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Effective Advocacy at Mediation of Personal Injury Cases

Mediation is used to resolve the majority of civil cases in the U.S., and the basic process does not differ much among jurisdictions or based on the type of dispute. The dynamics of mediation proceedings do vary, however. The author discusses some aspects of personal injury cases that require attorneys to take special care during mediation when representing clients who have been injured or parties alleged to be at fault or financially responsible for the damages.

The number of civil cases tried to verdict in Wisconsin has dwindled to less than one percent, part of a nationwide trend.[1] Mediation is now the primary means through which civil litigation cases are resolved, being institutionalized or a de facto extension of the civil justice system.[2]

Mediation is a form of alternative or extrajudicial dispute resolution. Some states have mandatory mediation statutes, while other jurisdictions, like Wisconsin, have adopted its use as a standard provision in civil trial scheduling orders. The formality of mediation proceedings varies widely by jurisdiction, with some resembling non-binding arbitration proceedings and awards.

In this article, I provide suggestions on how to be an effective advocate when mediating personal injury cases. It is the area I know best after spending most of my career representing injured plaintiffs and now serving as a mediator in general negligence cases.

While this article focuses on personal injury cases, it is important to understand that the *process* of mediation remains the same regardless of the subject matter of the dispute. What changes in these scenarios are the interpersonal dynamics. For example, the issues encountered and their emotional import are dramatically different when mediating child custody cases, corporate disputes, or general negligence actions. This area is beyond the scope of this article except as it relates to personal injury cases.

Next, and as important, the expectations of the parties to mediation vary not only by their legal status as plaintiffs or defendants but also by their use of and familiarity with litigation. For individual litigants, the underlying lawsuit is likely the only time they have been involved in litigation. In contrast, institutional litigants such as insurers and other corporate entities engage in litigation routinely.[3] One result is that individual litigants focus on process or procedural fairness, in particular, the opportunity to be heard, while institutional litigants focus on outcome and settlement numbers.[4]

Characteristics of Mediation

Three key aspects of mediation distinguish it from jury trials and arbitrations:

- In mediation, the parties voluntarily participate in a negotiation process to try to settle their dispute rather than having an outcome imposed by a third-party decision-maker.
- The mediation process allows for maximum participation by the plaintiff in the negotiation and decision-making process compared with the limited role of giving testimony in a question-and-answer format.
- Parties retain the right to trial by jury if they do not settle at or after mediation.

Although few litigated cases proceed to verdict,[5] a party's right to trial by jury influences settlement negotiations in part because juries introduce unpredictability. This is as true for defendants as for plaintiffs. Juries have long been a particular concern of corporate defendants, resulting in protective legislation like damages caps and the use of contractually mandated arbitration provisions that waive the right to a trial by jury by operation of law. The necessary prerequisites to mediation are that both sides desire to participate, seek to resolve their dispute, and are willing to compromise.[6]

Mediation can be evaluative or facilitative. Evaluative mediation involves a neutral assessment of the merits of a case based on information each side presents. Facilitative mediation, in contrast, involves a focus on negotiation through individual caucusing facilitated by the mediator to identify disputed and undisputed issues. Mediators seek to ascertain the interests underlying the parties' positions, with almost all disputes involving reputation, relationship, or communication concerns.[7]

The parties then debate the merits of each side's proof on each of the plaintiff's claims. The goal is to

help the parties reach an agreement: parties control the outcome while the mediator controls the process.

The "contemporary mediation movement" originated in the 1970s and 1980s in neighborhood justice centers.[8] The mediation process was imported into the legal system to address family law cases that were more prevalent after no-fault divorce laws were enacted. These cases, especially those involving children, were viewed as inconsistent with the adversarial nature of the traditional legal system.

In the past few decades, judges began ordering mediation of personal injury and other civil suits under their inherent authority to control their dockets. Mediation is now required in the majority of civil litigation scheduling orders.

Formal, Substitute, and Alternative Dispute Resolution

Trial, arbitration, and mediation are forms of dispute resolution used to adjudicate rights in civil disputes. Jury trials rarely occur, but a party's entitlement to have the case tried before a jury is a substantial factor in settlement negotiations. As others have observed, bargaining occurs in the shadow of the courthouse.[9]

Arbitration and mediation are considered alternative forms of dispute resolution because they involve extrajudicial case resolution, but they differ significantly. Arbitration proceedings are similar to court trials. Mandatory arbitration clauses function to displace the legal system. These clauses limit judicial review to determining the enforceability and scope of a clause and confirmation of an arbitration award once issued. A party cannot pursue a jury trial on claims falling within the clause.

Mediation is a pure alternative form of dispute resolution because it offers the opportunity to attempt informal resolution while preserving the party's right to try the case before a jury. The proceedings are non-binding unless the parties reach a signed settlement agreement. The parties are free to explore settlement negotiations without fear that amounts offered and declined will be discussed at trial. Mediation proceedings in mandatory mediation jurisdictions resemble arbitrations with the important caveat that the recommended award is not binding, and the plaintiff may decline it and proceed to trial.

Mediation proceedings in Wisconsin are typically informal. By statute, with limited exceptions, matters discussed during mediation are confidential and inadmissible at trial.[10] The parties engage in settlement negotiations to determine whether the case can be resolved without a trial; in these negotiations, the mediator caucuses with each side privately. Information revealed is confidential unless the mediator is authorized to disclose to the opposing side.

Significantly, mediation is the only forum that gives plaintiffs an opportunity to tell their story unconstrained by rules, procedures, interruptions, or time limits and to participate directly in settlement negotiations. The opportunity for the plaintiff to be heard is widely viewed as beneficial regardless of the outcome.[11]

Shared and Competing Interests in Mediation

The parties to a mediation, including the subrogated entities, have shared and competing interests. The parties share an interest in exploring informal resolution. In mediating a personal injury lawsuit, the predominant interest is financial: the plaintiff wants the most the insurer will pay, while the insurer wants to pay the lowest amount the plaintiff will accept.

The parties hold shared interests in case mediation, including the ability to control case outcome, limit the risk of a higher or lower verdict than the parties anticipated, and ascertain the exact amount of the defendant's exposure and the plaintiff's recovery after all other obligations are satisfied.

Mediation offers the plaintiff's counsel the opportunity to negotiate subrogation liens, which often makes a settlement achievable. The parties save considerable money in avoiding further litigation expenses, with this reality weighing on individual plaintiffs because every litigation cost reduces the plaintiff's net recovery dollar for dollar.[12]

The parties also have individual interests when mediating a case. Insurers are corporate clients and sophisticated legal consumers. The insurer's interest is largely economic and dispassionate, a business decision. Although financial interests are dominant for insurers, they are not exclusive. Insurers are also contractually obligated to exercise good faith in protecting an insured from an excess judgment.[13] The insurer has reputational issues at stake, for example, by limiting an insured's involvement in litigation as much as possible, thereby promoting the client satisfaction of an at-fault insured.[14]

From a plaintiff's perspective, these cases are personal and emotional, especially when serious injuries or death result or when the defendant's conduct in causing the occurrence is highly negligent. Throughout the claims and litigation process, plaintiffs often think the insurer has failed to accept responsibility or to demonstrate accountability for the insured's negligence.

Plaintiffs experience the litigation process as invasive, often feeling as though they are on trial. It is difficult for plaintiffs to understand, for example, why an insurer is not paying medical bills and wage loss contemporaneously when liability is clear.

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Concepts like the burden of proof, claim elements and requisite proof, and partial or complete defenses are largely (and understandably) lost on clients. Some clients, regardless of the challenges the case presents, see proof of their claims as self-evident, assuming counsel can merely make a motion to have all records introduced as evidence and let the jury decide.

Client control might not be easy, but it is essential to the success of mediation. Counsel must explain the implications of the offer and document the file if the client, against the lawyer's advice, does not agree to settle. It is necessary to ensure that counsel understands the extent of their authority rather than have a misunderstanding after mediation has concluded. Being certain the client understands what is being communicated is also part of a lawyer's ethical obligation.

In some cases, clients plan to use claim proceeds for a specific purpose – buying a home, for example. In those instances, the value of what the plaintiff seeks in compensation bears no relationship to claim value.

The plaintiff's counsel walks a delicate line in supporting the client through the process while also having to control client expectations, one of the most important functions a plaintiff's counsel performs. Before mediation begins, counsel should discuss the client's expectations while explaining counsel's valuation analysis. Other issues to discuss include the strength of the respective parties' evidence on liability when disputed, the claims being made and in what amount, potential merits-based defenses such as failure to mitigate, and valuation.

Preparing for and Advocating During Mediation

Clients lack an independent basis to evaluate case value and must rely heavily on counsel for guidance. Mediation can be a productive and meaningful process when the parties prepare their proofs of claims and defenses and argue those issues at mediation as they would at trial. Positions taken should be supported by admissible evidence. The strengths and weaknesses of each party's proof will be discussed during individual caucuses. Claim value should also be discussed in advance of mediation to manage client expectations and establish settlement parameters.

An initial step the parties must decide is at what point in the case mediation should proceed. Some mediations occur after initial discovery and the plaintiff's deposition are completed. If the case can be reasonably resolved at this juncture, both parties will avoid considerable litigation expenses. If mediation is unsuccessful, the parties can return to mediation after additional discovery has occurred. In more complex liability or damages cases, the parties might defer mediation until some or all expert-witness discovery has occurred.

Time is a limited commodity when running a high-volume caseload. Nonetheless, for mediation to be productive, the plaintiff must be able to articulate the claims brought, the amount of special damages sought, and the evidence establishing a prima facie case for each aspect of special and general damages claimed. The defendant must be able to identify the weaknesses in the plaintiff's proof and the evidence that supports any defenses asserted.

Subrogated parties must be included in the mediation process. Plaintiff's counsel is required by law to satisfy accident-related liens and also has an ethical obligation to do so.[15] Plaintiff's counsel should request that the subrogated parties provide updated healthcare liens to all the parties. When any governmental lien is involved, counsel must factor in the time it takes to obtain updated lien information to ensure its availability in advance of mediation.

Personal injury cases can last a long time, in large part due to the plaintiff's healing period. If there is a substantial increase in the subrogation claim, the plaintiff's counsel needs to investigate and ascertain what accounts for the discrepancy. When the increase is due to additional treatment, as opposed to the inclusion of unrelated charges (which should be promptly disputed), opposing counsel should be advised and provided with records that have been collected or with a release to obtain them.[16] If there is a substantial change in circumstances that cannot be addressed fully before mediation is scheduled to begin, the parties might want to consider rescheduling.[17]

It makes little sense to start a mediation when the information needed to assess the full nature and extent of the plaintiff's injuries is not yet available for review.

Valuation and Settlement Negotiations

Valuing a personal injury case is difficult. No lawyer, regardless of talent, can predict how a jury will determine what a case is worth or how comparative fault will be assessed when liability is disputed. For the plaintiff, discussing claim value is likely to be an especially painful undertaking, especially when severe injuries, the death of a loved one, or driver conduct going beyond simple negligence is involved.

There is also no objective measure of value. A case is worth what a plaintiff accepts in settlement or, viewed in another way, what the insurer is willing to pay to settle. If the case proceeds to trial, the value of the case is what the jury awards. In mediation, the value of a case is what the parties agree it is worth.

Both the merits analysis and claim valuation must be evidence-based. As in a trial, the only evidence that matters in mediation is *relevant and admissible* evidence. Mediation, arbitration, and trials all incorporate the jurisprudential concept that an adversarial system produces the most reliable result when assessing disputed and undisputed facts. When mediation is used to resolve legal disputes, the proof process is no less adversarial than arbitrations or trials.

Much of the work at mediation by the plaintiff's counsel involves explaining why the insurer views the case as they do and what evidence exists to support the claims the plaintiff is asserting. When liability is contested, it is often helpful to start with a full value analysis and then debate the modifier for contributory negligence.

I believe that rather than focusing immediately on case value, mediation is more productive with a greater likelihood of success if the mediator initially talks with the plaintiff about their experience of the event that caused the injury to the present. This information provides context for case valuation and helps establish a trust relationship between the mediator and the plaintiff.

Conclusion

Mediation has established its significance by providing parties with the opportunity to participate in negotiating an agreed-upon resolution of their dispute, even if they do not resolve it. Mediation offers a forum where the parties may express their views freely, which does not occur at any other phase of the litigation. The parties retain their right to take the case to trial if they cannot reach an agreement.

While not every case will settle at mediation, many will, and some will settle after further discovery, returning for further mediation or direct settlement negotiations between the parties. In one sense, mediation that does not result in a settlement fails to achieve its goal. But even when a case is not resolved, mediation will have been a productive undertaking because the parties should leave knowing more about the case than they did at the beginning of the process. **WL**

ENDNOTES

[1]*See* C. J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 Suffolk J. Trial & App. Advoc. 203, 212-13 (2020) (less than 1% of federal cases proceeding to trial). In 2023, 110 civil cases in Wisconsin were tried to jury verdict. *Disposition Summary*, Wisconsin Courts, 2023 Certified Year End Statistics, https://www.wicourts.gov/publications/statistics/circuit/docs/disposumstate23.pdf. Jeff M. Brown, *Endangered Species: Civil Jury Trials Are Increasing Rare,* InsideTrack, June 19, 2024, https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=16&Issue=11&ArticleID=30505.

[2]James J. Alfini & Catherine McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law,* 54 Ark. L. Rev. 171, 171-72 (2001) (footnote and citations omitted).

[3]Nancy A. Walsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash. U. L. Q. 787, 817-820 (2001).

[4]*Id.*

[5]*See supra* note 1.

[6]Michael D. Rust, *Mediation Skills Manual* (Winnebago Conflict Resolution Center Inc. 3d ed. 2022) (on file with author).

[7]*Id.* at 15.

[8]Walsh, *supra* note 4, at 817-20 (footnotes and citations omitted).

[9]Alfini & McCabe, *supra* note 2, at 172.

[10]Wis. Stat. § 904.085.

[11]Walsh, *supra* note 4, at 794-95 (footnote and citations omitted).

[12]Statutory costs are nominal. Wis. Stat. § 814.04. The exception is cases in which a fee-shifting statute is involved.

[13]Reputational interests are heightened when an insurer has a dual-insured case: it provides coverage to both the plaintiff and the alleged at-fault party.

[14]Obtaining dismissal of an individual defendant is of particular interest to an insurer, especially for clients involved in credit-based transactions such as mortgages. These cases last years by the very nature of a plaintiff's healing, and they tend to remain pending in litigation for many years after suit is filed.

[15]*See, e.g.*, SCR 20:1.15(d); Model Rules of Professional Conduct Rule 1.15(d).

[16]As mediation progresses, the defense will likely identify the date they believe the plaintiff reached the end of accident-related healing. The information should be provided to subrogation counsel to put them on notice that there is a dispute over the relatedness of treatment after the date indicated.

[17]When substantial direct negotiations have occurred, the parties remain considerably far apart on value, and an impasse has been reached, the parties may wish to move jointly to vacate the mediation order on the grounds of futility. **WL**