

**WHY INSTITUTIONAL USERS EMBRACE MEDIATION, AND
OCCASIONAL USERS SHOULD TOO**

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Lynn M. Roberson practices litigation, particularly in the areas of premises liability for violent crime, sexual harassment, and other personal injury law, as well as insurance coverage matters. Ms. Roberson has completed over 65 jury trials in these areas. She is chair of the Premises Liability committee for the Georgia Defense Lawyers Association. Ms. Roberson is secretary of the Board of Directors for the Litigation Section of the Atlanta Bar Association. She is currently vice-chair for DRI=s section on Trial Tactics and Techniques, is a member of DRI=s Insurance Law committee, and is a frequent contributor to the Covered Events newsletter. Lynn is a certified mediator and was certified as a civil trial advocate in 1990.

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In recent years, liability insurers and corporations have been called upon to greatly reduce their costs and exposures in claims and litigation. Institutional claims handling procedures have been instituted by many insurance carriers and even some corporations or self-insureds, both for their in house claims handlers and their outside counsel. Many of these procedures emphasize resolving claims or suits as soon as possible and at the least cost.

In this paper, we will examine why insurance companies and other business entities have, to a large degree, embraced ADR, particularly mediation, in handling their litigation.

1. Mediation saves money

I think the primary reason liability insurers and corporations have embraced mediation is because it stops the clock from running for the costs of defense. Mediation, particularly where both sides are motivated to settle, can save the parties thousands of dollars in legal and expert expenses.

2. Mediation saves time

The second reason liability insurers and corporations have embraced mediation is because it enables them to close files sooner than not. My own experience has been that many cases would have settled anyway, just not as quickly. On the other hand, I have also seen cases settle through mediation which would likely never have settled otherwise.

3. Mediation helps resolve claims/suits which may not be settled otherwise

I have become a strong believer in the mediation process as a result of a number of cases which have been resolved through mediation which I felt sure could not be resolved without the assistance of the mediation process. Every case I have mediated as a party has not resolved at the first mediation, but all of them have ultimately been settled, one on the second day of trial. So I feel the process is almost always helpful.

4. Mediation allows the parties to control the outcome

8Fulton County Daily Report, February 17, 2003:

Verdict in Defective Title Case Leaves All Puzzled

8Fulton County Daily Report, March 17, 2003:

Personal Injury Pair Win \$1.25 -Million Verdict

Two Atlanta personal injury lawyers won a second million-dollar-plus verdict in six months. The defendants in both cases were represented by the same insurance defense firm.

Peter A. Law and Allen L. Broughton won a \$1.25-million jury verdict Thursday for Judy Carnes, the 63-year-old plaintiff in a personal injury suit against AT Systems Southeast Inc., an armored vehicle operator. The case went to trial after Law and Broughton rejected a \$200,000 settlement offer from AIG Insurance Co., the armored vehicle company's insurance provider.

8Fulton County Daily Report, February 7, 2003:

Wachovia Told to Pay \$1.1M Over Iraqi Trust Flaws

8Fulton County Daily Report, February 12, 2003:

Lawyers: City Lost by Not Settling Suit by Firefighter

City offered \$10,000; jury awarded plaintiff \$1 million

8Fulton County Daily Report, May 23, 2002:

DOT Hit for Injury Caused by Faulty Road

A jury wants the Georgia Department of Transportation to pay a \$4 million toll for a badly designed, poorly marked road that turned a healthy 17-year-old into a paraplegic.

8Fulton County Daily Report, September 24, 2002:

Parents Awarded \$1 Million in "Back to Sleep" Verdict

The award came in a wrongful death suit brought by a couple whose infant died in 1996 while in the care of the Applebrook Country Dayschool in Ringgold.

8Fulton County Daily Report, January 29, 2002:

Shot Leg Draws Minimum Wage for Life

A Fulton State Court jury sent a Texas man home Jan. 17 with a \$2.2 million verdict for injuries suffered in a motel shooting.

8Fulton County Daily Report, May 24, 2002:
Bell to Direct Fulton Appeal of \$16.6M Verdict for Librarians

8Fulton County Daily Report, November 11, 2002:
Kennestone Loses \$11.5M Verdict in Patient Death

8Fulton County Daily Report, August 14, 2002:
\$13.4 Million Damages Awarded in Gwinnett Apartment Slaying

8Fulton County Daily Report, October 14, 2002:
Med Malpractice Jury Awards \$5.5M for Wife's Loss of Eye

8Fulton County Daily Report, February 13, 2002:
Librarians' Award a "Travesty," Court Told in Verdict Challenge

8Fulton County Daily Report, January 7, 2002:
Judge Urged to Mediate End of Suit Claiming Insurer Fraud
Three years of litigation, including a trip to the Georgia Court of Appeals and a change of venue, is enough, say defense lawyers for State Farm Mutual Automobile Insurance.

The company's Powell, Goldstein, Frazer & Murphy team wants Fulton State Court Judge M. Gino Brogdon to step in and mediate a settlement in a long-running fraud and racketeering suit against the insurer.

8Fulton County Daily Report, April 2, 2002:
\$257 Million in Punitives Upheld Against Time Warner

These are just a few of the recent headlines where the results of trial were clearly unexpected for the defendant. In many, if not most, of these cases, the parties probably discussed settlement. But clearly, they were not able to reach a resolution. There will always be cases which cannot or will not be settled for whatever reason, but for those cases where the plaintiff is willing to negotiate and compromise and the defense is willing to consider payment of some kind to avoid the time, expense and uncertainty of a trial, mediation is the best alternative, in my view.

Mediation is not "binding" unless and until the parties reach an agreed settlement. The parties control the numbers. For example, you will not have a case like I once had in arbitration, where the plaintiff's demand is \$25,000 and the award is \$40,000! Nor will the plaintiff risk an outcome where the defense is willing to make an offer but the outcome is a zero verdict!

Many times it is said if both sides leave a mediation unhappy, then the “right” result was achieved. It is the rare case in mediation where the plaintiff gets everything s/he wanted or where the defense pays only what they wanted coming into the process. Yet, that seems to be the “magic” of the mediation process. Frequently, both as a mediator and as an advocate for a party, I will hear a participant complain about how long the process is taking or how much time the mediator is spending with the other side. I always advise the party to just relax and let the process work. By the time the end of the day rolls around, both sides are more inclined to compromise to “get it over with”. Which brings us to the next advantage of mediation for institutional clients:

5. Mediation ends the process NOW

The fact that an agreement at mediation ends the litigation or the claims process in a very short time (time to issue the settlement check and get the release signed and the dismissal filed) is a very attractive part of the process. It is one that I believe makes parties more willing to compromise at mediation. A plaintiff who is seeking a million dollars in litigation may start thinking about how long s/he will have to wait for a trial result, which then may be subject to appeal. \$500,000 cash in hand within a couple of weeks - a sure thing - may start to look very attractive. Similarly, for the defense, it is a very attractive option to get the matter over with and to shut off the defense attorney’s billing!

6. Mediation allows resolution in a manner not permitted by civil trial

Structured settlements have become the vogue in the past decade or two. It can provide some real security for unsophisticated claimants/plaintiffs who would likely otherwise spend their entire award in one or two years. This option is particularly attractive where minors are involved, or where the claimant/plaintiff is going to need long term care or money to cover expenses in the future. As a defense attorney, I particularly feel more gratified in these situations when I know the money may really be there to assist the person when it is needed far into the future.

Civil trials simply allow for an award of a lump sum of money damages in most cases. Rarely is some kind of equitable relief sought or recoverable. However, in the mediation setting, the parties are free to be creative in the resolution of their dispute. Oral or written apologies may be demanded or offered. One corporate defendant once resolved an employment case through an agreement to provide a number of calling cards for the plaintiff to share with her large, widely dispersed family.

Another advantage mediation may have is confidentiality in matters of sensitive circumstances for either side. I have mediated a number of disputes involving claims arising out of the improper publication of the claimant's positive HIV status. A suit for invasion of privacy may be viable but the suit itself may have the effect of publicizing that information to an even greater audience. Similarly, cases involving sexual harassment or other employment disputes may lend themselves to confidential resolution as the employee may fear being labeled as a troublemaker, making it more difficult to find another job. Or the company may fear adverse publicity from being labeled a bad place to work. Particularly in employment cases, alternatives to cash payments may frequently lend themselves to resolution. For example, the parties can agree to giving a good reference in exchange for the claimant's agreement not to disclose the circumstances of the settlement.

In product liability cases, defendants may be particularly concerned that a public trial may result in the public airing of problems with product design or the company's willingness to settle claims, fearing such publicity might generate further claims. Since so many restrictions have been put on the ability of parties to enter into court approved "secret settlements" it is oftentimes difficult to obtain a sealed settlement through the courts. But the parties may be freer to reach such confidentiality agreements as part of a private settlement.