Mediation: Enhancing Its Effectiveness

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Mediation Defined:

Mediation is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." See Cal. Evid. Code § 1115(a).[1]

Mediation has become a favored and highly successful vehicle for negotiating and finalizing the resolution of litigated disputes. The former typical approach to settlement of litigated cases, by means of correspondence and telephone calls exchanged directly between opposing counsel, has been on the wane for years. The expense associated with litigation has steadily increased, as have the economic strains on judicial resources. Waiting until the eve of trial to commence serious settlement negotiations is viewed as neither efficient nor cost effective.

Correspondingly, the use of mediation as an adjunct to litigation has exploded over the last 20 years. By 1980, there were approximately 100 institutionalized alternative dispute resolution programs at state and local levels in the United States. 57 Am. Jur. Trials 555 § 1, Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, November 2006. By 1993, there were more than 400 such programs. *Ibid.* Predictably, the number has continued to grow. Approximately ninety-five percent of all types of cases in litigation settle prior to judgment in court proceedings. *Id.* at §7. And mediation has played an increasingly effective role; it is generally reported that 80% or more of the cases that are processed through voluntary paid mediation proceedings settle.

The Mediation Process:

Effective mediation is ultimately a product of reasonable and informed compromise. One commentator has suggested that the likelihood of achieving successful resolution of a case in the mediation process is enhanced by creating "credible fear" in the mind of the opponent concerning the outcome that could occur in the absence of settlement. Joe Epstein,

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[1] This article is framed solely in the context of mediating litigated cases involving a plaintiff and an insured defendant, both represented by counsel.

Effective Mediation of High-Valued Cases, ABA TIPS Tort Source, Vol. 9, No. 2, Winter 2007. However one labels this aspect of negotiation - fear, concern, uncertainty - the mediation process undeniably presents an opportunity for the parties to focus and apply pressure on each other to settle. That exercise, like most other aspects of litigation, requires a high degree of skill and preparation if it is to be accomplished in the most effective manner.

As in most other aspects of litigation, preparation plays a significant role in achieving a desired case resolution. One study has determined that, viewed in the aggregate, parties on both sides of every kind of litigated dispute are typically better off settling than going to trial, but that most of the time one of the parties has made some kind of significant miscalculation or mistake in assessing their case. Journal of Empirical Legal Studies, September 2008. Studies have also shown that results achieved at the trial of a case only infrequently validate the settlement positions of both sides. Therefore, it appears that even thorough preparation by all of the participants in a mediation does not guarantee an accurate prediction of a cases ultimate value. In the absence of settlement, one of the parties' case valuations will usually be proved to be wrong due to a miscalculation of risk and/or value.

For instance, a study of 554 New York State court trials in 2005 demonstrated that plaintiffs who rejected settlement offers to go to trial were wrong (lost or got less) 61% of the time, and defendants were wrong (lost or paid more) 24% of the time. However, even though the plaintiffs were wrong in deciding to go to trial two and a half times more often than defendants, the negative adverse economic impact of the trial result to defendants, when it occurred, was substantially higher than for plaintiffs on average in this study (a $1.1 million difference for defendants versus $43,000 for plaintiffs). In the remaining 15% of cases, both parties were essentially "right" (defendant paid less than the plaintiff wanted, and plaintiff got more than the defendant offered). Kiser et al., New York State 2005 Trial Result Study, Journal of Empirical Legal Studies, September 2008.

Medical malpractice cases can be even more problematic in terms of predicting outcome on a case-by-case basis. A recent national study indicates that only 1 in 5 medical malpractice cases results in a plaintiff monetary recovery. The study was conducted by the Harvard Kennedy School of Government, with funding from the Rand Institute for Public Justice and the National Institute on Aging, and published in the New England Journal of Medicine. (on-line edition, August 17, 2011). The results of this study are essentially the same as a two year survey conducted by the author almost 30 years ago of all reported medical malpractice verdicts in California; the defense won at trial 81% of the time regardless of the medical speciality, the type and severity of injury or loss, the amount of damages claimed or the venue involved.

The formalized processes associated with mediation are set out in statutes and rules.

See e.g., Cal. Code Civ. Pro. §§ 1775, *et seq*. (Civil Action Mediation Act), Cal. Rules of Court, Rule 3.850, *et seq.* (Rules of Conduct for Mediators), Cal. Evid. Code §§ 1115 *et seq*. (which defines mediation, its scope and the processes and procedures applicable to it), and Cal. Evid. Code §§ 1119-1128 (confidentiality and admissibility of mediation-related matters), and regarding mediation confidentiality and privileges, see also *Foxgate Homeowner's Ass'n. v. Bramalea California, Inc*. (2001) 26 Cal. 4th 1, 14-15, 108 Cal. Rptr. 2d 642, *Eisendrath v. Superior Court* (2003) 109 Cal. App. 4th 351, and *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 15 Cal. Rptr. 3d 643.

However, the dynamics of mediation in general, and the intangibles necessary to achieve successful resolution of disputes through mediation in particular, are not matters easily reduced to a formulaic approach. As one mediator observed, "...there are no set rules. Reaching settlement is the goal. How you get there is up to you. (O)ne thing for sure: when it comes to negotiation, we all have to use our improvisational skills to make deals happen." Krivis, Improvisational Negotiation (Jossey-Bass, 2006).

Advantages of Mediation:

The many significant advantages of participating in mediation are weighed and assessed by the parties on a case by case basis. In summary form, they are, as follows:

- Party control of outcome (allows for self-determination)
- Risk avoidance (case resolution without the unpredictability of trial)
- Cost avoidance (related to discovery, experts and trial preparation, depending on timing of the mediation)
- Flexibility and creativity of outcome (influence and control regarding the form and the details of resolution)
- Relative informality of the process
- Relative efficiency of the process
- Client involvement and education
- Encourages focus and case preparation (strong points, weak points and strategies)
- Confidentiality of settlement (typically required by insurers as a condition of settlement) [2]
- Perceived disadvantages of mediation can be managed by parties on a case-by-case basis (such as premature full disclosure of work product or case valuation).

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[2] Confidentiality of settlements is a potentially controversial topic, a full treatment of which is beyond the scope of this article.

Key Elements of Effective Mediation:

The factors that can contribute to an effective and successful mediation may be summarized generally as follows:

1. A case sufficiently evaluated for the purpose at hand;
2. A plaintiff prepared for the potentiality of settlement;
3. An insurer prepared for the potentiality of settlement;
4. A demand, well-reasoned, well-supported *and* communicated well in advance of the mediation; and
5. A mediator experienced in analyzing and evaluating litigated cases, and effective in helping the parties reach closure.

The Evaluated Case:

It goes without saying that the primary objective of litigating attorneys is to thoroughly understand the case, and prepare it for trial. Some might argue that the optimum time to obtain a successful resolution of litigation through mediation is after completion of all discovery and all potentially dispositive law and motion. However, that is not necessarily so; in the context of mediation, well-prepared does not necessarily have to mean trial ready. As a practical matter, mediation often does not occur with such timing or under such circumstances, and mutually successful outcomes can still be achieved.

Determination of the relative strengths and weaknesses of the parties' positions can often be accomplished for purposes of settlement evaluation prior to completion of all discovery and motions, and there are commensurate economic and strategic advantages for both sides. As a general proposition, the process is enhanced when the attorneys are experienced in the particular area of litigation, and, naturally, it would be an unusual case that involved an insurer that is not experienced in the type of claim involved.

When the mediation or similar procedure (such as Early Neutral Evaluation in federal court) occurs very early in the case, or where participation is involuntary or contrived to meet some judicially-imposed procedural requirement, the challenges presented by the negotiation process and the obstacles to successful resolution predictably increase. This is because the parties may not really be ready to settle, or the parties may perceive the possibility of risk to their respective litigation positions if they unilaterally reveal a comprehensive case assessment prematurely as part of a failed negotiation.

Mediation conducted closer to trial also involves both incentives for settlement and disincentives for settlement, usually on both sides. The predicate conditions for plaintiffs to submit their claims to a trier of fact, and the defendants to submit their defenses, have been

established, and each side has usually completed their evaluation of liability and damages, including respective strengths and weaknesses. However, having fully prepared for trial, and having expended the associated effort and incurred the associated expense, the parties may become more entrenched in their opposing positions.

Insurers have extensive experience in evaluating potential exposure and expense in light of their own risk tolerances on a case by case basis. The factors that vary from case to case and significantly affect settlement valuation typically turn on the specific facts surrounding the claim, the type and quantum of evidence, the appearance and credibility of the plaintiff and defendant, the experience, ability and reputation of the attorneys, and the certainty or uncertainty concerning the law that applies.

In addition, the venue and potential jury pool can significantly influence the valuation of a case. This may be especially so in federal court where cases are pre-assigned to a judge for all purposes and preemptory judicial challenges are not available; foreknowledge of the assigned judge's attitudes and past rulings can on occasion significantly influence the evaluation of a case.

The Prepared Plaintiff:

The plaintiff attorney's preparation of a client for potential settlement is an important element of effective mediation, and it is highly specific to the individual case and individual client. An uninformed and unprepared client can present a serious obstacle to settlement. The more preparation of the client prior to the mediation, the more manageable and predictable will be the negotiation process. The client should be fully informed about the weaknesses and strengths of the case, the general challenges associated with litigation, the specific obstacles and risks presented by the case, and the procedures and dynamics of mediation. Further, every effort should be made to obtain reasonable and realistic settlement authority in advance of the mediation.

In addition to understanding the process, the client needs to be educated about the different role the attorney will play as a negotiator in mediation seeking a reasonable compromise resolution as compared to the role of a zealous advocate seeking a favorable verdict. Attorneys know and appreciate the difference, but it should not be assumed that a client does as well. An uninformed client may perceive a change in the attorney's attitude or bearing in mediation as signaling abandonment of the client's cause and interests, however slight; if so, it can undermine credibility and trust, and present an obstacle to achieving settlement.

Similarly, the more effort made to gain an understanding of how the client feels,

thinks and makes decisions, the better prepared the attorney will be to communicate with and assist the client during the inevitable stresses associated with finalizing settlement negotiations in the mediation. Every person is different when it comes to processing information and be able to make decisions. In general terms, some are "linear" solution-oriented thinkers and others are "non-linear" option-oriented thinkers, and within those broad categories individual variations are widespread and complex due to personality and life experience among other factors. Likewise, every person is different when it comes to assessing risk, ranging anywhere from an intolerance of risk to a proclivity to seek out and embrace risk. In addition, it is to be anticipated that the plaintiff will approach evaluation and decision-making from a more personal and legally unsophisticated point of view than will insurers and their counsel.

What an individual client thinks is important may not be what is important to the attorneys or the mediator, and it will probably vary from what an insurer and its counsel thinks is important. By way of an admittedly simplified illustration, consider the dynamics involved in a wrongful death case - the amount of a settlement is undeniably important, but it may not be what really motivates a plaintiff deep down in their psyche or what will in the end move them to accept settlement. The conclusion of the lawsuit by receiving a monetary settlement may represent but one element of a final, highly personal and emotional closure regarding the loss of a loved one. Concentrating solely on facts, law and money may well have no meaningful or convincing effect on the deeply personal and emotional decision the plaintiff is being asked to make if addressed before the subjective personal needs are addressed.

In the process of thoroughly preparing the client and obtaining settlement authority, the variable personal factors that will come into play during mediation usually reveal themselves, although not always. Classic examples include non-linear thinking and passive-aggressive behavior, which can become road blocks to effective communication and decision-making. It is important to gain understanding about them and address them before the mediation as part of the evaluation and preparation process, if possible, so they can be anticipated and effectively understood. This is especially true when clients are going to be confronted with information that will be either critical of them or their position, or will be perceived by them to be negative. The failure to do so may lead, in the heat of negotiation, to surprise, disappointment and resistance to even a reasonable compromise. This is especially important in those more extreme circumstances in which the litigant fails to appreciate that they have become illogically resistant to acting in their own personal best interests.

The Prepared Insurer:

Insurance companies are typically informed by defense counsel about a case's details and issues at every stage of the litigation, and are intimately involved in managing the litigation process; mediation being no exception. In addition, an insurance company sets reserves on cases from the outset as a matter of course, which involves, at least in part, an evaluation of their potential exposure. Reserves and potential exposure (including case value) may then be re-evaluated from time to time and in response to significant developments in the case.

It is to be anticipated that an insurer will be fully prepared at the mediation to substantiate its own position and aggressively question and attempt to undermine the plaintiff's position. While that dynamic may indeed be reflected in the insurer's overall evaluation, it does not necessarily preclude a reasonable settlement, even if negotiations open, as they not infrequently do, with what is perceived by the plaintiff to be an unreasonably low offer.

Assuring that the insurance company is prepared to meaningfully engage in settlement negotiations at the mediation is not solely the task of the defense counsel or the insurer's personnel. As discussed immediately below, sending a "well-communicated demand," whether it be in the form of a letter or a brief, well in advance of the mediation will enhance the probability of meaningful negotiations, and that is the plaintiff attorney's responsibility. The focus and emphasis of a demand letter or mediation brief should be on attempting to substantiate liability and the insurance company's potential exposure from the plaintiff's perspective. A demand typically includes what is called, in mediator parlance, "The BATNA" (the best alternative to a negotiated agreement).

It is generally not advisable, if the objective is to maximize the effectiveness of the mediation process, for plaintiff's counsel to wait until the last minute before a mediation to make a demand. The ultimate target audience for the demand is the insurer, not the mediator. Even if the mediator does not need or want a mediation brief until just a few days before the mediation, the mediator's role is to facilitate communication, not to sit in judgment on the case, or to pay the money that is being sought, or to unilaterally fix the amount of a settlement.

In order to influence an insurer's evaluation of a case for mediation, effective plaintiff attorneys aim to influence the insurer's decision-makers, not just defense counsel. Depending on the case and the circumstances, including the level of settlement authority involved, the decision-maker could be a claims manager or a director of claims, but it could also be a claims committee, a vice-president or even a president, CEO or the Board of

Directors. The case at hand is not the only case the insurer is defending, and there are always many other demands on the time and attention of an insurer's decision-makers. Therefore, if the aim is to impress decision-makers, the effective timing of plaintiff counsel's input in the insurer's established claim valuation process is important.

Insurers tend to have thoroughly, and in their judgment accurately, evaluated the case based on the information at hand prior to mediations. While they may be amenable to revising their assessment at the mediation, that usually will depend on receipt of new information that necessitates a change in the evaluation range. As noted above, the plaintiff attorney has an opportunity to influence the insurer's pre-mediation case valuation process, and the more he or she does so, the less likely pre-determined settlement valuations will present an obstacle to settlement.

Of course, whether or not to share damaging evidence with an opposing side as a means of influencing that party's case valuation involves each party weighing the perceived advantages and disadvantages - either attempt to enhance the prospect for settlement now, or hold damaging evidence for later discovery or trial. The resolution of this practical dilemma on a case-by-case basis lies within the discretion of the parties as the mediator does not share confidential information with an opposing party without an instruction to do so. But, as an obvious observation, the existence of damaging information cannot influence an opposing party's case valuation if it remains unknown to them and therefore unappreciated by them.

The Well-Communicated Demand:

The basic dynamic involved in the settlement process is simple - a plaintiff demands payment of money that an insurer will not pay unless there is a reasonably compelling reason to do so. Coupled with the burden of proof that typically applies to litigated disputes, it is up to the plaintiff to convince the insurer that it should pay. Therefore, plaintiff's ultimate demand for money must be convincing from a factual and legal standpoint and also compelling from the insurer's practical and financial perspective.

In today's litigation environment, insurers may choose not to respond directly to a demand, or make an offer, prior to commencement of the mediation session. Acknowledgment by the plaintiff attorney of certain business realities, and procedural accommodation of them, can enhance the possibility of maximizing settlement efforts at mediation. In the end, this is a practical approach to procedural considerations aimed at serving the interest of the client and attorney in achieving a better resolution of the case.

In terms of ideal timing, as noted above, the demand should be communicated

sufficiently in advance of the mediation session to allow the insurance company to receive, process and evaluate the demand, and then have it reported to the individuals or committee within the company charged with the responsibility, and corresponding power, to grant authorization for settlement. This typically occurs in a process that involves interaction between and among a number of different people, and may also involve a number of different departments in the company. Depending on the case and the company, in addition to the claims department and the legal department, the internal authorization process may also involve interaction with other personnel within the company, such as underwriting, sales, financial, medical and accounting.

Depending on the type of insurance involved, or the amount at issue, excess or surplus insurance may be involved, in which case there may be additional layers of bureaucracy and decision-making authority involved. The situation can get even more complicated if the party-defendant has a significant self-insured retention (SIR) or a stop-loss excess policy that only kicks in above substantial personal exposure. While reinsurance can also be implicated in some cases, typically that relationship is addressed directly between the insurer and reinsurer by means of reinsurance agreements or treaties, and the third party claim handling and settlement responsibility falls solely on the insurer.

In presenting a demand, the plaintiff, in addition to making a case for liability based on an accurate statement of the facts and law, should set out the potentially recoverable damages completely and accurately. While this sounds like an obvious point, mediation experience suggests it can be an elusive goal. If the demand is viewed as the beginning of a journey toward potential settlement , it is best to have a good idea about where one wants the journey to end before starting out. This is precisely what insurers do as a matter of course in preparing for mediation. Engaging in a similar process is advisable for plaintiffs; in other words, the demand that is presented should be the end-product of an extensive and detailed process of evaluation that paves the way for negotiation informed by a realistic pre-mediation assessment and pre-secured settlement authority. Such a pre-mediation process on the plaintiff side enhances the probability that the focus of the attorney's negotiation efforts at mediation will be with the opposing party and insurer, where it should be, and not their own client.

The Effective Mediator:

The mediator sits in a truly unique position, and brings to bear on the proceedings both an independence and skill-set that neither party possesses. The mediator is neither for nor against either party, and correspondingly the mediator arrives at no ultimate judgment of either side's position. It is to be expected that during the negotiations the mediator will hold each side's communications in strictest confidence unless instructed or authorized to reveal

them to the other side.

An effective mediator obviously has to be an effective communicator, and someone who is knowledgeable about, and experienced in, managing complex negotiations. In addition, the mediator should have more than a passing lay understanding of the factual setting and law involved in the case, as well as extensive experience in how the litigation process typically plays out through law and motion, trial and appeal. The primary reason is that success in mediation involves more than just getting people to talk to each other. Completing the toughest part of a negotiation and closing a final monetary gap between the parties that stands in the way of achieving settlement are almost never accomplished in mediation during joint sessions with the parties and their counsel all present in one room.

In order to influence each party's final assessment, especially when the parties have become entrenched in their positions, the mediator must have all party's respect and trust. From the plaintiff's perspective, it is important that the mediator have the ability and experience to disabuse an insurer of any erroneous analysis of such things as plaintiff's personal appeal or credibility, legal liability, damage valuation and insurance coverage. Most, if not all, communication between the mediator and the insurance representatives occurs outside the presence of plaintiff's counsel - the "shuttle diplomacy" dynamic in the mediation process. Thus, the mediator is inter-acting with a sophisticated and informed institutional negotiator, a role well-served by in-depth knowledge and experience.

Likewise, from the insurer's perspective, it is important that the mediator's knowledge, experience and judgment be respected by plaintiff's counsel, and that the mediator be capable of communicating to plaintiff's counsel unwelcome assessments with authority and credibility. The insurer wants to have a high degree of comfort in the knowledge that plaintiff and his or her counsel will be confronted with critical facts and the applicable law from the perspective of the insurer when appropriate and necessary. Finally, the insurer wants to be sure that the plaintiff appreciates the realities of litigation, including what is referred to in mediator parlance as "The WATNA" (the worst alternative to a negotiated agreement). For instance, aspects of the downside alternative for plaintiff can include not only a defense verdict, but liability for defense costs.

Important components of an effective mediator's skill-set may go unnoticed and unappreciated by the parties during the mediation. They include the ability to listen carefully and empathetically, to ask purposeful and productive questions, and to read the unstated intentions and mood of the individuals and the rooms correctly. When necessary, the mediator can employ techniques that cannot usually be brought to bear effectively by the parties themselves on impasses that threaten to stalemate the negotiations (including initiation and management of such devices as bracketing, high-low ranging and a mediator

number). Whether to employ such devices, and their timing, varies significantly from case to case, as such devices can be counter-productive if not applied in a manner appropriate to the specific circumstance.

Not all activity that helps to make a mediation effective occurs during the actual joint mediation session. Depending on the case and the participants, mediators may be able to increase the efficiency of the process by contacting the attorneys prior to the mediation session as part of "convening" the mediation. This may occur before or after receipt of mediation briefs. The focus of such pre-session contacts is on preparation for negotiation, not the substance of the negotiations. Topics can include such things as what the status of the case is, how the attorneys would like to proceed at the session, how they have worked with each other thus far, what problems if any they are having with clients, how they feel the mediator can be most effective during the session, etc.. The mediator may also have basic questions about the state of case preparation, the facts of the case, the damage claims, the defenses, or the like, that can be cleared up easily without having to waste time at the negotiating session.

Likewise, the joint mediation session is not necessarily the end of the mediation process. If the mediation session does not produce a settlement, an effective mediator will often follow up with the attorneys until a settlement is achieved or the futility of such follow up contacts is confirmed with finality.

Conclusion:

When considered in the aggregate, parties to litigation tend overall to be better served by settlements rather than by trial results, and mediation has been demonstrated to be highly effective in helping disputing parties reach mutually agreeable resolutions.

The efficiency and effectiveness of mediation can be enhanced through contributions made to the effort by all involved in the process - an evaluated case, a prepared plaintiff, a prepared insurer, a demand timely communicated, and an effective mediator.