Getting to YES

The Do's and Don'ts of Mediation

The growth, popularity and success of mediation as a settlement vehicle is revolutionizing how many professionals conduct their post-negotiation risk analysis. Lawyers and their clients are successfully incorporating mediation into their resolution processes. More insurers are also embracing the value of mediation for all types of cases from simple tort to more complex commercial matters.

To better understand the mediation process, a panel of experts was assembled to address some key questions about mediation. Their collective responses will give you a clear picture of the Do's and Don'ts of mediation — a proven process that is often your best opportunity available for the disposal of disputed cases.

Alex Goodrich, Vice President of ADR Systems' Risk Management Services: *What's your opinion regarding when to commence mediation? If you do it early on in the case, what information is needed at a minimum?*

Hon. Daniel J. Kelley (Ret.): Generally speaking, the sooner your case gets to mediation, the greater the economic benefits to the parties (fewer depositions, experts, etc.). On the other hand, as a mediator, I have a better understanding of the case with more discovery and fuller disclosure. One thing is certain — the case should not be mediated until the attorney and the client have sufficient information to properly evaluate it.

Louis Cairo, Senior Partner, Goldberg Weisman Cairo: I think Judge Kelley is correct, when you agree to mediate, everyone should know what the pros and cons are regarding going to trial. However, I think it is often wise to consider mediation at a much earlier stage if parties agree on the liability facts and damage aspects of the case. The main physicians may need to be deposed to establish evidence of permanency, future medical treatment and/or loss of trade or diminished earning capacity. Nonetheless, if the parties have a handle on the facts and damages, then a successful mediation can be accomplished without taking that last fact deposition or final expert on vocational rehabilitation.

Rich Lenkov, Bryce Downey & Lenkov: The earlier you start mediation the better. I generally know about 80 percent of what I need to know about a case when I receive the assignment. Remember, I often receive these cases when the statute is about to expire, meaning that the case has been around for at least two years, sometimes longer. The name of the game for me as a defense attorney is to close the case as quickly and as economically as possible, rather than spend a lot of time and money on costly discovery and litigation. However, there are many cases where you have to go through some initial discovery before mediation.

Goodrich: *Once you agree to mediate, how do you select a mediator?*

Lenkov: I have mediated with judges who have a spectacular resume, but were not very effective in persuading the parties to settle. What really distinguishes the best mediators are their people skills. The top mediators are able to deal with a diverse mix of personalities from all walks of the socioeconomic spectrum, and ensure that they all feel as though the process is working for them. This is a rare skill, but one that is crucial to successful mediation.

Cairo: As a gregarious Italian and plaintiff's attorney, I like mediators with a pleasant personality who can discuss the complex issues associated with a case as easily as current events and sports. Once the negotiations start, I insist on a mediator who is willing to discuss the positions of the adverse party, and to take back responses. The best mediators are very effective in presenting the pros and cons of either side's arguments and making recommendations and expressing opinions on the probable efficacy of my positions as well as the defendant's.

Goodrich: *How do you actually make the selection of a mediator?*

Judge Kelley: An attorney and client should select a mediator whose style and background matches what they are seeking. It is essential that you do your homework before making a selection. Inquire about a prospective mediator's background and training. Ask for biographies, and do not be afraid to make inquiries with other attorneys regarding the mediator's knowledge of your case type. One way to condense the mediator selection process is to utilize a mediation vendor. Most, if not all, of the information you will be looking for can be provided by the vendor.

Goodrich: *Why do negotiations break down in mediation? How do you avoid an unsuccessful mediation?*

Cairo: Sometimes the expectations of the parties, when unreasonable, will be a major impediment to a successful mediation. If a plaintiff demands that the case settle for jury verdict value, it will often result in an unsuccessful mediation. Additionally, if a defendant remains steadfast with a defense, then mediation is doomed before it begins. The bottom line is that both sides have to keep an open mind and be willing to concede that their case may not be as rock solid as they have claimed in their submission briefs.

Lenkov: I agree with Lou that unrealistic expectations are a major obstacle. The reason mediations fail is due to one simple concept — ego. Backing down from your position of strength is difficult, especially when you are dealing with mediators, clients and attorneys who have worked with you

before and will work with you again. Successful mediation inherently involves putting aside your ego.

Judge Kelley: It is true that unrealistic expectations often prevent a successful mediation. I see a few other reasons for mediation breakdown, and these include: non-commitment by one or more of the parties; the individuals essential for the settlement, such as a party, an adjuster with sufficient authority, or an attorney, are not at the table; the case is not ready for mediation; one or more attorneys are not prepared; and the wrong mediator was selected.

Goodrich: *When and how do you give authority to a mediator?*

Cairo: Conveying authority to the mediator is a major decision based on three principles: trust, trust and trust! I am quite wary about conveying ultimate authority to a mediator unless I have an established rapport with him or her. If either party commits too early, it can have huge repercussions on the overall process. Unfortunately, mediations are a process somewhat similar to making wine. Time is a necessary prerequisite in order to achieve the goal.

Lenkov: Since I generally select mediators I know and trust, I am confident that they will not misuse the authority by giving up too much too soon. It is sometimes frustrating to spend hours going back and forth, but like Lou said, the ends justify the means.

Goodrich: *What are your top three tips for a successful mediation?*

Judge Kelley: Do not be afraid of re-evaluating your position from time to time. Remain patient; let the mediator do his or her job and let the process work. Choose the right mediator for your case.

Cairo: My three tips revolve around preparation. Counsel must prepare a solid, compelling submission brief with photographs, jury instructions, deposition excerpts, medical reports, etc., to present at the mediation. It is equally important to prepare the clients for the process and ensure that they have reasonable expectations for the process. In addition, mediators should do a reality check with opposing counsel so that they do the right thing for their client. In many cases, a decent settlement is the right thing for the client. All too often, cases get tried to fulfill the egos of counsel who want to score a big verdict or get a not guilty on a case. In many of these same cases, however, eliminating the risk, uncertainty and expense of trial through an amicable settlement in mediation would have better served everyone's interests.

Lenkov: Be confident in the strengths of your case. Do not fear walking away. Recognize your leverage and use it wisely. Leverage is everything in negotiation!

Goodrich: *Last question: Why is mediation such a big success and why does it continue to grow in usage?*

Lenkov: Litigation is now more time-consuming and expensive than ever. The satisfaction of presenting your case to a jury is tempered by its cost and risk.

Cairo: I feel the same way as Rich. Mediation is such a success because it allows the parties to express their views of their case, make their big demands, proffer their defenses and ultimately do what they can never do in a court room — exercise control over their case. Once the case goes to trial, all the uncertainty, risks, expenses, anxieties and fears associated with a jury trial hit the litigants smack in the face. Having tried a considerable number of cases, I can honestly say that no litigant really wants to go to trial. And if you have tried enough cases, you certainly know that it is not simply all about the facts of your case when it comes to getting a fair jury verdict. Attorneys are recognizing the benefits of mediation over the risks of proceeding to trial.

Judge Kelley: More people have come to understand mediation and trust the process. There are a high percentage of settlements — it is a tried and true dispute resolution method that achieves results. That is why mediation is such a success and will grow in importance in the years ahead. LM

OUR PANEL

Alex Goodrich is Vice President of ADR Systems' Risk Management Services. He has been involved on the client side of ADR as well as working from the service provider side for more than 20 years.

Hon. Daniel J. Kelley (Ret.) served 24 years as a circuit court judge in Chicago where he was assigned to the commercial litigation and jury sections of the Law Division as well as the felony trial section of the Criminal Division. Judge Kelley has been a mediator and arbitrator since he retired from the bench in 2008.

Rich Lenkov is an attorney with Bryce Downey & Lenkov. He represents organizations ranging from Fortune 100 corporations to small businesses across the civil litigation spectrum. He concentrates his practice in premises liability and personal injury, along with workers' compensation.

Louis Cairo is Senior Partner of Goldberg Weisman Cairo. As a personal injury trial lawyer, his practice focuses on construction negligence, product liability, trucking accident fatalities, Federal Employer Liability Act cases, automobile accidents, slip and falls and other types of catastrophic injuries and general tort liability.