LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, AUGUST 19, 2024

PERSPECTIVE

Mediation: the right strategy can make all the difference

By James Curry

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When litigants bring their cases to a mediator, they seek to resolve contentious issues in a more efficient and less costly manner than going to trial. If they are able to reach a mutually agreeable settlement, they can bypass protracted discovery, lengthy delays, and potentially large jury awards. But if parties and counsel fail to understand some fundamental principles of mediation, they could be in a world of hurt. The cases I share below actually happened. Names and details have been removed, but the lessons they teach are powerful reminders of the importance of good mediation strategy.

The cases that didn't settle offer an object lesson in how to mismanage mediation. Over the course of my career, I have participated in hundreds of mediations and overseen more than a thousand settlement negotiations. Parties and their stories may be unique, but key strategies can lead to successful resolution of almost every matter.

Whether debating fault in an auto accident case or determining the extent of damages in a contract dispute, parties and counsel can navigate around pitfalls and reach a satisfactory conclusion only if they understand the dynamics of the process and move through it carefully and intelligently.

Evaluate exposure: Share information

Litigants come into mediation with general ideas about the strength of their cases, but they don't always have the full picture. Until they understand the other side's position and perspective, they really cannot know the true value of their claims.

Not all cases will end in a settlement, but the chances of resolving a dispute are higher when both sides are open to sharing and receiving information. An experienced third party can listen to both sides, share information between parties, and discuss the issues with them and their counsel. This provides litigants with a broader understanding of their matter. After listening to the neutral's observations and insights, one or more parties may reconsider their positions. They may recognize that their initial assumptions were flawed, and they may be much more open to negotiating settlement of their matter.

The price of skipping this process could be staggering. In one case, a real estate developer allegedly defaulted on a commitment to fund a project. The parties disagreed about the enforceability of the funding commitment and never took their dispute to mediation. The developer offered the plaintiff $10 million, the offer was rejected, and the case went to trial. The trial award was $120 million, with an additional $24 million in interest.

How much better for the defendant, had it been willing to work with a mediator, to listen to and understand the plaintiff's position. A defense offer that actually ac-

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knowledged the plaintiff's position, even one that was lower than the ultimate jury verdict, had a good chance of being accepted or countered by the plaintiff.

Limit exposure:
Set a bracket

Sometimes parties cannot reach a settlement, but they realize that the case could go either way. They may in such circumstances agree upon a damages "bracket" with the help of a mediator. That bracket can create a "win-win" situation for both sides, with the plaintiff guaranteed a minimum and the defense protected against high exposure. With an agreed-upon floor and ceiling in place, the case can then go to an arbitrator or even to an expedited or regular jury trial, which could take far less time.

A plaintiff sued her dog trainer for negligence after she was injured by falling from a plastic chair during a training session, but it was not clear that she had an airtight case. The trainer contended that his chairs were safe and had been used for many years without mishap. At arbitration, the plaintiff was awarded $450,000 for her injuries. But because the parties had agreed on a bracket before the arbitration, the final award was reduced to $200,000. It was still a meaningful recovery for the plaintiff but also a substantial savings for the defendant.

Split the difference:
Not too soon

When parties begin mediating to midpoints early in the process, the mediator may step in to advise them that such financial hair-splitting is not likely to be productive. Only after serious negotiations have occurred, when the parties have exchanged information and have begun closing in on an endpoint, may splitting the difference make good sense.

A plaintiff whose car was rear-ended by the defendant's vehicle demanded $30,000. The defendant offered $20,000. At trial, the plaintiff was awarded $40,000. Had the parties been able to work through their differences in mediation, they may have arrived at a settlement that was much closer to the plaintiff's demand but far less than the trial verdict. The plaintiff, whose out-of-pocket loss from the accident was less than $10,000, would still have been made whole; the defense would have realized a significant savings.

Keep cases small:
Avert a blow-up

When parties agree to mediate their cases, they effectively draw a line in the sand. They work with the mediator to define the scope of their claims and agree upon a case value as of the date of settlement. If they forgo mediation and pursue claims in court, the clock keeps running. An accident victim whose initial injury and treatment plan may have been relatively modest could, over time, accrue considerable expenses.

This is exactly what happened in an automobile accident case for which the plaintiff initially made a $25,000 demand. When the defense countered with an offer of $6,000, any hope of settlement went out the window. By the time of trial, the plaintiff had a lengthy treatment history, a history that jurors saw as evidence of long-term residual injuries. They awarded the plaintiff $135,000. Had the defense been willing to mediate the case, to seriously consider the plaintiff's original demand, the case may have settled for even less than $25,000.

Pick your battles:
Some must be tried

When the facts are clear to everybody in the mediation, but one party digs in its heels and refuses to move, it is time to throw in the mediation towel. A client who is unable or unwilling to listen to the mediator, who fails to register what counsel is telling them, and who does not understand that their case may have holes should be allowed to take that case to trial. No mediation can succeed with a party who is entrenched in their position.

A plaintiff who claimed substantial injuries from an automobile accident demanded between $6 and $7 million from a defendant who made a strong argument for comparative fault and counter-offered $550,000. The divide was too great, and the case went to trial. The jury issued a unanimous verdict for the defendant.

Know when to settle:
Limit costs

Sometimes all sides to a litigation can agree on the value of the claim, but the defendants cannot agree between themselves on their respective liability. If they can settle the case without going to trial, they stand to save further costs and expenses while they avoid a potentially higher judgment against them. It makes sense, therefore, for defendants to agree on a temporary payment split and then, subsequently, resolve their dispute without involving the plaintiff. This allows them to cap their exposure, and any future litigation costs will be much less.

In a case involving an automobile accident that resulted in a fatality, two other vehicles were involved. The first defendant offered $500,000; the second offered $50,000. All parties agreed that damages of $1 million were appropriate, but the insurers were unable to agree upon the split. At trial, the jury assigned fault at 90/10 and awarded $1.2 million. Because they were unable to commit to a payment amount, both defendants ended up paying far more than they needed to.

Consider costs:
Keep small-policy claims small

Just because a claim appears weak does not mean that it should be litigated. When an insurance policy affords some level of coverage, both sides would do well to engage in settlement negotiations well before they start serious trial preparation. If they can successfully mediate their dispute prior to trial, they avoid discovery and other costly and time-consuming steps. Carriers are generally averse to calculating costs when exploring settlement, but this can be short-sighted. Once a case goes to trial, costs can be significant. It makes no sense for an insurer to spend thousands of dollars in costs and attorney's fees in order to prove that actual damages are low.

In an automobile accident case in which fault was at issue, the plaintiff made a 998 demand for $15,000; the defense rejected that demand. The defense changed its mind right before trial, but its $15,000 offer was too little, too late. At trial, jurors found the defendant 75% liable. Noting the plaintiff's age and prior medical history, as well as the prospect of future medical expenses, they awarded the plaintiff $95,000.

Trust the process:
Let mediators do their job

The best part of mediating difficult disputes is that parties are not left to their own devices. They work with mediators who understand the law and the process and can guide both sides toward a fair and equitable resolution. When parties and counsel commit to finding middle ground, the mediator can help them structure a satisfactory settlement. But when outside forces - parties who were not part of the negotiations - try to superimpose their own ideas on the process the end result can be disastrous. Instead of allowing this to happen, both sides should ask the mediator to write a proposal explaining why the case was resolved in a certain way and laying out the risks of rejecting that settlement and going to trial.

After a claim was asserted against a large municipality because of a particularly egregious use of a choke hold and knees on the neck of an individual, the parties agreed to settle the matter for $475,000. That settlement was rejected by the city's oversight board. At trial, the city was ordered to pay more than $4.7 million.

Conclusion

Every litigation and every mediation is different. But there are common themes across all types of cases. When counsel understand the risk-reward profile for the choices they make during the course of their cases, they can limit exposure or increase recovery for their clients. Working with mediators and incorporating smart strategies into the process can make all the difference.

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