

## Interview

# On Preventing Prolonged Legal Brawls

Attorney Geoffrey Gaulkin works with small and large companies to settle disputes before they balloon into long and costly court battles. The 68-year-old jurist spent more than two decades as a judge in the criminal, chancery and appellate divisions of the New Jersey Superior Court before stepping down from the bench in 1995. He has since conducted more than 70 mediations, more than half of which have resulted in settlements. Gaulkin, who is now with the Newark law firm of Saiber, Schlesinger, Satz & Goldstein, spoke with Associate Editor Scott Goldstein.



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**NJBIZ:** What kind of cases are best suited to mediation?

**Gaulkin:** All cases can be mediated. It is particularly good for parties who want to continue a relationship, like problems between franchisers and franchisees and buyers and seller of goods. I did one mediation with a major computer manufacturer which [had] established a substantial network of equipment for a major customer. Both sides wanted to solve their problems in a way that didn't necessitate all this stuff [being] yanked out and ending their relationship. One of the most useful things about mediation as compared to a court

settlement or litigation is that it's flexible and creative. On the other hand, a judge, whose role is to oversee the legal process, doesn't get as involved in finding other ways to look at a case.

**NJBIZ:** When should parties consider mediation?

**Gaulkin:** Lawyers should be thinking about it at the very outset and it should be a judgment they constantly review from the day their client first walks through the office door. One of the real problems I have is that mediation often comes up only after a lot of expense and effort are put in a case.

Eventually, someone says, "Let's see if we can settle." It is so curious that in this very sophisticated area, there is still a sense, like on the playground in an elementary school, that people are afraid to be the first one to say, "Let's talk about it." They think it's a sign of weakness. So you get the feeling that there are so many situations in which liti-

gation goes on for literally years because no one wants to take the first step.

**NJBIZ:** Do you blame lawyers, litigants or both?

**Gaulkin:** I don't blame. That's human nature at work. And those are the realities mediators have to work with and try to rechannel.

**NJBIZ:** Who is more reluctant to compromise, lawyers or their clients?

**Gaulkin:** Traditionally, lawyers are likely to be less willing because it impairs their income. Litigation is their bread and butter. I don't know if that traditional wisdom is sound. It seems to me that a lawyer who solves problems quickly is going to have people beating down their door. Sometimes the clients are reluctant to settle. There are clients who say to lawyers, "I don't care what it costs. I want to win. I want to destroy this person."

**NJBIZ:** How do you help participants understand that a compromise can be the right solution?

**Gaulkin:** You've got to be prepared to let people talk to each other and have a very open-minded kind of dialogue. It's amazing that when you start a session at 9:30 in the morning, people are tentative and dubious of each other. But by 6 o'clock at night, they develop a working relationship and really begin to understand what the other side is troubled by and what they need in order to get it resolved. Perhaps it's because people get worn down, but I believe it's because they get realistic. They begin to understand how much of what the other side has been saying is, for negotiating purposes, essential to their own inter-

ests. Suddenly, they are talking about things that eight hours before they would have exploded about.

**NJBIZ:** How do you grease the tracks?

**Gaulkin:** The most persuasive thing I can say is that 95% of cases are ultimately settled anyway. So why not do it now and save a lot of money? It's appalling to see people who can settle a case for \$100,000 after a session of mediation end up spending \$200,000 to go to trial and then settling the case for \$700,000. There may be certain situations in which the parties can't really start mediation until there is at least some discovery back and forth. But that doesn't mean you have to do your discovery in a formal setting of depositions and things like that. You can sit down with the other side and say, "Look we have this problem. I'm saying A and you are saying B. What are your proofs? Show me your proofs. Let's just sit down around a table and talk about it and let's look at it like businesspeople."

**NJBIZ:** Who should be doing the talking, the lawyers or their clients?

**Gaulkin:** It depends on the case. This is an art, not a science, and you have to be exquisitely sensitive to the interactions among all the players. In one situation, you may look to the lawyers and in another situation you may look at the principals themselves. It is critical and it is a requirement that the players be present at all mediation sessions. Sometimes you ask the lawyers to leave the room. It's based on your own, hopefully informed and educated, instinct.

**NJBIZ:** What other kind of cases have you mediated?

**Gaulkin:** Employment cases, contract,

landlord-tenant, construction. In one construction case there was a threatened job shutdown because of a disagreement and we had to get it resolved fast, because if it went to court, everybody would lose. That was a situation in which the circumstances compelled both sides to say, "Hey, we have a common problem and we have to resolve it."

**NJBIZ:** Why isn't mediation more widely used?

**Gaulkin:** There was a period, I would say probably in the early '80s, that the whole idea of mediation and training mediators was becoming very popular. At that time, as I recollect, there was an expectation that the business community would be the ones that would be demanding their lawyers pursue these alternatives to get them resolved quickly and inexpensively. It didn't work out that way. My impression is you don't have a clamor by the industry to say we want to do things a different way.

**NJBIZ:** What percent of your mediations result in a settlement?

**Gaulkin:** I would say overall it's well over 50%. It takes as many as a dozen sessions and as few as one. The sessions, which are in my office, start in the morning and may last into the night.

**NJBIZ:** How can lawyers, trained to be adversarial, learn to compromise in mediation sessions?

**Gaulkin:** Better training. There is a lot of effort in training mediators. If there were similar efforts for lawyers, mediation would be much more attractive and successful. ■