Mediation Matters

by Christina Magee

Christina Magee founded Brevard Mediation Services, LLC in 2011 and has extensive experience as a neutral in federal and state court matters in many forms of dispute resolution. She is the current Chair of the Florida Bar ADR Section, as well as the Chair of the Small Claims Rules Committee for the 2018-19 year. Among other distinctions, she is a member of the National Academy of Distinguished Neutrals in the Florida Chapter.

This column appears monthly and relates to all aspects of mediation. If you have specific questions that you would like to see addressed in this column, please contact: cmagee@brevardmediationservices.com.

Preparation is the theme of this month's mediation matters. It goes without saying that some preparation is necessary. Without preparation, assessing whether an offer or demand is good, bad or indifferent might be impossible.

The definition of "prepared" varies greatly, it seems, depending on where you are seated in the mediation. For defense counsel, especially those accompanied by insurance company representatives, prepared means that an analysis of the case has taken place that incorporates the damages to the injured party discounted by defenses to liability and/or significant coverage issues that would preclude payment by the insurance company. In a personal injury case, for example, the defense side reviews the medical records and billing information produced in discovery to ascertain what the plaintiff's medical specials should be, possibly taking into account any medical provider liens, and evaluates those damages along with any claims for pain and suffering and determines a value for the case.

Perhaps this case involves a claim of negligence and recklessness that rises to the level wanton behavior and permits the plaintiff to assert punitive damages. These would be uncovered damages in Florida, and a carrier would take a no-pay position on them, possibly requiring a discussion with the defendant about payment without the carrier's participation for that portion of the damages. The defense position might also include substantial comparative negligence by the plaintiff, so that any value placed on the case will utilize an appropriate liability discount depending on where the defense thinks the jury will assign plaintiff's comparative fault. On top of all this, typically a case is reviewed by a carrier based on verdict values from comparable cases in the venue, and with the assessment of at least one committee of experienced case evaluators. In other words, there is not usually a unilateral assessment of the case by a single counsel or insurance representative. This might be characterized as a "bottom up" approach to determining value.

In the plaintiff's caucus room, "prepared" may mean something very different. Plaintiffs have a high degree of personal investment in the value of their cases because they are living with the injury and its consequences on a day-to-day basis. They know what the case means and how it has affected their lives and their families. In my experience that

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one fact has an enormous impact on the value context. Plaintiff's value assessments, to generalize broadly, are typically much, much higher than those proffered by defense. Plaintiff counsel also have a different approach to what value means for a case. Counsel for plaintiffs assess the costs invested in the case to date, the remaining costs to bring the case to verdict, such as the costs of testifying expert witnesses, exhibit preparation fees (videos, reconstructions, etc.) and sometimes, the impact of the current case on the availability of funds for other cases in counsel's inventory. Referral fees may also impact the case value assessment on the plaintiff side. I have heard more than one plaintiff counsel explain to their client why an offer of $50,000 is more valuable at mediation than it would be as damages awarded by a jury, but potentially subject to appeal. In contrast to how defense values cases, this approach resonates more as a "top down" way to determine the value of the case.

How does the mediator prepare? You can find checklists everywhere telling counsel what they need to do with their presentations in mediation and what the mediator needs to know. Keep in mind that the mediator has not been living with the case for the time period from filing onward. A "big

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picture" view of the case and its major themes is helpful. Seeing what counsel chooses for the narrative exposition of the case matters and tells the mediator a lot about what the value propositions are before we begin. During counsel's opening statements, the way that counsel present the case is also telling. A trial ready opening statement will make one type of impression; a succinct presentation with a single telling moment, accompanied by the statement that the party wishes to settle creates a different settlement environment.

Just a brief digression to touch on the extent to which parties may dispense with their opening statements for each other's benefit. Instead, parties want to deliver their openings to the mediator in caucus and move directly to these private sessions once the mediator concludes the ethically-mandated Mediator's Opening. This approach is perfectly acceptable and in some cases, absolutely necessary, as for instance, where there is a no contact order in place between the parties. Think about this approach and how it will affect your presentation of the case to the other side and the other side's representatives. The opening statement may be the sole opportunity to measure the impact of a significant fact or legal argument on the other side. Especially in cases involving insurance, the plaintiff's demeanor is absolutely under scrutiny by the insurance representative. How that demeanor is perceived can be the basis for a "changed" fact that impacts the value assessment of the case, either positively or negatively.

When time permits, I like to review the file in a circuit civil or federal case. It is essential to see what the parties are alleging, what defenses are in play and to review any motions of consequence. For example, motions to compel recapitulate the important facts and theories of the case, as they seek to persuade the court that the discovery requested should be ordered produced. Clearly, a dispositive motion, if present, takes the mediator far into the case and what the issues are from the parties' perspective.

What matters most for a successful mediation is that preparation occurs by parties and the mediator before the mediation session begins. Counsel have many approaches to mediation preparation and hopefully, this discussion raises food for thought for litigants.

Brevard Bar Foundation Dinner