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The Art of Mediating: The Goal Is to Settle, Not Win

By Daniel E. Cummins | October 17, 2017

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With the uncertainty of what a jury will do in a particular case and the significant costs associated with trying a case to verdict, alternative dispute resolution proceedings in the form of mediations and arbitrations have been a rising trend across the commonwealth of Pennsylvania.

The following practice tips for nonbinding mediations may assist litigants in bringing their cases to a desired resolution.

Be Fully Prepared

All too often, parties may arrive at a nonbinding mediation without having provided the opposing party with all of the information necessary to allow for a successful mediation.

On the plaintiff's side, there are times where a plaintiff has not yet finalized the information pertinent to the economic damages claims, such as wage loss claims or medical expenses claims. At times, the parties are still waiting for the completion of the lengthy process associated with securing health care, Medicaid or Medicare liens.

It is advisable to postpone any mediation proceedings until this information has been secured and documented so as to allow the defense to complete its evaluation and arrive at the mediation with additional settlement authority. The production of such information also provides the plaintiff with ammunition to argue for a higher settlement of the claims presented.

On the defense side, it may be advisable not to proceed to an arbitration until all written discovery, depositions and expert review of the claims presented has been completed.

Plaintiffs allowing a case to proceed to mediation before such items have been accomplished may be faced with a defense asserting that there is no additional settlement authority to be discussed at the conference but that the case may be revisited after the completion of additional discovery efforts, such as an independent medical examination of the plaintiff. Plaintiffs can take away this argument by not agreeing to proceed to mediation until such discovery tasks are completed.

Written Submissions

When proceeding to a mediation, it is important to provide the mediator with a concise, but thorough, overview of the claims and defenses presented. A concise chronology of the facts of the underlying matter will inform the mediator as to the legal issues presented and provide an initial sense as to the value of the claims asserted.

Written submissions need not contain a recitation of every medical visit or diagnostic study completed. Rather, the highlights of the plaintiff's treatment following the accident will suffice.

On the defense side, a mediation memorandum can be utilized to raise and provide support for defenses on the liability issues, the causation question and the alleged extent of the injuries and damages presented. A defense mediation memorandum can also be utilized to emphasize the plaintiff's prior medical history so as to confirm that the case presented involves an aggravation of a pre-existing condition claim.

There is also no need to provide a mediator with voluminous written materials to review. Rather, litigators should emphasize the highlights of the case through documentary evidence. Rather than providing the mediator with complete medical records, it may be advisable to only submit the notes of the important office visits and notable reports of diagnostic films and studies.

Also, rather than submitting entire transcripts of depositions, the better practice may be to submit the cover page of the deposition transcript along with the pertinent pages that may have been cited in the mediation memorandum.

In addition to not overburdening the mediator with unnecessary information, presenting more concise documentation will also serve to keep the cost of the mediation down as the mediator will have less to review in preparation for the proceedings.

Oftentimes, the parties will submit their mediation memorandum and supporting exhibits to the arbitrator confidentially. The better practice is to disclose your materials to the opposing party in order that the opposing party

may share the same with their client in order to let their client know of the weaknesses of the case presented and the strengths of the opponent's case.

Prepare Client and Claims Representative

Most plaintiffs and some claims representatives are not familiar with how the mediation process works.

The better practice is to fully inform your client that, at a mediation, the mediator will likely have all of the parties in the room for an initial conference at which updates on the case presented can be provided. At the initial conference, both parties may also be invited to provide their overview of the case presented in order to let the opposing party know how the case is viewed by the opponent.

A plaintiff should be advised that he or she may be requested by the mediator at this initial conference to provide an update as to the client's condition and treatment. In this regard, a plaintiff who admits to improvement in his or her condition with the treatment provided to date adds to the credibility of that litigant. An injured party who contends that there has been no improvement whatsoever in his or her condition despite years of treatment may have their overall credibility called into question by the opponent.

If a plaintiff is reluctant to admit improvement, the plaintiff can add the proviso that, while he or she may have improved somewhat over time, the injuries have not resolved and continue to limit the plaintiff in his or her everyday activities of daily living.

The client should be advised that, once the initial conference is completed, the mediator will likely put each party in a separate room and commence the negotiations by traveling back and forth between the rooms in a continuing effort to bring the parties closer together towards an amicable resolution of the claims presented.

The parties should also be made aware that there may be a reiteration of the same points over and over with different emphasis on different points at different times during the course of the mediation. This is all a part of the process of helping each side of the litigation to fully understand and appreciate the pros and cons of the claims and defenses presented.

The client and the claims representative should also be advised that the mediator has been selected to preside over this mediation because that person has experience in evaluating the claims presented in the jurisdiction in which the case is pending. It should be noted to the parties that a mediator typically does not provide the parties with his concrete evaluation of the case presented as the job of the mediator is not to evaluate the case. Rather, the mediator's function is to facilitate negotiations between the parties towards a settlement figure that each party may not be entirely happy with but are satisfied enough to agree to conclude the matter.

Listen to What the Mediator Is Saying

When engaging in a mediation, parties may get so wrapped up in their own position that they may fail to listen to the information being provided by the mediator after the mediator has met with the opposing side.

Listening to what the mediator is reporting from his last conference with the opposing party may send signals as to where the opposing party may be willing to proceed in its next step. Listening to such information may also assist the party hearing the information in formulating their next step in the negotiation process.

Be Clear on What Can Be Disclosed

At various times during a mediation, a party may disclose information to the mediator that the party does not wish to be disclosed to the opposing counsel.

When disclosing information to the mediator that a party does not wish to be revealed to the other side, that party should be clear in its statement to the mediator that such information should be kept confidential. Mediators will keep this information confidential to keep your trust.

The provision of such confidential information may assist the mediator in understanding certain aspects of the case and why a party may be taking a particular position on a particular issue. The disclosure of such information to the mediator confidentially may, in the end, assist the mediator in massaging the other side closer toward a settlement figure.

Willingness to Negotiate

Obviously, the success of any mediation depends upon the willingness of each party to negotiate reasonably. In addition to emphasizing the strong points of one's case, the credibility of the parties will be enhanced by that party's concession with respect to the weak points of their case presented. An admission of the weak points of a case, with an associated explanation as to how that party plans to deal with those weak points at a potential trial, will provide the mediator with information to take to the other side in the continuing negotiations on the case presented.

When going into a mediation, clients and claims representatives should be made aware that the goal is not to "win" the case, but rather to settle the case and secure compensation or close a file. Shifting the parties' focus from winning to settling prior to going into the proceedings may make all the difference in the success of a mediation.

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