cases in nine months.

LT. KAFFEE:

One more, and I get a set of steak knives.

JO:

Have you ever been in a courtroom?

LT. KAFFEE:

I once had my driver’s license suspended.

Although the opportunities for trial lawyers to stand before a jury in civil cases continue to decline, the skills unique to trial lawyers

⁵ Joseph W. Ryan, Jr., “The President’s Page,” 77 *Def. Counsel J.* 423, 425 (Oct. 2010).

⁶ American College of Trial Lawyers, “The ‘Vanishing Trial:’ The College, The Profession, The Civil Justice System,” 226 *F.R.D.* 414, 414 (2005).

remain paramount, as the DRI recently concluded in its 2009 study, “The Future Of Litigation”⁷:

Trial and litigation teams have become more important ... Related litigation skills—deposing skills, negotiation skills, mediation and arbitration process skills, etc.—are increasingly valuable and need to be a component on litigation teams.⁸

As “The Vanishing Trial” project and other leading authorities have recognized, the ongoing conversation about the vanishing trial typically leads to a discussion about Alternative Dispute Resolution (“ADR”), and in particular, the use of mediation as an accepted, cost-effective means of resolving disputes. In fact, some commentators have suggested that “if ... the new goal of ‘litigation’ is settlement, then mediation may have replaced trial as the endpoint.”⁹

While a more moderated approach is to view mediation as one of several alternatives available in the life of a dispute to facilitate its resolution, one truth emerges under either approach: even with the rise of mediation and the concomitant decline of the trial, continued development and use of a trial lawyer’s “underlying skills” remain as important as ever.

In fact, maintaining and developing the “fundamental skills”—identifying key factual and legal issues, legal research and writing, effective oral argument and persuasion, discovery and depositions, synthesizing evidence into a compelling narrative—and the “higher order capabilities”—trial and ADR—is vital to meet the “robust” growth of future litigation.¹⁰

In the context of mediation, these “underlying skills”—taking a deposition, delivering an oral argument on a motion for summary judgment, evaluating the potential outcome of a case, preparing a witness for her testimony, cross-examining an expert at trial—are undeniably “needed to generate positive outcomes for clients in a mediated setting.”¹¹ In fact, applying these skills to negotiate the resolution of a case to the client’s satisfaction should be viewed as a “natural extension of being an effective litigator.”¹²

II. UTILIZING THE TRIAL LAWYER’S UNIQUE SKILLS TO ACHIEVE AN EFFECTIVE OUTCOME AT MEDIATION

“[T]he great war stories of the next generation of trial lawyers [will] begin, ‘And then, I looked that mediator in the eyes and said ...’”¹³

Despite the ever-expanding popularity of mediation, many practitioners approach their preparation for mediation as almost an afterthought. Unfortunately, such an approach both undermines the mediation as a

⁷ Defense Research Institute, “Future of Litigation,” p. 9 (2009).

⁸ Refo, p. 2.

⁹ Kimberlee K. Kovach, “The Vanishing Trial: Land Mine On The Mediation Landscape Or Opportunity For Evolution: Ruminations On The Future Of Mediation Practice,” 7 *Cardozo J. Conflict Res.* 27, 46 (2006).

¹⁰ “Future of Litigation,” p. 17.

¹¹ “Future of Litigation,” p. 21.

¹² “Future of Litigation,” p. 20.

¹³ Michael Orey, “The Vanishing Trial,” *Businessweek*, Apr. 30, 2007 (Quoting Houston, Texas trial lawyer David Berg on the vanishing trial).

“process” and jeopardizes the client’s chance to satisfactorily resolve the dispute. A better approach is to prepare for mediation in the same deliberate manner that the trial lawyer prepares for trial: by providing one’s client with the best opportunity to reach a “positive outcome.” When approached from this perspective, a trial lawyer can effectively implement the “underlying skills” he or she would use if mediation were unavailable. Indeed, this trend is a modern one.¹⁴

In so doing, practitioners should always remember two of the fundamental reasons for the popularity and success of mediation: (1) shifting the power to determine the outcome of the dispute to the parties themselves, and (2) averting the risk of an unfavorable outcome being imposed by a third party, such as a jury or arbitrator. Maintaining consideration of those two fundamentals should be a guiding force in all aspects of preparing and engaging in mediation.

A. Ensuring The Case Is “Ripe” For Mediation

At least one commentator has hypothesized that the cause of the vanishing trial is “procedural reform,” concluding that too many cases were tried when parties did not have full and balanced information about their claims and defenses.¹⁵ Now, however, state and federal rules of civil procedure allow for broad discovery of information potentially relevant to the claims and defenses, allowing all sides to gain as much information as necessary to understand and evaluate the

relative strength and weaknesses of their respective legal positions in a case.

Garnering sufficient information about the case—the parties and the witnesses, their credibility, their appearance and demeanor, and availability; key documents, their relevance and potential admissibility; the venue in which the case is pending, the make-up of the venire, the judge, and past verdicts; and the applicable law, whether it is favorable, in flux, or otherwise; and, the resources and willingness of the client to undergo protracted and costly litigation, including potential negative publicity—can be just some of the information necessary to secure before mediation. Without the benefit of such vital information, the parties are not equipped to place themselves in the best position possible to achieve the desired outcome.

As a result, before mediation is ever meaningfully discussed, the wise practitioner will utilize the procedural tools and devices available to gather that information. Doing so does not require a “scorched-earth,” all-out discovery plan. Strategically identifying key witnesses to depose, developing the necessary testimony to support a claim or potential defense, understanding the venue in and judge before which the case sits, and testing the strength of an expert witness under cross-examination, can be done economically if undertaken with deliberation and forethought in the early stages of discovery—while still providing the factual information to permit the client to make intelligent decisions in mediation.

Although it should go without saying that each case and each client are different, inherent in that statement is the premise that the practitioner handling the case can draw upon his or her “underlying skills” to counsel the client as to the approach most suited for

¹⁴ Christopher A. Kenney, “Using Your Trial Skills to Achieve Best Results in ADR Settings,” 40 *The Brief* 1, 62 (Fall 2010)(“Counsel should not proceed to ADR as though it were an exercise in passive bartering ... By infusing an ADR presentation with trial tools, techniques, and tactics, counsel can maximize the prospect for favorable results.”). Mr. Kenney is an IADC member.

¹⁵ “The ‘Vanishing Trial,’” 226 FRD at 426.

the case at hand. Ensuring that a case is “ripe” for mediation requires a trial lawyer’s skill in not only assembling and analyzing the necessary information, but in processing that information as well. In preparing for trial, trial lawyers evaluate the totality of the case in assessing a likely outcome, based on the facts, the law, the parties, the judge, and the venue. If approached from this perspective, that analysis is no different when for mediation.

B. Preparing For Mediation

Having determined that the case is “ripe” for mediation, preparing for the mediation is key. Here, preparation means more than ensuring that you have the entire file organized and ready to bring to the mediator’s office.

First, selection of a mediator requires preparation. Unlike a trial where assignment of the presiding judge is random, the parties usually have input into and control over the mediator. Just like the evaluation of a judge in assessing your chances at trial, practitioners should make every effort to assess and provide input into selection of the mediator, his or her style and experience, and whether the complexity of the issues requires a mediator with expertise—such as in a multi-party, complex construction dispute law—to facilitate the mediation.

Second, preparing and submitting a thorough mediation position statement arms the mediator with all of the information necessary to facilitate the best possible result at mediation. Many practitioners fail to submit a position statement at all, submit a case summary that inadequately details the relative strength and weaknesses of the dispute, or fail to provide the position statement with sufficient time for the mediator to review the submitted materials. Any of these missteps

can jeopardize the opportunity to maximize the outcome at mediation.

While some practitioners suggest, or mediators request, an objective position statement, submitting one with the trial lawyer’s persuasion can serve several functions. For example, it can enlighten the mediator about the theme and theory of a case, and provide the mediator with an opportunity to explain to the practitioner and/or the client why the theme or theory may prove ineffective based on the mediator’s experience. Likewise, a party’s failure to acknowledge in its position statement key facts—otherwise disclosed in an opposing party’s submission—can undermine his credibility with the mediator and make a significant difference in the outcome.

Of course, the position statement must be submitted with enough time for the mediator to read, absorb, and analyze the information contained in it.

Third, pre-mediation contact with the mediator can be critical. Generally, *ex parte* communications between a party, counsel, and a mediator are not prohibited. If the mediator does not hold a pre-mediation conference, practitioners may be wise to initiate contact with the mediator if the circumstances dictate regarding particularly unique or sensitive issues. However, practitioners are wise to be restrained by their obligations to clients, the rules of professional responsibility, and the attorney-client privilege in revealing information that they may deem important for the mediator to know but cannot otherwise communicate.

Fourth, preparing one’s client for mediation requires an understanding of the goals and objectives of mediation. If a trial lawyer has done his or her job in evaluating the case in assessing the chances for settlement and trial

outcome, much of the client preparation may be complete in terms of setting expectations, objectives, and priorities within those objectives.

Finally, strategy for opening statements and the presentation of materials as part of the opening statement, evaluating anticipated demands, and the overall potential pitfalls are vital to preparation. Indeed, under some circumstances, it may be important for the client representative to communicate directly with the opposing party, in which case, selection of the appropriate client representative and preparation for his or her statements must be given necessary attention.

C. The Mediation Opening Statement

Perhaps one of the greatest missed opportunities at mediation occurs at the opening or joint caucus, and specifically, the chance to deliver an opening statement. Many practitioners, and unfortunately some mediators, believe that, by the time the parties have reached mediation, they know enough about the case that opening statements are simply unnecessary and will serve no constructive purpose other than inflaming the opposing party.

Generally, such an approach is short-sighted. Not only does it fail to recognize that mediation is, by definition, a conciliatory process of negotiation, not an adversarial proceeding, but it also undermines the vital role of the mediator in facilitating resolution by helping each party to view the case through the lens of the opposing party. Certainly, if opening statements are delivered in an adversarial or combative manner, the result can be devastating to the opportunity to reach a favorable resolution.

An opening statement at mediation serves at least three purposes. First, it is an opportunity for the trial lawyer to directly engage the opposing party and set proper “tone” for the mediation, from conciliatory to righteous indignation, and all points in between, depending on the predetermined strategy and circumstances at the mediation.

Second, it provides a chance for the practitioner not only to concede any weaknesses in his case, but also highlight the strengths of the case; and also to educate the opposing side about the potential weaknesses of their claims, all the while reminding the opposing party that he or she retains control of the risk and the outcome at mediation. The opening statement is a meaningful chance for counsel to communicate their version of the information, facts, and evidence developed through discovery, and more importantly, to facilitate the other party’s understanding of—although not necessarily agreement with—that version

Finally, the opening statement is, perhaps more subtly, an opportunity to demonstrate (rather than articulate) the party’s ready-willingness to proceed to trial. Showing up early to the mediator’s office, having the “right” client representative physically present, and delivering a concise but compelling opening statement that communicates your theme and theory—supported by highlighted deposition excerpts, key documents, time lines, exemplars, or PowerPoint slides—are all time-tested methods used by trial lawyers to deliver the message of professionalism, capability, and trial readiness.

D. Negotiating at Mediation

While the multitudes of negotiating tactics are well-beyond the scope of this paper, several skills useful at trial are worth highlighting in

the context of mediation. First, remembering the objectives, and priorities within those objectives, of participating in mediation is crucial. Like a trial lawyer that knows what testimony he must elicit from a given witness before calling her to the stand, mediation counsel must also remember that in a business dissolution mediation, the parties may well be willing to consider resolutions that involve something other than simply exchanging money; creative counsel should discuss all the potential business-relationship options with his client and be prepared to explore them in mediation.

Second, listen, not just to the words said, but to the demeanor, timing, and tone of the communication. Just like a critical witness on the stand at trial, listening to the opponent's mediation opening statement, and the documents or testimony highlighted in it, can be vital to modifying the delivery of one's own opening statement or opening offer, in understanding the other side's view of the case and willingness toward reconciliation.

Third, persistence and patience are critical ingredients for a successful outcome. Effective trial lawyers know which "battles to pick" and are prepared to concede, for example, on the admissibility of a document that is not critical, only to advocate with

unfettering persistence for the admission of key testimony later. Mediation is truly a process, and if allowed to persist through patience, one that works. Preparing for that process, and preparing one's client for it, can create a previously non-existent opportunity to reach a mutually satisfactory outcome.

Of course, persistence is not limited to the mediation itself. Seasoned practitioners know that even if the case does not settle at mediation, many times the psychological prospect of relinquishing control of the case—and a meaningful offer of settlement—is enough to lead to a post-mediation settlement.

III. CONCLUSION

The "Vanishing Trial" is not just theory, it is a reality. However, the decline of the jury trial in no way signals the decline of the trial lawyer's "underlying skills." Despite the "litigation explosion and trial implosion," continued development and maintenance of those skills remain vital to achieve positive outcomes for clients. As the use of mediation continues to grow in popularity and success, trial lawyers can best place their clients in positions to reach favorable outcomes at mediation by relying on their time-tested trial skills in the context of mediation.



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