Turning Justice into a Business: The Perils of Private Mediation in Tort Cases[1]

by Patrick M. Flaherty, Esq.

What's wrong with mediation? Nothing, if you are a defendant, an insurance company or a mediator. And nothing if you are a plaintiff whose case shouldn't be tried, either because liability is weak or damages are inadequate. But if you are a plaintiff with a reasonably strong liability and damage profile, mediation should be approached cautiously if it is considered at all. Here's why.

Tort Reform by Another Name

Private mediation favors the defense by design. The structure and process places insurance companies at a distinct advantage. After decades of fighting tort reform and preserving the jury system, lawyers ironically embrace a process that eliminates the jury and neutralizes the plaintiff's attorney, the holy grail of reform that could never be accomplished legislatively.

The American jury has always been the great equalizer, the conscience of the community, "the purest example of democracy in action,"[2] the one force that business and medical interests cannot control and therefore fear. Mediation abandons that safeguard for the promise of efficiency, economy and certainty. How does mediation favor the defense? It changes the culture of the adversary system. It removes humanity and advocacy from the equation altogether and substitutes business principles for principles of justice.[3] That is significant, hugely significant, but it is just the beginning.

Economic Incentives

Private mediation means for-profit mediation. It is a business and a big business. One dimension of the insurance company advantage stems from the economic pressure on the mediator, conscious or unconscious. Mediation companies get far more business from insurance companies than they do from a single plaintiff or plaintiff's attorney. State Farm simply has more cases to refer than does any individual. Mediation companies market themselves to insurance companies. Many insurance companies have "approved" mediators and won't agree to someone not on the list.

This reality creates a dangerous familiarity that can influence the advocacy and recommendations of a mediator during the mediation process. It can shift the dynamics to the point that what the insurance company "wants to pay" or "usually pays" is transformed into a "fair settlement" or a "reasonable verdict" when finally conveyed to the plaintiff by the mediator. Trial lawyers scrutinize the impartiality and credibility of jurors and witnesses every day based upon far less evidence of interest or bias. There is no reason to abandon suspicion or to assume immunity from influence just because a person bears the title "mediator." They are human, with all the frailties and foibles that go with it.

Another aspect of for-profit mediation that favors the defense is that settlement becomes the sole objective of the process--whether the terms of settlement are in the best interests of your client or not. Success is measured entirely by whether the case settles. The percentage of cases settled is a marketing tool for the mediator. Persistence during mediation is directed toward getting any settlement rather getting a fair settlement. This focus may influence the advocacy and recommendations of the mediator even more than the economic pressure of referrals. Always ask yourself whether the proposal is recommended because the mediator wants a settlement or because it represents a reasonable verdict expectation.

For the same reason, never abandon your own judgment or experience in favor of the mediator's. You will always know your case and your abilities better than the mediator and the mediator may or may not have trial experience or knowledge of jury verdicts in your venue. More importantly, he has a different agenda than you have. Mediation seeks a settlement, any settlement. You want a settlement which falls within the range of likely verdicts based upon all the facts and circumstances of your case. Those can be two very different things. To ensure that they remain different things, never let "what cases settle for at mediation" become the standard by which case value is measured or determined. In fact, use verdict expectancy as a basis to reject any offer below trial range reduced only by trial costs and the time value of money.

The fact that the mediator has a different agenda is not a criticism of mediators; that is how the institution was designed. Because of that, however, understand that the mediator is not your friend or your ally. It is not his job to protect your client or to maximize your client's recovery. Those are your responsibilities alone. Fulfilling those responsibilities often requires that you battle the mediator as well as the insurance company.

System Dynamics

The dynamics of the mediation process also work in favor of the insurance company. The mediator and the insurance company almost always require that the plaintiff be present and that he participate. This is demanded because the plaintiff is more vulnerable to being worn down than is the plaintiff's attorney. This vulnerability is the key to the mediator notching a settlement or to the insurance company settling on "favorable terms." It explains, for example, the mediator repeating defense argu-

ments that have little legal significance but may worry an inexperienced or unsophisticated plaintiff.

Pressure

The pressure to settle created within a mediation is another aspect of the dynamics that favors the insurance company. It is created in subtle ways and depends for success on the presence and vulnerability of the plaintiff. The pressure begins with an early speech by the mediator praising mediation and denigrating jury trials. It is critical of such matters as the time, expense, risk and stress of trial. The consequence of this speech is to invalidate the only alternative to mediation and to create or reinforce a positive association with any final settlement offer that may be presented during mediation. It is a technique of which even Pavlov would be proud.

Additional pressure comes from the mediator praising the skill and stature of the plaintiff's attorney in front of his or her client, whether the mediator really knows the lawyer or not. This gratuitous flattery may have several purposes but one is to build up good will with the attorney which the mediator can later tap when he needs help at the end of the day selling his settlement recommendation. You and the mediator are not a team. Don't let yourself be played.

Pressure is also created by being confined in a room for four to eight hours with a mediator frequently reminding plaintiff of the weaknesses in his or her case and of the risks those weaknesses pose at trial. Don't underestimate the psychological impact that experience can have on an unsophisticated or inexperienced plaintiff. Remember also that you relinquish control of your client during mediation in ways that do not ordinarily occur. For the first time since the representation agreement was executed, a lawyer other than you has direct communication with your client about the merits of the case. The mediator spends significant time building rapport and confidence with the client which he later uses to push his final settlement recommendation. There may be cases or circumstances where you keep the client isolated and have the mediator talk only with you. You are the one with the fiduciary responsibility and the ultimate liability. It is your right to communicate with your client exclusively and independently. Because the institution depends so heavily on this access, however, you may have to be selective in efforts to isolate if you want to pursue mediation.

Negotiations

Negotiations are another aspect of the dynamics that work in favor of the insurance company. Plaintiff is usually expected to make a demand before the mediation starts ("in order to assess whether mediation will be worthwhile"), but the insurance company is not expected to make an offer in response to the demand. This is the insurance company's way of controlling the starting point of negotiations before the mediation ever begins. If the demand is "too high," the insurance company will refuse to mediate until an "acceptable" demand is made. By the same token, waiting until the mediation has begun to make an initial offer prevents the plaintiff from influencing the starting point or from backing out altogether. As mentioned below, it is very difficult for the plaintiff to ignore the pull of the mediator once inside the room, just as it is for the fly to escape the spider's web.

One illustration of negotiation dynamics is the insurance company making an initial offer during mediation that is less than the specials in a case where liability is not seriously contested. The obvious goal of this tactic is to keep the ultimate settlement low by forcing plaintiff to expend time and energy just getting to what should have been the starting point, all the while creating the illusion of progress with subsequent but still inadequate offers. Never stay or participate in a mediation under these circumstances (when the first offer is less than the specials in a case where liability is undisputed), regardless of how much the mediator pleads with you to stay or whether he asks you to stay as a personal favor. You owe the mediator nothing. You owe your client everything.

The Mediator

There are good mediators. But there are also bad ones. And the bad ones may outnumber the good ones. The bad mediators are the courier pigeons; the ones who shuttle back and forth conveying numbers and regurgitating arguments regardless of merit or weight. This happens because the mediator is not sufficiently familiar with the facts (he either didn't read everything or wasn't provided everything) or he doesn't possess the requisite advocacy skills to question, probe, challenge or debate. A courier pigeon is a waste of time and should be avoided.

Contrary to marketing literature, and even conventional wisdom, retired judges do not necessarily or even usually make the best mediators. They don't because many judges were not trial lawyers and thus were not trained in advocacy. In my experience, the best mediators are trial lawyers who are or were formidable advocates and who remain committed to achieving a fair and just result. Effectiveness has more to do with advocacy skills in general and less to do with whether those skills were acquired in battle on behalf of plaintiffs or defendants. Not only can the trial lawyer identify the strengths and weaknesses in the case on both sides, but he or she can persuasively argue during the mediation the significance of those issues and the impact they will have on a jury. That skill is a key to ensuring that settlement is driven by the merits of a case rather than by the economics of mediation. Unfortunately, and ironically, the advocate is not always hired because he or she is viewed as too partisan. Kane County is fortunate to have several trial lawyers who are experienced and effective mediators.

The good mediator will want a detailed summary of the liability and damage facts with a candid disclosure of all the strengths and weaknesses. Only then can the mediator have a command of the details necessary to critically evaluate and advocate the

case on both sides. Beware of the mediator who requires only a short summary. He is a courier pigeon or lazy and either way should be avoided. Sample mediation summaries for both injury and death cases can be downloaded from www.kfkllaw.com /publications/news.

It is not suggested that the mediator be an advocate for one side or the other. It is suggested that he use his trial experience and advocacy skills to persuade both sides how the facts and the law will influence a jury on liability and damage issues. In other words, the effective mediator will motivate the parties to understand the verdict expectancy of the case–the ultimate barometer of value. A tour de force by a strong mediator may go a long way in bringing the parties together around an appropriately discounted verdict expectancy.

This scenario assumes that the mediator, when warranted, can persuade the insurance company to pay more than the value it placed on the case before the mediation began. If that assumption is untrue, and it may well be untrue, then mediation is simply a tool for the insurance company to settle cases within the limits of preset reserves, whether or not those reserves bear any relationship to verdict value.

Even under these circumstances, however, there is an argument for using mediation. In cases where a direct dialogue on settlement is unavailable or unreliable, mediation is an opportunity to learn what defendant will pay so your client can make an intelligent choice about settlement versus trial. Using it in this fashion requires resisting the pressures of settlement during mediation when the final offer does not meet minimum expectations.

Inexperienced Plaintiff's Attorneys

The perfect foil for private mediation is a plaintiff's attorney who cannot or will not try the case for reasons unrelated to the merits (*e.g.*, inexperience, financial cost, time commitments, etc.). These attorneys are most susceptible to the pressures of settlement brought to bear during mediation. The mediator's goal of "any settlement" and the insurance company's goal of a "favorable settlement" are more easily achieved with a plaintiff's attorney who already has a low settlement threshold. The willingness and ability of the plaintiff's lawyer to try the case is an essential safeguard against capitulation. Unfortunately, but not surprisingly, mediation may promote participation by inexperienced attorneys who believe they can obtain a settlement without the time, expense or commitment of a trial. This is unethical and it is a disservice to injured plaintiffs and to justice in an adversary system.[4]

Conclusion

So, what do you do with this information? Use it to evaluate whether your case is a fit for mediation. Consider adapting the old maxim: "mediate" the bad cases and try the good ones. Does the case have serious liability or damage problems that would prevent you from trying it? If so, mediation might be worthwhile because the jury limitations of your case outweigh the limitations of mediation.

If you do mediate this class of case, use the information here to manage expectations for both you and your client. Explain the economic and system dynamics to your client in advance to avoid frustration and disappointment at the end of the mediation. Part of managing expectations includes an honest discussion with the client about strengths and weaknesses in the case.

If your case is strong on liability and damages, you have a tougher decision. Use this information to weigh the pros and cons. Selecting the right mediator here is particularly important. Look for the trial lawyer who knows the power of advocacy and the capacity of the jury to know the truth. Don't sacrifice the pivotal advantage of a jury unless settlement is within the range of likely verdicts. Most of all in these cases, if you chose to participate, don't let fatigue and expediency rob you of your good judgment. You can and should say no at the end of the day if the offer on the table fails to do substantial justice.

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[1] This article is based on the experiences of the author. The observations which follow may not apply to every mediator or to every mediation and do not apply to every mediation in which the author has participated. Nor are these observations criticisms of people who are mediators. Most mediators perform as the institution was designed. Instead, these reflections are offered to help plaintiff lawyers understand the nature and limitations of the institution so that they can decide whether to mediate and to prepare themselves and their clients if they do mediate.

[2] William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006).

[3] The increase of ADR in tort cases is part of a broader trend toward the dehumanization of justice that includes mandatory arbitration clauses in consumer agreements, the proliferation of exclusionary motions in limine and the marginalization of juries in federal court through case dispositive motions (which are electronically filed and decided without oral argument). Young, *supra* note 2, at 69. For you Woody Allen aficionados, remember the Orgasmatron in *Sleeper*? (SLEEPER (Rollins-Joffe Productions 1973)).

[4] *See* ILL. RULES OF PROFESSIONAL CONDUCT, R. 1.1 (eff. Aug. 1, 1990).

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