



# MEDIATION – Know When to Hold Them + When to Fold Them

## What Every Advocate Should Know

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# Mediation – The New Normal.

1. Often mandated by contract.
2. Often mandated by courts.
3. Seldom a waste of time.

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# Advantages of Mediation.

1. Avoids costs + hassle.
2. Allows principals to be heard.
3. Minimizes risk + uncertainty.
4. Can preserve relationships.

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# How Well Does Mediation Work?

Settlements  $\pm$  85% of the time.

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# The Downsides of Litigation Are Not New.

“Discourage litigation. Persuade your neighbors 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.”

- Abe Lincoln

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# The Vanishing Civil Trial.

Civil cases reaching trial:

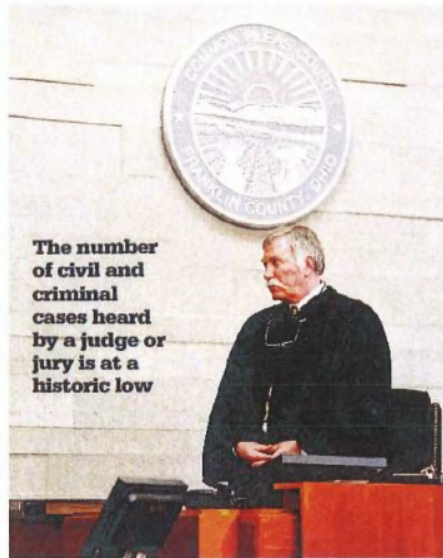
1990	4.3%
2010	1.1%

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# The Columbus Dispatch

MONDAY, JANUARY 13, 2014

DISPATCH.COM



The number of civil and criminal cases heard by a judge or jury is at a historic low

BARBARA J. FRODO / COURIER  
Judge Daniel T. Hogan waits for the jury to leave for a break while presiding over a medical-malpractice case in Franklin County Common Pleas Court.

## Trials a rarity in Ohio, U.S.

By John Fetty • THE COLUMBUS DISPATCH

**K**nowing he would go to prison for at least six years if convicted at trial, Donald E. Griffin decided to accept a plea deal that could lead to probation for fatally shooting a burglar outside his East Side home.

Griffin wanted to argue self-defense but didn't want to risk putting his fate in the hands of a jury — "a flip of a coin," in the words of his attorney.

Such plea agreements have become so common that the number of trials by juries or judges has reached a historic low. In Ohio, just 2.5 percent of criminal cases in common pleas courts were resolved by going to trial in 2012, the most recent year for which statistics are available from the state Supreme Court. In Franklin County, the figure was

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# Common Pleas Civil Trials

1980 16.2%

- Ohio Supreme Court

2002 1.8%

2012 1.2%

- American Bar Association

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# What Killed Trials?

5. Economic downturn.
4. Tort reform.
3. High costs of litigation.
2. E-discovery costs.
1. Mediation.

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# Most Cases Settle.



# So if it is going to eventually settle anyway...

Don't you want to solve problem sooner rather than later?

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# How Much Money Can Be Saved?

+104 hours per case

+\$60,000 per case

- U.S. District Ct. Nebraska (2006)

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# How Much Time Can Be Saved?

+Mediation → 2 months

+Trials → 2 years

- American Arbitration Association

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# Ohio has adopted Uniform Mediation Act (“UMA”).

Requires conflict check and full disclosure by Mediators.

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# What Type of Mediator Do You Want?

1. Facilitator = Process (Diplomat)

vs.

2. Evaluator = Opinionated (Tough Love)

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# Be Secure.

Pick a Mediator Your Opponent is Comfortable With.

Pick a Place that Adversary Feels Comfortable With.

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# Mediation Statements.

- To other side?
- To mediator only?

Almost always separate confidential communications to mediator are permitted.

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# The “Las Vegas” Rule.

“What happens in a mediation, stays in a mediation.”

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# Use of Opening Joint Session.

Good –

Allows principals a chance to vent and understand positions of other side.

Not So Good –

Can polarize positions and increase emotion.

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# How Much Advocacy is Too Much?

Enough to let other side know you are prepared and that they should appreciate risk.

WITHOUT MAKING OPPONENT DEFENSIVE.

Do not be afraid to concede, appreciate, apologize, or otherwise be HUMAN.

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# Mediation “DOs”.

1. Keep an open mind.
2. Remember your people skills.
3. Be a problem solver and work for consensus.

# Mediation “DON’Ts”.

1. Do not negotiate with the Mediator.
2. Do not bring a firm bottom line to the mediation.
3. Do not expect to “win”.

# Is the Courtroom the Place for the Truth?



# Seeking Consensus That a Deal Makes Sense.

1. Frequently all sides cannot afford to “push away from the table” due to high collective legal fees.
2. Making parties realistically handicap their costs and chances of success.

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# “It’s the Principle of the Thing!”

Really??

But Principle Costs ...

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# Get Folks Back to Work → Return to Normalcy.

LITIGATION TAKES PEOPLE AWAY  
FROM THE CORE BUSINESS

A high intangible – but very real-cost

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# Be A Trusted Advisor.

Remember that an Attorney is also  
a Counselor at Law

Manage Client Expectations

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# Breaking the Final Impasse.

1. Splitting the difference.
2. Use of the “bottom-line”.
3. Be creative.

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# Use of “Mediator’s Number”.

“4<sup>th</sup> and long” play when all else fails.

Yes

No

Both must agree or No deal.

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# What is a Fair Settlement?

“One Where Both Sides Are Equally Displeased.”

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# Documenting The Settlement.

**SAVES COST + TIME LATER.**

Terms Come Before the Numbers.

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# When is Mediation Really Over?

Rather than declaring impasse, “sleeping on it” may allow for greater flexibility in the coming days.

Follow-up call – Anything else that mediator can do?

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# What If Mediation Fails?

MISSION ACCOMPLISHED – can litigate with clear conscience.

“You tried ...”

“You had no choice ...”

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# Questions?

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