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There are three types of baseball players: those who make it happen, those who watch it happen, and those who wonder what happens.

Tommy LaSorda

Northern Kentucky Bar Association

HOW TO EFFECTIVELY MEDIATE YOUR CASE

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Mediation is an efficient, effective and invaluable tool for resolving disputes. However, too frequently it is approached without sufficient thought as to whether it should be pursued at all, and when is the best time. To ensure mediation is both successful and right for your case several questions must be considered and resolved.

Why Mediate?

There are three primary answers to this question. First, it is cost effective. Taking a case to trial is expensive, there are expert witness fees, trial exhibit costs, deposition transcript fees and the list goes on and on. By mediating a case a number of these costs can be avoided, especially if entered into early in the case. Second, mediation allows the client to take the case into his or her own hands and avoid the uncertainty of trial. Any good mediator will ask the parties: who would they rather decide their case, a jury of twelve complete strangers or decide it themselves? Third, parties entering into mediation typically resolve their cases months, if not years, before a jury would.

While those are the primary answers why to mediate, there are several other issues to be considered when making the decision. For example, look at the client. How will he or she present at trial? The client may be young, old, inexperienced in speaking before an audience or simply someone who cannot handle the stress of being on the witness stand. On the other hand, what if the client is a corporation or worse – an insurance company! Think Enron and AIG. This can affect the jury verdict even if the facts are in the client's favor. Avoiding trial via mediation is a very important consideration if the client will not be sympathetic to a jury.

Another concern is the jurisdiction and venue. It is important to assess the court in which the case is being heard. Some jurisdictions are known for being more favorable to plaintiffs or defendants and this may affect the client. Considering mediation should also include an analysis of the venue to obtain the best resolution for the client.

Lastly, does the client need mediation to better understand the case value? As attorneys, we tend to look at cases objectively and professionally. This is our job, not our life. On the other hand, to many clients this is the most important aspect of their lives, and it is likely their first time being in the legal system. A mediator can assist the client in gaining perspective into the system, the value of a case and many times validate what the attorney has advised them.

When to Mediate

Now that you have decided that mediation is in the best interest of the client the next step is to determine when mediation would be most successful. If the case is mediated too soon all the information necessary to resolve the case may not have been obtained; if it is mediated too late the cost effectiveness of the process may be lost as well as an advantage available earlier in the case. Sometimes mediation is advantageous early on, even before suit is filed.

A good case for early mediation is one without liability issues and known damages. In those cases, taking depositions and indulging in comprehensive discovery may end up costing more than the plaintiff was seeking in damages in the first place.

On the other hand, sometimes a fair amount of discovery is required before entering into mediation. For example, key depositions and expert witness opinions may be necessary before either side has placed their case in a position to be resolved in the best interest of the client. If too much remains to be done at the time of mediation, it is easy to walk away from what may be a good offer down the road but the opportunity was missed due to too many unknowns remaining in the case. It may be a better idea to wait until key information is obtained and then mediate the case.

You Are Ready To Mediate – Who Should Mediate And What Do You Need To Do To Make The Mediation Successful

Now that the case is positioned for mediation deciding which mediator is best for the case and what needs to be brought to the table for a successful mediation is key.

Choosing a mediator is crucial to the success of mediation. If the wrong mediator is chosen the case is unlikely to get resolved – again wasting time and money. A key component to selecting a mediator is to find a mediator who will be acceptable by both sides. All mediators have their own style. Some are laid back while others aggressive; or charming while others blunt. How the parties will respond to the mediator is a factor to be considered. Picking a mediator who is not properly suited to the parties can be detrimental. A mediation will not be successful if the client walks out shortly after starting the session because of discomfort with the style or personality of the mediator.

The complexity of the case must also be considered before choosing a mediator. While some mediators are comfortable and knowledgeable in a straight forward personal injury case, it may be necessary to retain someone with more experience in the specific issues involved in a complex construction, wrongful death or medical malpractice case. While the mediator need not be an expert in the law involved in the case, a mediator with no

background on the issues may have a hard time convincing either party to resolve the case and how it is beneficial for them to do so.

Now that a mediator has been chosen the last component to mediation is determining what needs to be presented to the mediator for a successful outcome. Always prepare a brief that sets out the important facts and law related to the particular issues. Do not overwhelm the mediator with the kitchen sink of information, but provide the mediator with what is necessary to fully understand the case, the issues to be resolved, and the applicable law. If the mediator is not prepared with facts that support the position of the client, valuable time will be wasted at the mediation educating the mediator. Also, the mediator may not understand the issues important to the client to resolve the case because of time constraints. Give the mediator the necessary information and the time prior to the mediation to fully understand it.

Visual aids, PowerPoint presentations and exhibits at the mediation are a recent trend. When using a visual aid at mediation there are several things to consider. First, know the audience. Is the purpose to educate the mediator, impress the client or convince the opposing party? This leads to the second consideration, is it worth it? Although some of these visual aids are easy to make with little time or cost involved, others involve considerably more of both. Before spending the money and time make sure it will be beneficial to the case and not be money spent that causes the sides to polarize before the mediation ever begins. Finally, know how to work the equipment. An inability to operate the equipment to put on a quality program only ends up wasting time and money and irritating everyone involved.

You Have Reached An Agreement – You Are Not Finished Yet!

While a settlement agreement may have been reached, your job is not done. Before leaving the mediation, put the agreement in writing. All too often parties leave a mediation only to continue negotiations afterwards on the specific terms of the agreement reached, both with different interpretations. Write down the key elements of the agreement and have all parties sign it. This protects the agreement and can be upheld by a court. When failing to reduce the agreement to writing, at least on the key points, you run the risk of questions arising after leaving the mediation.

Finally, before concluding the mediation, determine who will draft the settlement documents, set a timeline for their completion and the exchange of the signed settlement release for the settlement check.

Congratulations – You Have Successfully Settled Your Case

Once the settlement releases are signed and the dismissal is entered the case is successfully settled. Mediation is a worthwhile and effective tool – when used properly. Remember the three keys to an effective mediation and do not enter into it without considering the why, when and how we have discussed. Be prepared in advance and be prepared that day. Although not every mediation is successful, and no result can be guaranteed, taking the case out of the hands of the jury and putting it in hands of the parties is never a bad idea.

Patricia J. Trombetta
Pat has been with Smith, Rolfes & Skavdahl since 1997, joining as an associate and is now a partner. She has been involved with the insurance industry since her graduation from law school working first as an in house subrogation attorney and then a claims litigation attorney before entering private practice in the Cincinnati area in 1992. Pat has successfully defended a wide array of cases ranging from coverage issues to bad faith, including intentional torts, building risks, and significant personal injury cases, among others.

Lindsay A. Rump
Lindsay is an associate attorney in the Ft. Mitchell office and has been with Smith, Rolfes & Skavdahl since 2005. She has practiced in Kentucky since her graduation from law school. Lindsay focuses her practice on insurance litigation, bad faith, coverage and issues regarding the Motor Vehicle Reparations Act.

In Memoriam

The Northern Kentucky Bar Association honors attorneys and family members of attorneys from our legal community who have recently passed away.

Joseph A. Cleves
Father of attorney
Joseph Cleves, Jr.

William J. Deupree, III
Attorney at Law

****Ben Davis Eichelberger, Jr.***
Father of attorney
Sarah Tankersley

Joseph Guilfoyle
Father of attorney
Kelly Schoening

Harold Luersen
Attorney at Law
Father of attorney
James Luersen

Barbara McMurray
Mother of attorney
Scott D. McMurray

Jack Nidiffer
Father of attorney Rusty Sheen
Father-In-Law of
Judge Martin Sheehan

A. Christian Worrell, III
Attorney at Law

****Contributions have been received in memory of this person to the Northern Kentucky Bar Foundation.***

Please contact Julie Jones at (859) 781-1466 or at juliejones.director@nkybar.com if you are aware of a death to be listed in an upcoming issue of the NKBA *Lex Loci.*