Mediation: The Resolution Revolution

by Janet Rubin Fields, Esq.

"The lawyer must serve the people and solve their problems rather than just [win] their cases." [1]

Although the past Attorney General's remarks are just about three years ago, the addition of mediation to a lawyer's "negotiation tool chest" began in California in the mid 1980's. Since then, most of the top litigators have accepted mediation as perhaps their best opportunity toward resolving lawsuits at the best possible time, for the most favorable result.

Seasoned attorneys and experienced mediators know all too well that parties to litigation have both a financial and emotional stake in the litigation process. Sometimes, their emotional attachment to the lawsuit can be the biggest source of difficulty when trying to convince them of the benefits of settlement and the risk of trial. The value of mediation to a client is that it provides a relaxed and positive and protected venue for clients to vent, and to put in humanistic terms the strengths and weaknesses of their case. An effective mediator will assist the plaintiff as well as the defendant in exhausting all possible paths that will hopefully lead them to settlement, a settlement which ***they*** have helped create, and one that may well give them emotional closure as well as a satisfactory financial resolution.

"The essence of peace is to join together two opposites. Do not be alarmed if you see someone whose way of thinking is so completely opposite to your own that you imagine it to be absolutely impossible that the two of you should ever be at peace. On the contrary. To find peace between two opposites is the essence of the wholeness of peace."[2]

When to Use Mediation

More often nowadays, it is up to a local court as to when parties must proceed to mediation. However, when dealing with mediation strictly as a voluntary process, mediation should be one of the first considerations given when a client comes into their office. Consider the following questions;

- Is this a case where the client will do better with an early attempt at settlement rather than a prolonged lawsuit?
- Does the client have the financial and emotional resources to withstand litigation through trial?
- What relationship (business or personal) does the client have with the opposition? Is a lawsuit more destructive than the potential gain from victory? (Winning the battle vs. losing the war.)
- What information can be gathered through a collaborative discussion with the other side rather than the need to proceed through depositions?

Assuming the answers to the above questions lead to an early settlement attempt, and not necessarily for prolonged depositions and expert reports, then it is **never** too early to mediate.

The Benefits of Mediation

In order for the mediation session to be effective, a tremendous amount of work has to go into its preparation. Not only must your documentation be in order, your client has to be extremely well prepared for what is to occur in the hours that will be spent with you and the opposing side.

One of the most important of aspects of preparation is the discussion of potential settlement numbers. An unprepared client who sees the figure of $3,750,000 go up on the board where the realistic settlement range is somewhere between $200,000 and $300,000, will view his lawyer as "soft" and "starting to cave," wondering what happened to their zealous advocate as the day progresses. I urge you to relay the same message to your clients as what the Wizard of Oz said to Dorothy, "Pay no attention to that man behind the curtain." Have your client listen to everything you say to them but not to pay attention to what is said to the defendants!

If your client reads a mediation brief that has astronomical numbers, be sure to let them know that those numbers may not be probabilities, either in settlement or in a jury award. Remember that this is the first, and probably the last time your client will be witnessing your advocacy skills.

1. United States Attorney General, Janet Reno, in her speech to the American Association Of Law Schools on January 9, 1999.

2. Nachman Brostav

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What Defines a "Successful Mediation?"

Mediators are sometimes guilty of quoting their "closure stats" as a way of defining success. Many will brag of a 90% or more "success rate." While it is true that the goal of mediation is to resolve the dispute, "success" is best measured in parties walking away from the process feeling that they made the right decision, whether it was with a settlement or not. Mediation is successful when each party has had the opportunity to learn more about their case, its strengths and weaknesses. The three primary goals at mediation are education, negotiation and resolution. When and how a case settles should primarily depend upon what further information is gathered, and how that will reflect upon the probable outcome at court.

Imagine that you are looking to buy a house, and as you walk up the driveway you see beautiful landscaping, lush scenery, and what appears to be perfect neighbors next door You decide right there and then what you might want to pay for the house. You become very excited as you walk up the stairs, eagerly anticipating the front door opening to a welcoming hallway, with the fresh smell of apple pie in the air, and the pleasant sounds of birds feeding in the honeysuckle trees in the vast backyard. Instead, when the door opens you find 18 kids have been climbing all over the banister, there are odors of a dozen cats, dogs and the odd ferret wafting through the hall leading into the path of the stale smells coming from the kitchen. The paint is peeling, and the water is dripping from the tap. Your expected price of that house has just tumbled by about 50% or more, depending upon your willingness to continue looking. An effective mediator helps give all parties the opportunity to examine their case fully, not just see their case with its curbside appeal, but to examine it from all sides, and to explore strengths and weaknesses, upside and downside potential.

The mediation process does not necessarily fail when the parties are unable to achieve settlement. There is a plethora of reasons why a settlement may not occur at the mediation yet the mediation will still be considered by the parties to be successful. While the ultimate goal is to settle the case, an effective mediator ensures that when the mediation session has ended, the lawyers the parties are satisfied that progress toward the end of litigation and arrival at settlement has been achieved.

A "successful mediation" can be defined as to include any of the following:

- Resolving a pending discovery dispute
- Improving lawyer-client communication
- Improving lawyer-lawyer communication
- Improving client-client relationships
- Getting the insurance claims professional or defense counsel to commit to obtaining more authority
- Learning the adversary's defense and the evidence to support it (otherwise misconstrued as "free discovery")
- Becoming enlightened through a neutral third party as to how your client's testimony will affect the outcome of your case for purposes of evaluating whether to risk going to trial.

In determining whether a mediation has been successful, I encourage attorneys to look at the reasons why the mediation session failed to end with a settlement. A failed mediation is typically one where neither you nor your client has learned anything more about your case (the positives and negatives), or that you have turned down a "final offer" which does not accurately take into account the fair balancing of rewards versus risk.

The three common reasons mediation fails are:

(1) insufficient settlement authority by the insurer representative or defense counsel;

(2) late breaking medical or economic material given to the defense; and

(3) clients who will not take their lawyer's advice. The first and second reasons are often tied into each other.

- Insufficient Authority

You have worked hard in preparing you and

your client for the mediation, and take the process seriously. The defense counsel and insurance representative come to the mediation with far less authority than realistically reflects the exposure and the value that you believe is justified by the facts known to both sides. This can be extremely frustrating for the plaintiff and the mediator. Often is the case when an adjuster will concede a value of the case to the mediator indicating that they would pay more, if only they had the authority to do so. Although an effective mediator knows that there is usually an opportunity to request the adjuster make at least one phone call to obtain more authority, the lack of authority coupled with the inability to obtain more authority will result in an unsettled case.

- Late Material Given to the Other Side

As much as plaintiff's counsel can get annoyed at the adjuster who comes with insufficient authority, it is equally frustrating and aggravating for defense counsel and the adjuster to be faced with new reports which may well alter the landscape, and make their ability to obtain higher authority impossible, especially on short term notice. When plaintiff's counsel fails to provide defense counsel or the adjuster without current medical or economic documentation to support the claim, the mediator is without the ammunition necessary to motivate the defense off of their current position as to case value.

- The Client Who Rejects Their Lawyer's Advice.

Most attorneys at one time or another have experienced the client who will not follow their counsel's advice. This can be as equally frustrating and sometimes even more than fighting with the insurance adjuster! Despite the numerous hours you or the mediator spend explaining the realities of litigation and benefits of settlement to the client, the client remains reluctant or refuses to settle because they are either being swayed either by an outsider or by what they have seen on television, in the movies or reported in the press.

The Benefits of Mediation for Lawyers

Often, emphasis on whether or not to utilize the mediation process is focused on the parties, however there are several advantages for the lawyers involved to opt for mediation.

1. The mediator can assist the lawyer to help the client get a perspective on the realities of their case.

2. The client is more likely to be satisfied with the settlement result and therefore more appreciative of their lawyer's efforts.

3. A satisfied client translates into more clients.

4. The lawyer has a greater chance of being paid a full fee, rather than having to chase the client and maybe even another attorney for fees at some later time.

5. The lawyer has some control over the outcome of the case rather than having the outcome determined by a judge, arbitrator or third party.

The Benefits of Mediation for Clients

1. Cost. Mediation is generally cheaper than continuing with the litigation including trial. "Soft costs" including use of company employees and executives at deposition or trial result in a substantial cost to business over and above the hard dollar cost of paying lawyers and other litigation expenses. A conflict with a key executive can devastate a well-established company.

2. Less Stressful. Mediation can be less stressful because it is generally less adversarial than court. The parties are able to discuss their issues privately in caucus versus being subjected to cross-examination.

3. Allows the Parties to Tell Their Story. A case cannot settle until the client has the opportunity to tell their story. Mediation is an informal process allowing the parties to express their feelings and emotions. In our legal system it is the lawyer who tells the story on their behalf of their client through evidence. When a client is permitted to speak directly to the mediator or other parties involved in the dispute, the chances for settlement increase. There is a lot to be said for an active and empathetic neutral third party. Client participation goes a long way such as when the mediator facilitates communication between a quadriplegic who seeks a new bed or wheelchair and an insurance adjuster who is evaluating how much the case is worth.

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4. Promotes Communication. Mediation promotes and facilitates improvement of communication between parties. This is especially true in cases where one of the goals of settlement is to preserve existing business or workplace relationships.

5. Controls the Outcome of the Case. The parties make the ultimate decision on whether or not to settle their case and the outcome that derives from it as opposed to a judge, arbitrator or third party who controls the outcome.

6. Develops Trust. Mediation can be effective when there is distrust between the parties and/or the lawyers, encouraging cooperation and developing trust.

7. Simplifies the Case. Complex litigation can be simplified by separating, eliminating and refining issues.

8. Allows for Creativity. It is not just about money. Mediation enables a settlement to include terms other than or in addition to money. An apology goes a long way. Reinstatement of a job position develops self-esteem. A structured settlement provides for long-term care.

9. Everybody wins. Both sides come to an agreement versus a judgment or verdict being awarded to one side.

10. A Second Bite at the Apple. Not all cases settle during the first mediation session. An experienced mediator follows through on unsettled cases and uses acquired skills to try and break an impasse.

In closing, experience shows that mediation has an extraordinary rate of client and lawyer satisfaction. The successful attorney can use the mediation process to an advantage in obtaining a satisfied client. A satisfied client brings personal and professional satisfaction as well.

FieldsMEDIATION

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