MEDIATION

Representing Your Client
Crucial Techniques in Mediation

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It was not so long ago that alternative dispute resolution did not exist as an option in the minds of litigation attorneys. In those days, my practice was principally spent representing insurance companies and corporate clients in defense of tort claims. When the call came in for representation in a new case, it was essential to make a preliminary evaluation as to whether or not the case would be one that would be headed to trial or headed toward settlement. The opportunity to consider and evaluate that option early on is the advantage that a defense lawyer had and still has.

In this day and time, given the prevalent role that mediation and arbitration play in the litigation process, whether one represents the plaintiff or defendant, it makes sense to begin early to steer the case toward alternative dispute resolution in most instances. Each side should begin by accomplishing the tasks necessary to ready the case for evaluation by their client and their adversary, while at the same time not necessarily going to the full extent necessary to present the case before a jury. Obviously there is an economic advantage to pursuing mediation at a point prior to trial when enough work has been done so that everyone knows where each side stands. The finishing touches may not be necessary because the level of education needed for mediation may not be as high as the level necessary to educate a jury.

For instance, it very well may not be necessary to spend the time, energy and money necessary to produce medical testimony for trial by videotaped depositions. Lawyers and the

parties involved in evaluating the case are generally sophisticated enough to evaluate medical issues based on medical charts and diagnostic studies. However, if lawyers and parties are going before a jury, actual testimony from doctors can be instructive and informative for lay decision makers.

That said, there are a number of things that have to be done in order to ready a case for mediation and obviously that will vary depending on the nature of the case. Some cases can be mediated pre-suit, and I have been involved in such cases both as a litigant and as a mediator with some success. Assuming suit has been filed, there obviously are certain essentials that should be performed prior to declaring a case ripe for mediation. Liability needs to be pinned down and any witnesses should either give sworn statements or depositions under oath. Information relative to insurance coverage, including primary and excess policies needs to be known by all parties. The insured also needs to understand this, as he or she may have exposure beyond the level of insurance coverage. The parties obviously need to be deposed. The manner in which the plaintiff comes across during deposition is an important element in the evaluation of a defense lawyer and defendant insurance carrier.

Legal issues need to be flushed out. At times there are legal issues which may be a stumbling block to a plaintiff getting to a jury. Each adversary needs to make a decision as to whether or not mediation prior or subsequent to ruling on motions for summary judgment is the best approach. I was involved in a very large detailed and significant case in which motions for summary judgment were filed by both plaintiff and defendant in front of a federal judge. Pending a ruling on those motions, the judge ordered the parties to mediation, which ended up being successful. One of the elements in the success of that mediation was the concern by both parties of what the case would look like depending on the Court's rulings on the pending motions. While certainty on legal issues may be seem to be the best recipe for success in proceeding to mediation, the fear of the unknown may provide leverage which can result in a case being resolved.

Once the lawyers have gotten the case to a position where mediation is appropriate, there are a number of things that need to be considered and certainly communicated to the client. Most of my work has been in personal injury litigation, so I tend to use that fact pattern as a basis for discussion. The first issue which must be addressed is choosing a mediator. From a plaintiff's standpoint, I generally prefer to let the defendant choose the mediator. After all, the defendant is the one with the money and it seems paramount that the defendant be comfortable with the person we are relying on to assist in resolution of the case.

That said, we all know mediators who have different styles in their approach to mediation. In my experience, some mediators tend to be more quantitative and intellectual in their approach while others tend to be more sympathetic and compassionate in their approach. Depending on the nature of my plaintiff and the extent that I want to influence the choice, these factors can play an important role. For instance, in a case where the plaintiff is the family of a child who has died or someone with very serious injures and a great deal of emotional distress, one may seek a more compassionate mediator who will genuinely take into consideration raw emotions. In the case of a particularly intelligent plaintiff who over time had proven to be inquisitive and perhaps more rational than emotional, a more analytical mediator might be a better fit. These are some of the things that need to be considered when addressing the choice of a mediator.

A mediator's role is to assist the parties in taking a more objective look at the strengths and weaknesses of their case. Part of what the mediator does during the course of mediation is engage in reality checking to assist the parties in evaluating weaknesses in their case that they may not have adequately considered.

Generally speaking, there are two types of mediators. One type of mediator is referred to as a facilitative mediator. The facilitative mediator tends to engage the parties in problem solving and reality testing by asking questions to help the parties better understand the risks confronting them in pursuit of their case to trial.

The second type of mediator is referred to as an evaluative mediator who perhaps may more readily express opinions about a likely outcome in the case. Mediators are trained to ask questions to make people think. Therefore, when questions are asked, by all means think!

Often times, mediators will ask questions of the lawyers in individual caucuses which may address the likely outcome of the trial, the time it will take to get to trial or appeal, the costs and a verdict range. Therefore, it is essential that the advocate come prepared to answer those questions and that those answers not be heard by the client for the first time in the caucus with the mediator.

There are some basic considerations which need to be addressed, but which are probably known by many who attend mediations today. I will set some of those out below.

1. Make sure everyone understands who will be present at the mediation and that those present can really seal the deal.
2. Determine how you wish to approach preparation for the mediation. Preparation may be different for a plaintiff and defendant. The plaintiff needs to determine to whom he or she is addressing their case. It should be addressed obviously to the person with the money and to the mediator. Sometimes it is important for the person with the money (insurance representative perhaps) to eyeball the plaintiff's lawyer and be convinced that those representing the plaintiff will do whatever it takes to achieve the best outcome at the end of the day.
3. The mediator needs to be armed with information, so be prepared to provide that information at the mediation or prior thereto.
4. The client needs to be prepared and decisions need to be made about how much the client is going to say in the opening session of the mediation.
5. Thought needs to be given as to the level of initial offers and demands that are going to made. It is my experience both as an adversary and as a mediator that the initial moves in mediation are oftentimes somewhat meaningless on behalf of

both parties. There is a downside to that approach in that. First of all, this tends to make mediations last longer. Secondly, unrealistic initial numbers may have a rather chilling effect on negotiations.

In the personal injury environment, there is a significant difference between plaintiffs and defendants which needs to be addressed either by the lawyers or the mediator. This is particularly true when the case is one which deals with a serious injury that may be life changing for the plaintiff or the plaintiff's family. In those instances, the plaintiff comes to the mediation with the weight of the emotion of the loss. To them, an appearance at mediation may as well be their first day in court. They come with the expectation that somehow, at the end of the day, they will receive compensation for their loss.

On the other side of the table are the defendants, who are professionals. While for the plaintiff what is happening during the mediation session is a matter which will affect their lives, for the defendants (insurance carriers in particular), it is just business. For the plaintiff, the loss that is being dealt with on this day of mediation is their only loss. For the defendant on the other hand, this is simply one of a large number of files in their inventory. It is imperative that the plaintiff be made aware that the mediation process is not one which will bring them full compensation. Instead, it is a process of analyzing risk. In that process the defendant has the advantage.

Some mediators are very good about making that point and some do not focus on it. Therefore, as an effective advocate, it is very important that the different places from which the two parties come be explained in depth to the plaintiff prior to the beginning of the mediation.

Mediation is an exercise in patience, creativity and compromise. The need to act politely and professionally toward adversaries is supremely important leading into the mediation process, during the mediation process and coming out of the mediation process in the event the matter is not resolved.

Often times cases are not settled at the mediation conference itself. Most mediators are willing to keep the file open and follow up with telephone calls and e-mails in an effort to bring the parties to a close, when the positions of each party warrant further thought and debate. Therefore it is a good idea to request the mediator's assistance and welcome any opportunities for the mediator's help in the days, weeks and sometimes months immediately following the mediation in an effort to get the case settled.

Thanks – let me know if you have any questions.