



# SOME THOUGHTS ON MEDIATION

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The costs of litigation and taking a case to trial are so great that there is a new emphasis on alternative dispute resolution in personal injury cases. Although arbitrations are sometimes substituted for a jury trial, mediation is the preferred and more common means of resolving a claim without the need for a trial.

As a plaintiff's attorney and as a mediator I have participated in well over a hundred mediations. The procedure is both simple and complex at the same time. The concept is simple: all sides to a dispute meet with a neutral person who serves as a "facilitator" in settlement discussions. How or why this procedure works so well in resolving disputes is more complex and less well-understood, even by those who regularly participate in the process. It is likely that a successful mediation is based on a number of techniques and approaches used in combination by a skilled mediator. Following are some of the characteristics of mediation that may help explain its success.

- *It is a condensed and more efficient negotiating process, with offers and demands being made over a period of hours rather than days, weeks, or months. Simply having all parties in the same place at the same time facilitates settlement negotiations.*
- *It provides the psychological fulcrum for a settlement, since both sides come*

*to the mediation with the pre-determined idea that they want the case to settle at that session, and both sides are emotionally and financially invested in the process.*

- *It is a form of "day in court" for clients (especially personal injury plaintiffs) with the mediator being the authority figure to whom facts and feelings can be presented and "closure" of the claim can be achieved.*
- *It allows communication of information about each side's case in a non-confrontative manner. The mediator can point out weaknesses or strengths of a position without forcing the adverse party to respond in a manner that creates conflict.*
- *It allows education of a client who is difficult to control and has unrealistic expectations. The mediator can be the "nay-sayer," rather than the attorney who is supposed to be an advocate for his/her client. This usually applies more to the individual plaintiff than to an insurance company, since the latter has more information upon which to base expectations, or at least believes that it does.*
- *It allows the use of "trial balloons" during negotiation. Rather than losing bargaining leverage by advancing a particular dollar figure, a party can have the mediator pose a hypothetical: "if the defendant would pay "x" dollars, would you consider taking that amount?"*
- *In multi-defendant cases (or those with subrogation lien holders or other stakeholders in the case), it allows simultaneous negotiating of all issues, with all of the players being present. Settlements are sometimes like the puzzles where you have to move different squares to get other squares in the desired position. Having everyone present makes that difficult task much easier.*

- *Mediation doesn't "cause" a case to settle, since the parties control what happens and a settlement only occurs when both parties are satisfied with the result. Yet the mediation session offers opportunities for the settlement process that is not readily available to the parties themselves.*

In the normal process of negotiating a settlement, each party is wary about disclosing its real objectives so that it can preserve its bargaining position. This can easily result in a stale-mate situation with each side stuck on unrealistic dollar figures, with a very large gap between the respective positions. Mediation is a mutual education process, in which each side learns what the other side thinks about the claim's value. Of course, the initial figures advanced by both sides are often far from their actual valuation of the claim, and the mediation process serves to clarify each side's position only as more offers and demands are exchanged. Each side can then factor into its own analysis the perspective held by the other side, as that perspective unfolds through the exchange of dollar figures as well as information or theories.

For example, a plaintiff who has a settlement goal of \$150,000, but isn't sure how the defense values the claim, may make an initial demand of \$350,000. If the defense response is an offer of \$100,000, the plaintiff will quickly adjust his/her thinking to try to achieve a settlement of \$200,000. On the other

hand, a responsive offer of \$30,000 may result in the plaintiff reducing its settlement goal to \$100,000, since the defense offer may indicate the defendant has lower settlement authority, strongly disagrees with the plaintiff's value, or has other reasons why it won't pay as much as the plaintiff had hoped. The opposite process may also occur, with the insurance company adjusting its settlement goals in light of the plaintiff's demands.

Viewed in this way, the mediation process reflects the "market-place" aspect of settlements. The settlement value of a case is not simply a prediction of what a jury would award, discounted for factors of risk and cost. A case has a value in the market-place consisting of the "seller" (plaintiff) and the "buyer" (defendant). Many factors other than the strengths and weaknesses of a case may influence the sales price. During a mediation, each side is continually acquiring and processing information about how much the seller will take, and how much the buyer will pay, to settle a claim. At the same time, each side is giving and receiving information, through the mediator, as to why the buying or selling price should be adjusted up or down.

The future may see variations or combinations of ADR methods. A recent example was a medical negligence case in which the plaintiff and defendant physician resided in the same small community, and had known each other for many years. The defendant admitted liability, but there was a genuine dispute about what the settlement amount should be. Neither party wanted the publicity of filing a lawsuit or the delays and costs of litigation, so the parties agreed to mediate. They

further agreed that if mediation was unsuccessful they would use the last demand and last offer as the figures for a "baseball" arbitration.

Because the arbitrators would have to choose either the last demand or the last offer as the award, there was pressure on each side during the mediation to use realistic figures for settlement. Sticking to an unrealistic figure would have meant greater risk that the other side's figure would be chosen as the award in the arbitration.

The last offer had been \$200,000, and the last demand was \$275,000, so the arbitrators had to pick one of those figures as the award. In the arbitration, a three-attorney panel was used (similar to that commonly used in UIM claims). The arbitrators resided in different cities, so it was agreed that each side would submit informal written materials to the arbitrators, and the panel would participate in a conference phone call to reach a decision.

There were large savings in cost and time to the parties in using this method of resolving their dispute. It also involved less emotional distress for both the plaintiff and the physician. Ideally, the case would have resolved during mediation, but there was a good-faith dispute about the value of the claim that required some form of binding decision-making. In this case, a combination of mediation and arbitration achieved that result.

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