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How to Improve at ADR

By Daniel E. Cummins | April 12, 2011

With the ever-present backlog of trial court calendars across Pennsylvania, more litigants are turning to non-binding mediation or binding arbitration to bring their cases to a resolution. Of course, the uncertainty attendant with jury trials has always been a great motivator for parties to move their cases, as well.

There is no better way to learn about what works and what doesn't work during ADR proceedings than by asking questions of mediators and arbitrators who have presided over numerous ADR proceedings.

The following questions, seeking tips on how parties may improve their chances for success in ADR proceedings, were submitted for a response to Richard Fine, James A. Gibbons, Tom Helbig and Lucille Marsh, all noted attorney mediators and arbitrators.

On Memoranda

What tips would you offer in terms of improving the written memorandum submitted for an arbitration or mediation?

Richard Fine: The written memorandum should be a simple, convincing presentation of the party's position; it should anticipate the opposing party's arguments on liability (in arbitrations) and damages, and should set forth clear

responses to those arguments. Concentrate on the points that will put pressure on the opposing party.

If relying on case law, it should be summarized, but copies of relevant decisions should be provided with the memorandum, as well. Don't expect your arbitrator or mediator to go to the books to find the cases you cite.

A brief description of any settlement negotiations that occurred between the parties prior to mediation should be included.

If setting forth a settlement figure, or range of figures, be sure to give the basis for arriving at that figure. Explain how you calculated your values. Include proof of any liens that must be satisfied, etc.

Consideration should be given to whether the memorandum is to be shared with the opposing party or whether some or all of it should be for the mediator's eyes only.

Jim Gibbons: Try to not parrot the medical records, especially if you are submitting them. Pay attention to your strengths, but don't ignore your weaknesses. Outline your settlement position and provide a rationale for your figures.

Tom Helbig: For arbitration, make certain to address all the relevant facts and legal principles that support your position. My preference is for counsel to err on the side of providing too much information in the memorandum. Remember, the arbitrator will generally review the written submissions both before and after the hearing, and a well-written memorandum is another opportunity to persuade the arbitrator.

For mediation, an exhaustive memorandum is not necessary, since there will be more discussion of the case facts and issues during the conference. Since settlement is the ultimate goal, however, it is important to provide to the mediator your settlement position and outline the specific reasons supporting your present position.

Lucille Marsh: A concise mediation memorandum setting forth the essential facts of the case, damages and any issues, pro or con, to liability or damages is very helpful. Eliminate puffing and the superfluous.

If a case is complex, a chronology or summary of events, i.e. medical treatment, is useful to the mediator as a negotiating tool. Give the mediator information that can be used as leverage against the other side.

In arbitration, where counsel must convince the arbitrator of the merits, including all relevant facts, case law or argument supporting a claim or defense is highly effective. Avoid arguing a position not supported by the facts and law. Remember, a mediator only facilitates a settlement, whereas an arbitrator must be influenced to decide the case in a party's favor.

On Exhibits

What tips would you offer in terms of the exhibits to be submitted for an arbitration or mediation?

Richard Fine: The less paper you ask the mediator to look through, the better.

If you have already had an expert review medical records, or someone in your office has prepared a digest, summary or chronological chart of treatment, use that as your exhibit. If you feel that certain medical records are important for the arbitrator or mediator to see, tab or highlight the relevant portion.

If deposition testimony is being submitted, I prefer to have the entire transcript, but, again, relevant portions should be tabbed and highlighted for quick access.

Photographs should be clear and labeled on the back, preferably 5×7″ or larger. Include the date each was taken. Don't present five or six when one or two will do the job.

At the proceeding itself, consider a well-thought-out PowerPoint presentation for your exhibits.

Jim Gibbons: Highlighting helps attract attention; I have no problem with it. Don't submit unnecessary medical records. Submit the records that speak to the injuries at issue. If you're going to submit deposition testimony, submit the entire transcript. I'd suggest, in such an instance, that communication with opposing counsel beforehand can avoid duplicate submissions.

Tom Helbig: Make sure to reach an agreement with opposing counsel on the proposed exhibits before submitting them to the arbitrator or mediator.

A recurring problem has been the submission of updated medical records and reports without providing them to opposing counsel, or documents obtaining objectionable hearsay statements, such as police reports, without a stipulation as to admission from opposing counsel. Submission of all medical records is unnecessary. However, a complete medical chronology is helpful, especially for a comparison of an individual's pre- and post-accident medical condition.

Lucille Marsh: In mediation, since I do not need to be convinced of the merits of any party's position, only relevant and pertinent medical records, photos and portions of depositions need be supplied.

Do not overwhelm the mediator with paperwork. A short and concise summary of medical treatment is in my opinion far more effective than a stack of medical records. On the defense side, I generally like to have a copy of any IME reports, which I can compare to the plaintiff's concise summary.

On the other hand, in arbitration, counsel needs to convince the fact finder that his or her position is the correct one, and all supportive, relevant medical reports, documents, photographs or statements should be utilized. In complex or catastrophic cases, a "day in the life" video or other visual aid illustrating how the accident occurred or product was defective is very effective.

On Closing Arguments

In arbitrations, what is your position on the value of closing arguments?

Richard Fine: I welcome closing arguments and would always give parties the option, but never make them mandatory.

Attorneys should remember their audience; the arbitrator does not need or want courtroom dramatics — don't "hype" your case.

Be careful not to argue points that are clearly not supported by the evidence; sum up your case as succinctly as possible.

Jim Gibbons: I welcome closing arguments in arbitrations, but counsel need to remember that the panel is not composed of lay people. Less theatrics

have a bigger impact. I do not see any need for openings or closings in mediations.

Tom Helbig: [They are an] absolute necessity, and rarely, if ever, should be waived by counsel. They need not be lengthy or theatrical. Rather, I prefer counsel to elicit a concise summary of the credible evidence supporting his or her theory of the case and why the arbitrator should decide in his or her favor on a particular issue.

Lucille Marsh: Counsel should always be given the opportunity to make a closing argument. However, depending upon the complexity of the matter, a closing argument may or may not be of any value.

If there is a legal issue, a closing argument should reference case law and facts that support the party's position. Address any evidence that came up during the hearing that was not addressed or anticipated in the submitted memorandum. Avoid arguing anything unsupported by the evidence, as that will only adversely impact your credibility. Avoid arguing the obvious. Highlight the evidence that supports your position and/or nullifies your opponent's position.

On Preparing Clients

Any tips on how counsel may better prepare their client or claims representative for participation in ADR proceedings?

Richard Fine: Plaintiffs counsel should make certain that the client understands the purpose of the proceeding.

Unrealistic expectations can derail a mediation. The client should be fully briefed ahead of time as to the nature and significance of any subrogation liens, Medicare or welfare liens and costs that need to be reimbursed from the proceeds of an award or settlement.

Claims representatives must understand that without full authority to settle, a mediation cannot succeed. Ideally, the individual with authority should be present in person. This helps to streamline the negotiating process, avoiding the need for repeated calls "to the company." Furthermore, the opportunity to

meet the plaintiff will allow the claims rep to assess how a jury might react to the individual.

If there is more than one defendant, discussions should be held with the claims representative in advance of the ADR proceeding as to how a settlement package might be put together — by what percentage or other method the ultimate payout should be split between them.

Jim Gibbons: In mediations, counsel need to emphasize to their clients or adjusters that the tone is one of compromise. Parties must understand that there is a distinct possibility that what they want to pay or receive may not be what they will end up paying or receiving. Parties need to understand that the numbers at the beginning of the process will not be the numbers at the end of the process. Counsel also need to counsel patience. It is a process, and insisting on getting to the end at the beginning is counter-productive. It's not going to be over in an hour or two.

Tom Helbig: For mediation, it is important for the parties and claims representatives to clearly understand the process and ultimate purpose. There must be a sincere desire to resolve the claim and not necessarily prove the other party is wrong. Clients also must understand the mediator is a facilitator and not a fact-finder; thus, if the parties and/or claims representatives are unwilling to fully discuss the case issues and potentially re-examine their positions, then mediation should probably not be pursued.

Lucille Marsh: Impress upon your client or representative the importance of the ADR. Point out the pros and cons of your case so that the client or representative enters the ADR fully aware of the uncertainties. Have your client assess both best case scenarios and worst case scenarios in discussing settlement ranges and needs. Discuss in advance a realistic range of settlement you're willing to consider. Be flexible. Make sure that your client or representative has the desire and willingness to participate in ADR. Otherwise, you are wasting your time and money.

Other Tips

Do you have any other tips for counsel?

Richard Fine: Simplify and organize!

Know your facts, know the applicable law and, whenever possible, know your mediator or arbitrator. Take his or her style and personality into account when presenting your case.

Remember the Boy Scout motto, and be prepared.

Jim Gibbons: Obviously, having a claim rep in the room is ideal. Second best is having them available by phone. Come with authority. If you've had preliminary discussions prior to the mediation, don't raise the demand or lower the offer at the mediation.

Defense counsel should try to bring a proposed release to speed up the process of payment. Plaintiffs counsel should have a good handle on costs to date. His or her client will likely ask how much goes into his/her pocket at the mediation. That can be a big help. If there is a lien, initiate contact with the lienholder prior to the mediation and try to get a conversation going about compromising the lien.

Tom Helbig: Plaintiffs attorneys shouldn't necessarily rely upon a client as the only witness to be called at the hearing. It may be helpful to enhance a pain and suffering or wage loss claim with the testimony of family members, friends and/or co-workers. A relatively modest expenditure of time and money to present these corroborating witnesses may be beneficial.

For defense attorneys, important items for an arbitrator's or mediator's consideration may include a medical chronology and all relevant pre- and post-accident records, vehicle damage photographs and subsequent accident or incident reports.

Lucille Marsh: In mediation, be candid with the mediator when in private caucus. Confidentiality and trust are critical for any successful mediation. Posturing in front of the mediator (and your client) serves no purpose in advancing your case. A good mediator will make it very clear that any strategy or confidential information you provide will never be revealed to your opponent, and realistically discussing weaknesses as well as strengths of your case only enhances your credibility.

Be fully prepared to quantify your damages with back-up information, such as medical bills, wage loss and economic analysis of lost future earnings or earnings capacity. •

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