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CIW Research Project

March 7, 2005

MEDIATING THE TORT CLAIM

Statement of Purpose

In selecting a topic for this paper, I searched for a subject that is often mentioned in both oral discussions and in print in the casualty and property insurance industry, yet frequently either misunderstood or lacking appropriate clarity as to both definition and process. In addition to the research cited herein, I have drawn on my own considerable experience in the tort claim mediation arena.

It is my hope that those with whom my efforts are shared will come away with not only a clearer understanding of what a mediation is and how it works, but also how it has come to be such an effective tool in the arena of Alternative Dispute Resolution.

Introduction

Any parent of more than a single child recognizes that there is one thing certain in life – disputes are inevitable. Parents will go through child rearing, each developing methods for managing their sibling offspring through a variety of parenting styles. As often as not, those same children learn from their parents the method of resolving conflicts that they themselves are most likely to put into play as adults. Some styles involve groveling, pleading or begging, others bribery, still others coercion, threats of violence, and occasionally the “lose-lose” solution which results from “splitting the baby.” Consider the following parable:

“An overworked parent arrives home from a particularly hard day at work to find her (his) two adolescent offspring bickering loudly in the kitchen. ‘Give me back my orange,’ Susie cries. ‘I don’t see your name on it anywhere,’ Jimmy retorts. ‘Mom! (or Dad!),’ Susie says (appealing to adult authority), ‘I put the orange aside before I went to soccer practice. I put it right there on the second shelf in the fridge!’ ‘So?’ Jimmy sneers. ‘When I got home from school, I found the orange. Possession is nine-tenths of the law! The orange is mine.’ Jimmy turns slightly and hides the orange behind his back in one hand while holding Susie off with the other as she tries to snatch back the orange.

The parent, after quickly figuring out that there is only one orange in the house, comes up with what seems to be an eminently fair solution. She (he) opens a drawer and retrieves a large butcher knife. Complying reluctantly with a stern parental request, Jimmy turns over the orange. The parent whacks the fruit in two with the knife and hands each child a half, smugly self-satisfied with her (his) Solomon-like wisdom. Unfortunately, the siblings now jointly turn their anger toward the parent rather than each other. Why? ... Because each child wanted a whole orange (Cavanaugh 1).

Unfortunately, the variety of conflict resolutions used in raising children spills over into how adults see the need to resolve conflicts. Our legal system has become expert at teaching the combat and coercion method. We are one “suit happy” society! If someone does something to

you that remotely suggests harm or damage, there are television commercials, billboards or magazine advertisements in abundance that tell you just who to call. “Take them to court! Show them you mean business!”

What Exactly is ADR?

About 25 years ago, as our society became all the more litigious, choking the court dockets and flooding the market place with more lawyers, the creative legal theories of whom boggle the mind and tie up cases for years, a new concept emerged called Alternative Dispute Resolution, or ADR for short. ADR was created as a way to use creative methods of resolving legal conflicts short of expensive litigation which is normally accompanied by uncertain outcomes, enormous attorney fees, and only the rare successful ending. “*There has to be a better way!*” someone most certainly must have said. And there was!

Alternative Dispute Resolution uses the tools of arbitration, mediation and mock trials to settle civil actions by using trained, experienced and practiced barristers, arbitration panels, arbitrators, or mediators to act as a problem solver or trouble shooter with the idea of bringing some manner of closure to the conflict. Although the methods used in mediation and arbitration are widely different, the sought-after result is to resolve the case short of expensive trial preparation, endless attorney fees, anxiety and emotional trauma, and the inevitable uncertainty associated with a trial by jury.

“Instead of a judge and jury, plaintiffs and defendants are turning to mediation and alternative dispute resolution to solve their legal problems. Settlement is in many cases the preferred path to legal recourse these days. The trend, which has earned the attention of everyone from the American Bar

Association to law schools, has led to a phenomenon within the legal industry known as ‘vanishing trials’ ” (Anderson 1).

During the past quarter century, there has been a decrease of nearly 20 percent in the number of civil trials according to the American Bar Association’s Section of Litigation. Federal trials are down by nearly 50%. The wider use of mediation and arbitration is often attributable to state court requirements that parties go through a mandatory mediation before being granted a trial (Anderson 2).

How Do Mediation and Arbitration Differ?

The primary difference between these two effective ADR methods is that, in arbitration, each side presents its respective case to either a single arbitrator or a panel of arbitrators, and, at the end of the presentation, the facts and evidence are considered with the result that a decision of some sort will be rendered. The decision may be binding or non-binding, depending upon agreements reached by the parties in advance of the hearing. In binding arbitration, the decision of the arbitrator (or panel) is final. In non-binding arbitration, the parties can decide to accept the decision, or continue to prepare for a courtroom battle.

Some disputing parties may decide to use a modification of the arbitration method called a ***mock trial***. Here the purpose is to give both disputing parties an opportunity to present their respective cases to a ***mock judge and/or jury*** for the purpose of getting a non-binding sense of how their case may play out in a trial environment. Usually this is a “mini” trial, where not all evidence, but rather the key elements are presented for judge or jury consideration. After the mock trial, each side has the opportunity to re-assess its strategy and determine if it wants to remain in litigation or look for a way to otherwise dispose of the case.

Mediation differs dramatically from arbitration or a mock trial, in that it utilizes the trained mediator, usually an attorney or former judge, who has had specialized training in conflict resolution. In the mediation, the mediator makes it clear that this is an interim step that has the potential to bring the case to a conclusion without the expense, emotion and uncertainty associated with placing their fate in the hands of 8 to 12 strangers whom we refer to as a jury, quite often *not of one's peers*. The mediator works through separate private caucuses with both sides to try and establish reasonable settlement terms which will allow each side to depart with some measure of satisfaction and success. The balance of this paper deals with mediation.

Why Should One Consider Mediation?

For disputing parties who have otherwise given up on negotiating what, for them, is a reasonable settlement, by dealing directly with the other party (or through respective counsel), mediation is largely a painless and efficient way of solving the problem. It's quick, private, fair, and inexpensive, especially when one considers the cost of continuing a lawsuit.

Mediation is typically scheduled within a few weeks, or no longer than a couple of months, from the time it is requested ("Why Consider Mediation?" 1), sometimes in close proximity to a pending trial date.

Mediation usually takes anywhere from a few hours to a full day, depending on the nature of the case. By contrast, a trial or even the mere continuation of a lawsuit can take many months or even years to resolve ("Why Consider Mediation?" 1).

It can be a most useful tool if you are trying to resolve a dispute with someone with whom you desire to remain on good terms (e.g., family, neighbors, co-workers, business partners, etc.). Lawsuits have a way of polarizing people, ultimately resulting in ruined

relationships. Mediations of suits between those with whom the parties are familiar often assist in salvaging the friendship (“Why Consider Mediation?” 1).

Another advantage of mediation is confidentiality. With only rare exceptions, what is said during mediation stays at the mediation. It can’t be used later in a court of law. Followed through the trial stage, a lawsuit, by contrast, has a way of making a public record (“Why Consider Mediation?” 2) of everything to which there is sworn testimony. Transcripts are made by court reporters, and the proceedings are typically open to the press. This may pose a particular appeal to anyone who doesn’t wish their dirty laundry aired in open court (“Why Consider Mediation?” 2).

One is almost assured of saving money in a mediation. The typical cost to each side for their respective share of a mediator’s fees usually ranges from \$500 to \$1000, depending on the complexity of the case and the anticipated length of the mediation. Taking a case through the trial phase in 2005 will probably exceed \$50,000 (“Why Consider Mediation?” 2).

Finally, the mediator has the ability to speak to the parties in frank, yet diplomatic and often empathetic terms, identifying strengths and weaknesses in each side’s case (“Why Consider Mediation?” 2). The effect is that the posturing and macho efforts of the attorney’s representing each party can often be effectively dismantled or defused.

Why Does Mediation Work?

Mediation Changes the Shape of the Dispute

In stark contrast to the conflict resolution method suggested in the Introduction to this paper, a person with facilitative mediation skills asks questions to determine the *interests* of the parties (Cavanaugh 2). Digging deeper, the mediator is able to determine that it is, in fact,

possible to satisfy the interests of both parties, with the tools already at everyone's disposal. Perhaps there are shared interests (e.g., both are scared to death of going to court, but neither feels they can give ground). Discovering and building on the shared interests as well as identifying any independent (non-shared) interests is the stock in trade of the skilled mediator (Cavanaugh 2).

Mediation Takes the Pressure Off of the Parties and Their Counsel

It is not unusual outside the mediation environment – in fact it is quite common – for the attorneys on each side to posture, often in false bravado, as to their confidence in their respective cases. First of all, by competitive nature, they may simply not want to give ground. Second, they may not want to give the impression to their client of any perception of weakness, either in their case, or in their confidence in their own abilities to sell that case. Third, any suggestion of weakness in their case signals to their opponent that their bargaining position has been weakened. An effective mediator brings those parties to the table and explores possibilities of settlement while engaging in “face-saving” discussions (Cavanaugh 3).

Mediation Offers a Kind of “Day In Court”

Plaintiffs often file a lawsuit primarily because they feel they've never been heard before (Cavanaugh 3). In a personal injury lawsuit, sometimes they just want a chance to address the alleged “wrong-doer” and have their say, without having to do so under the intimidating conditions of a courtroom. In court, the neutral function is conducted by either judge or jury in a clumsy procedural fashion (Cavanaugh 3). In that setting, rules of civil procedure and rules of evidence often crowd out the opportunity for disputants to simply say what's on their mind.

In the mediation environment, the mediator may serve a dual role of being both facilitator and evaluator of the case (Cavanaugh 4). A good mediator is typically a skilled advocate who

can not only foster communication between both sides of the conflict, but offers an independent assessment of both the application of law and the measure of damages.

Mediation Offers Greater Flexibility

Litigation places control of the case into the hands other people. Mediation allows the disputing parties to maintain a measure of control as to their own destiny. Rules of evidence, materiality and limits on remedies – all of which are constrictions of the legal process – take a back seat for a period of time (Cavanaugh 4). Creativity abounds. Agreements can be reached that would never be considered by a jury whose charge is simply to determine whether burdens of proof have been met and to assess damages. These creative solutions meet the needs and interests of the party in ways that are not possible within the confining rules of a trial and jury instructions.

What Are the Stages of Mediation?

Mediation is much less formal than going to court, but it does involve distinct stages designed to lead to a mutually beneficial compromise. In mediation, two or more people come together to try to work out a solution to their problem, assisted by the trained hands of a neutral third person, called the mediator. Unlike judge or jury, the mediator does not take sides, nor does he (or she) make decisions. Their sole job is to help the two sides evaluate their goals and find a mutually satisfying solution (“The Six Stages...” 1).

Because the mediator has no authority to make a decision, nothing will happen unless both sides of the conflict want it to happen. The knowledge that no result can be imposed against one’s will reduces tension for both parties, improving the likelihood of flexible movement, rather than adhering to the extreme (“The Six Stages...” 1). That release of tension,

however, does not mean that the process is a totally relaxed series of chats in an open forum. There is a formal process which, within certain parameters, each mediation will take.

Usually, in advance of the mediation, each litigant's respective counsel will present a mediation statement, often accompanied by a package of evidence that helps to define their case and its relative strengths. By the time the mediation opens, the mediator will have had an opportunity to become thoroughly familiar with the case and with the arguments made by each side.

Stage 1 – Mediator's Opening Statement

On the agreed date of mediation, the principal disputing parties, their respective attorneys, the mediator, insurance representatives, and on occasion, supporting family members of the damaged parties meet at a pre-determined location – usually one of the opposing attorney's offices or at the mediator's office – and gather around a large conference table. Each side has the opportunity to get a look at the other side. The beauty of this is that it provides an opportunity to place human faces on others generally perceived as cold, heartless, insensitive, inflexible (or any one of a host of other adjectives) people. In some mediations, this has the immediate effect of melting some of the ice that often precedes such a meeting.

The mediator explains the rules and goals, talks about some statistics for mediation success (usually a rather high percentage of all mediated cases). Each side is reminded to keep an open mind, and that this is the opportunity for them to control the outcome, rather than handing it over to a jury of strangers.

Stage 2 – Disputants' Opening Statements

Each side is given an opportunity to present its case. Absent are the rules of evidence that accompany a trial. Frequently evidence is presented which could be excluded at trial via

effective motion practice, but during the time of the mediation, the outcome of those anticipated motions remains in doubt. The presenters are given an opportunity to be as elaborate in their presentation as they choose to be. With more sophisticated technology, animation and “Power Point”-type presentations are not uncommon.

What is incumbent upon each side is to keep in mind during and immediately following these presentations, that their adversaries are simply doing their job and representing their respective clients. Listening respectfully is the order of the day, but in so doing it doesn't mean that one's own case needs to collapse. In fact it is not unusual to see emotional body language flow both ways as each side presents its respective case.

Stage 3 – Joint Discussion

On occasion, but not in every case, the mediator may seize an opportunity to get both sides talking directly with one another about what was said in the opening statements (“The Six Stages...” 2). If there are particular issues to be addressed, this is sometimes a good time for that.

Stage 4 – Private Caucuses

The lion's share of the time spent in a mediation is spent in the private caucuses. The respective disputing parties are separated into private caucus rooms where they are free to openly discuss developments, opportunities, concerns, or frustrations outside of the earshot of the opposing side. At this point, the mediator really begins to exercise his craft.

By this time, the mediator has a pretty good idea what each side's case is about, and has formed an opinion as to what each side's strengths and weaknesses are. In my experience, it is not uncommon for the mediator to identify to the party he believes to be the stronger, and what he feels must be done to bring the other side into a reasonable discussion of settlement. It is

usually that gut feeling by the mediator that drives whom he spends time with first and what he tells them in his opening caucus discussions.

The mediator may caucus each side once, or several times as needed (“The Six Stages...” 2). Caucuses may go on for several hours, as each side makes settlement overtures to the other, followed, by some type of counter measure. If the latest overture appears to be completely outside of the realm of reason, it is not uncommon for the party receiving the current offer to refuse to counter without a measurable concession, usually to some stated plateau. The private caucuses are considered to be the “guts” of the mediation (“The Six Stages...” 2).

Stage 5 – Joint Negotiation

After caucuses, the mediator may bring the parties back together to negotiate directly (“The Six Stages...” 2).

Stage 6 – Closure

Closure occurs when all the progress that can be made has been made. More often than not, there is agreement and a settlement is reached. In that case, then the major tenets of the settlement are memorialized in some type of written document. Representatives from both sides sign the document, and copies are made and distributed to the participants.

If no agreement is reached, the mediator will review whatever progress has been made, advise the participants of their options, e.g., meeting again later, going to arbitration, mock trial, or going to court (“The Six Stages...” 2).

The Power of Apology

In any number of cases, the aggrieved party may feel that no closure can take place - regardless of the terms of settlement offered - until or unless they receive an apology from the person or persons by whom they feel they have been harmed or damaged. There is no better

place for such an apology to take place than during mediation. Usually by the time the case gets to the courtroom, positions have been steeled, each side is armed for war, and the opportunity has been missed.

Elements of an Apology

An effective apology has two elements – (1) acknowledgement of injury, with a measure of genuine acceptance of some level of responsibility; and (2) vulnerability – the risking of acknowledgement without excuses. This is what we call repair work – something which is necessary, but difficult. *“What makes an apology work is an exchange of shame and power between the offender and the offended...”* (Schneider 1).

Apologies in Mediation

When an apology is offered in a mediation, it is rarely, if ever, about problem-solving or negotiations. It is, rather, a form of ritual exchange where words are spoken that may enable closure. Some mediations involve a palpable desire or explicit insistence on an apology from the alleged wrong-doer to the alleged victim (Schneider 2). Although the parties to the conflict will only rarely have the opportunity to cross paths again, it is sometimes the last and final act required to seal the deal. Often the apologies extended in mediations in which I’ve participated have had the lasting affect of allowing the parties to part at peace with the outcome, even though the monetary agreement is substantially less than what had been sought.

Counsel for the alleged “wrong-doer” can render great assistance in this aspect of the mediation by merely helping their client get past the defensiveness and fear of blame that often acts as a roadblock to the apology. Key in this is some signal from counsel, who perhaps heretofore has acted as watchdog over any “hint” of an admission by his client, that it is now all right for the client to drop his (or her) guard.

What if Mediation Fails?

If the mediation is unsuccessful, it does not necessarily mean that a trial is imminent, although most certainly it remains an option. Determining the various options available begins with an assessment as to why the mediation failed in the first place. There are several reasons why the mediation may fail.

First, the parties may have unrealistic expectations that simply can't be bridged. A lack of sufficient flexibility and dedication to a successful process will doom any mediation to failure. In this case, the failure is probably going to necessitate either a court ordered settlement conference wherein a judge will apply arm twisting pressure to both sides to resolve their differences, or failing that, the case will proceed to the courtroom.

Second, the parties may have realistic understandings of the extent of damages, but there simply are not enough resources available to bridge the gap. Among the options available here, short of going to trial, are seeking alternative resources to assist in funding the dispute, or looking at some type of structured settlement where an agreeable sum of money is placed in an annuity to be paid out to the plaintiff in a larger sum, either by way of periodic payments over time, or a delayed payout.

Third, mediation may fail simply because it has been set prematurely. Not enough information was available at the time of the mediation to properly evaluate the case on one side or the other. In this situation, rather than calling the mediation a failure, the mediator would simply continue to mediation until a date in the future when all information necessary for a meaningful discussion is at the disputing parties' disposal.

Finally, mediation occasionally fails simply because one of the parties attends with insufficient authority to contribute to the successful movement of the case. While there is often

justification for the authority cap, if the case clearly has value and verdict potential well above the authority of one of the negotiating parties, the mediation might be continued while that party reconsiders its position or seeks additional authority.

If the mediation is timely, information is available, resources are adequate, and the parties are simply too inflexible or unrealistic to reach a meeting of minds, then the mediation will be concluded short of resolution and the parties are left only with the option of the inevitable trial.

Conclusions

Sometimes people engage in battles in which, unknowingly, they aren't even fighting over the same things. Identifying the real conflict makes for easier resolution. ("Resolving Disputes in a Different..." 1). So popular and effective is the mediation as an Alternative Dispute Resolution tool, that the majority of states have adopted standards within their civil tort procedure that almost preclude any chance of going to trial until or unless mediation has first been attempted. In some states, mediation is mandatory before any trial. In still others, while not an absolute requirement, it is the rare attorney who would ever want to risk a trial without having first tested the water through mediation, even if there is no mandate that one be held. Whether or not one ends up with an agreement, talking things over through a party who has no partiality to the outcome can be enormously useful. ("Resolving Disputes in a Different..." 1)

Drawing on the success ratios touted by the various mediators at the sessions that I have been privileged to attend, mediation success appears to be well above 75%. Do all the parties come away happy? No, not completely. On the other hand, the mediator always disarms this argument up front by telling both sides that to be successful, one side will give up more than it wants, and the other will accept less it wants. In that way, the playing field is at least leveled.

With no end in sight to the barrage of creative litigation that seems to have found its way into America's tort system, it is an understatement to say that tort reformers will need more than mere running shoes to keep up with the trends that favor plaintiffs. Obviously our courts cannot possibly function with dockets packed to the gills with filed cases. We should, therefore, expect to see mediation used frequently and effectively for the foreseeable future.

Mediation, simply put, places a human face on both sides of tort litigation in a non-threatening environment. From that understanding, as it winds its way through the mediation process, evolves a measure of comfort that allows both victims and the alleged wrong-doer to move on with their lives.

ANATOMY OF A TRUCKING CLAIM MEDIATION

The following is a synopsis of an actual mediation attended in 2003:

Plaintiff: Dwight Earl Evans

Defendant: Sea Lane Express, Inc.

Date of Accident: February 12, 2002

On Thursday, April 24, 2003, I attended a mediation at the office of Nathaniel Smith, attorney for the plaintiff, Dwight Evans. Smith is a partner in the firm of Bagwell, Holt and Smith, P.A. in Chapel Hill, NC. Also attending were defense attorney Donald F. Lively of the Raleigh defense firm of Teague, Campbell, Dennis and Gorham, LLP, the mediator, Dickson Phillips (Mediation and Arbitration, LLC), the plaintiff's reconstruction expert, John Flanagan (Accident Reconstruction Analysis, Inc.), the insured driver, Willie Hayes, and his wife, Mrs. Hayes, who is the daughter of the owner/operator of the truck Mr. Hayes was driving for Sea Lane. The mediation began at 10:00 AM.

Following introductions and formalities, including the presentation of the arbitration rules by Mr. Phillips, plaintiff's counsel opened his presentation with an explanation of Mr. Evans' case. Plaintiff's counsel readily agreed that this was an all or nothing case, turning on whether Hayes was negligent, and whether Evans was guilty of contributory negligence.

Plaintiff's counsel, Smith, discussed Evans' injuries, which included a broken left humerus in four places, a lower left arm and elbow fractured in three places, a hip broken in two places, a fractured left femur, and multiple ankle fractures on the left. There were also multiple facial fractures and a fractured skull which now contains a metal plate in the forehead with scarring in the scalp, quite visible across Mr. Evans' receding hairline. There have been 8 surgical procedures to either conduct open reduction repairs, or to adjust the previous placement

of pins, plates and rods. Medical special damages exceed \$202,000, and most have been paid by his private Blue Cross/Blue Shield policy. There appears to be no lien available to BC/BS due to the fact that this was not a group policy and in NC, health insurance not subject to ERISA cannot assert a lien. Mr. Evans also demolished a new Dodge pickup truck.

Nat Smith turned the floor over to his expert, John Flanagan who showed eight color blow-up photos made at the scene by the police, along with a diagram of the scene drawn to scale. Flanagan gave his opinion that Hayes had to have crossed the center line of East Pettigrew Street in making his exit turn from the parking lot where he had just turned around. He based this on a tire mark from what was alleged to have been Hayes first set of tractor tandems, measured to what would have been the front of the tractor, and the angle at which he believed Hayes tractor exited. Flanagan also opined that the plaintiff's estimated speed was 20 –25 MPH in a 35 MPH zone. Following his presentation, Mr. Flanagan left the mediation. By pre-agreement between Smith and Flanagan, we were not permitted to ask him any questions.

Don Lively presented his feelings on what the defense felt we could prove, which boiled down to one of two things – either Mr. Evans wasn't paying attention didn't see our vehicle, and drifted left of center just prior to impact, or he was paying attention but going too fast to avoid the emergency. In either event, his contribution was obvious, and that should, in effect bar his recovery in a trial under NC contributory negligence laws.

Lively argued strongly that Willie Hayes tractor was well lit (12 lights including headlights visible), that there was movement which should have triggered an opportunity for Evans to see the insured vehicle with 5.5 to 6 seconds in which to either stop or swerve to the right, and the fact that the plaintiff's travel lane was 19 feet wide leaving him plenty of room to the right to have moved away even if the insured unit's right front corner had crossed the center

line. Due to his closed head injury, Evans has no recollection of the accident or the hours leading up to it, including the speeding ticket he received only a few hours before the accident. Evans can present no evidence indicating why he would have hugged the center line as he did. It is undisputed that the impact occurred in the center of the road and photos at the scene plainly depict Evans' vehicle on or over the center line.

The group was then separated and the negotiations began. Plaintiffs' opening demand was for \$990,000, a strategic savings off our policy limits. We countered with \$200,000. Over several hours the mediator worked back and forth, plaintiff's coming back with \$890,000, our offer of \$250,000, their demand of \$750,000. At this point, we advised the mediator that if their movement was not more substantial, we'd soon bump our head on what we came to settle with. We made sure he knew that we wouldn't likely look for any additional money later, as the case wasn't going to change, that contributory negligence was driving our defense, and that paying much more would fly in the face of our defense arguments.

It became very evident as the day wore on that Mr. Evans just wanted to get on with his life, while Mrs. Evans was the sticking point in the negotiations. We offered \$300,000, and the mediator persuaded the plaintiff's to make a serious drop to \$450,000. Both Lively and the mediator told me they thought the magic number would probably be \$375,000. I held fast, advising the mediator that \$350,000 was the most we were going to offer, and that the mediator should first approach the plaintiff's counsel with the question of whether or not he could persuade them to accept \$350,000, before that offer was made. Agreement was reached. From all outward appearances, Evans came away reasonably happy and relieved, his wife probably less so! A settlement agreement and releases were drafted, approved, and signed.

Submitted by Ronald M. Joyce, CPCU, V-Pres. / Claims / Seaboard Underwriters, Inc.

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