

Virginia

Regulatory Hot Tip 2017 – 4

Professional Insurance Agents Association of Virginia and DC, Inc.

CONSIDER MEDIATION, NOT LITIGATION

When your business is harmed by the actions of another, your instinctive response might well be to (i) hire an attorney and (ii) file a lawsuit with an eye toward going to trial. After all, isn't that why we have courts? Yes, but...

You should consider another option as well. Many of my professional colleagues and I believe that a *good* settlement is frequently better than a *great* judgment. "Winning" at trial can be a grueling process which demands your undivided attention and commitment while you are trying to run your business. It can also involve considerable expenses for counsel fees, expert witness fees, court reporter's transcripts, complying with electronic discovery, and the like.

Alternative Dispute Resolution ("ADR") provides another route to obtaining relief from the damage done to your business. The most commonly used form of ADR

The author of this Regulatory Hot Tip, Barrett E. Pope, Managing Director of DuretteCrump, PLC, endeavors to provide accurate and authoritative information about the subject matter covered as of the date of publication. However, the substantive information and any statutory authority contained in this Hot Tip should be verified as they are subject to change with the passage of time. The author provides this Hot Tip with the understanding that he is not rendering legal, accounting, or other professional advice or counsel. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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is mediation, where a professionally-trained mediator is employed to facilitate—and even drive—negotiations. Retired judges, prominent private practitioners, and others with the appropriate skill-set are available. After a suit is filed in federal court, it may be the practice of the trial judge to refer the parties to a magistrate judge to oversee settlement discussions. Regardless of the approach, an effective mediator accustomed to getting the parties to “YES” can be of great value. Here’s why:

(1) Preparing for mediation can take *considerably less time and effort*—and thus *cost far less*—than going to trial, even though some mediators charge as much as \$500.00 or more an hour. (That cost customarily is divided between the parties.)

(2) A mediator can be engaged *at any stage* without having to wait for a crowded court docket to accommodate a trial for your particular dispute.

(3) Mediation can result in *multi-faceted and creative solutions*—sometimes even “win/win” scenarios. In one bitterly contested matter, I represented a party who settled during mediation. There were twelve “deal points” in the final agreement, *only one* of which involved the payment of money. Relief at trial, however, is limited to an award of money damages if you prevail.

(4) Parties at a mediation can deal face-to-face with one another in a controlled setting and become far more involved in determining the outcome than at trial. It is also a unique opportunity for your lawyer to speak directly and candidly to the other party, because the constraints of a deposition are not in place. This aspect of mediation can be effective if your opponent’s lawyer has failed or refused to identify and convey to his own client the weaknesses in his case.

(5) Almost all mediators will acknowledge that they have *only one objective*: Reaching a negotiated end of the conflict. They will do everything in their power to achieve that goal—thereby enhancing their reputation as *successful* mediators and, thus, the continued demand for their services. Judges, by contrast, realize that many disputes simply cannot be settled and are quite content to preside over a trial if one is necessary; moreover, their positions on the bench are not dependent on how many cases they actually try.

Another form of ADR is arbitration which involves submitting evidence and argument to one or perhaps a panel of three individuals who render a decision instead of facilitating a settlement. In this fashion, arbitration is more like a trial, but it has some of the same advantages of mediation: speed, efficiency, greater affordability. Sometimes, arbitration is required under the contract that is in dispute; on other

occasions, the parties simply choose it after the dispute arises. Arbitration can be either binding or non-binding. If the former, it enjoys the same dignity as a judgment. In any event, it is another valuable ADR tool to be used instead of marching to trial in a courtroom.

Both mediation and arbitration should be considered by you and your counsel in lieu of seeking a jury's verdict or a judge's final decision. You too may find greater value in a good settlement than in a great judgment.