

Mediation: The Antidote To Civil Litigation

by Jeffrey Krivis

In what appears to be the first mixed marriage of its kind, the insurance industry and trial lawyers have linked resources to encourage the use of mediation as the preferred method for resolving disputes. Known as the National Pre-Suit Mediation Program, the aim is to institutionalize the use of mediation in all cases. The concept was the brainchild of the International Association Of Defense Counsel (IADC), which recognizes the importance of mediating disputes. The program has effectively put the IADC and the trial lawyers in the center stage of public service for the consumer, the real victim of the overburdened civil justice system. Once in that position, both sides found themselves in a win-win situation. Hence, the unique affiliation of former rivals.

The pre-suit approach is significant because it responds to the needs of all parties. For injured victims, the civil justice system has a way of exhausting people into submission, usually on the eve of trial, but only after extensive discovery battles. This program accelerates the resolution of the dispute so that the victim can receive fair compensation quickly, and without the emotional scars of litigation.

The insurance industry is predictably thrilled, since the costs of defending many of these actions sometimes exceeds the amount of indemnity paid to the victims. By reducing defense costs, insurers can concentrate on the actual value of the claim, as opposed to arbitrary figures that tend to focus on court costs.

As for the trial lawyers, they can now provide superior services for their clients and receive contingent fees much earlier in the process. This helps achieve positive cash flow and better use of staff resources. Furthermore, if the case does not settle at mediation, the trial lawyer can simply recommend to the client that the case go to a jury. In choosing this option, the clients go to a jury trial acknowledging that every effort has been made to reach agreement with the insurance company.

In addition, insurance companies may decide to stop expanding the role of house counsel when they see that their outside counsel has embraced a concept

previously advocated by the insurance industry.

Why Mediation?

It often works better than traditional court intervention. The direct connection between the parties and the problem-solving process creates greater efficiency, solving the problems of increased transaction costs, delays in the judicial system, and the public perception of an unfair system.

Mediation is more efficient because the outcome of any mediation is controlled by those who have the most complete view of the case: the parties themselves. They are inevitably the ones best equipped to resolve the problems created by the case. The parties control how they wish to state their own view of matters, and the mediator provides a safe environment in which to do so. Eliminating the restrictions of formal rules, the mediator encourages an open dialogue that focuses on the forces that have brought the parties into a dispute in the first place. In so doing, the mediator is a catalyst for initiating mutually acceptable solutions.

The mediation process is completely confidential, and any information discussed in a private session cannot be revealed to the other party without permission. This is the basic technique used by the mediator to assist the parties in reevaluating their stated positions in a comfortable and supportive environment. The mediator also serves as a sounding board so that the parties can have an opportunity to "vent," or release thoughts and feelings that have contributed to their position in the dispute. In a recent mediation involving a wrongful death action, the parties were over one million dollars apart on the eve of trial. Both sides agreed to mediation as a last measure before engaging in costly expert depositions. When the wife of the decedent finally got her chance to talk to the mediator about her deceased husband, and express the grieving that she felt over his death, the case took on a different posture. It was as if a weight had been lifted from her shoulders, and she could finally accept the fact that her husband was gone and that the only way the justice system could deal with the problem was by a monetary payment. After some discussion with the mediator, the case settled in less than four hours.

Since the mediator is not a judge and will not make any decisions on the matter, the parties are more inclined to share information that will help bring the case to closure. As reflected in the case identified above, the parties maintain full control over the process, while the mediator offers insights into the issues at hand. Any party is free to withdraw from the mediation at any time. However, this rarely occurs since progress toward settlement becomes obvious as the mediator assists the parties focus on resolution.

Another recent example of a successful mediation occurred when a 40 year old woman made an uninsured motorist claim against her automobile insurance company. Blood tests taken at the emergency room after the accident revealed that the claimant may have suffered a miscarriage. This claimant had previously tried unsuccessfully to become pregnant, and the revelation of a positive blood test had a devastating psychological impact on her.

The case was on the road to binding arbitration, with the insurance company being faced with potential bad faith exposure if they didn't settle within policy limits. Rather than face the possibility that an arbitrator might be influenced by the blood test and psychological component of the claim, the parties went to mediation. During the mediation, the claimant got to tell her story. This opportunity in and of itself opened the doors to discussion and settlement within one day. Both sides left the mediation with an appreciation for each other.

In addition to the above examples, many personal lines insurers are submitting automobile and homeowners disputes to mediation. Some carriers will bunch their smaller disputes into three or four claims that can be mediated in one day in order to take advantage of the reduced mediation fees, and to move cases through the system quicker.

As can be seen, the mediation process is fair, friendly and efficient, with neither party dominating the other. Resolution is reached only if all sides agree, which, incidentally, occurs in over 85% of the cases.

How Does The Program Work?

The National Pre-Suit Mediation Program has been designed to mobilize

mediation as soon as impasse occurs during settlement negotiations. If the injured victim's counsel is unable to negotiate a fair resolution informally, he simply serves a Request To Mediate form upon the insurance company or self-insured participant. By the same token, the insurance company or self-insured has signed a written pledge to come to the table and allow the mediator to help facilitate the negotiations so that the parties can get past impasse and on to settlement.

Some insurance companies in selected jurisdictions are playing it a little more cautiously. They have agreed to the spirit of mediation, but have reserved the right to reject a Request To Mediate primarily where suspected fraud is involved. Nevertheless, the majority of jurisdictions and insurance companies have successfully followed the intent of the program which is to mediate any and all cases.

Once the Request To Mediate is served, the parties have 90 days within which to informally exchange information about their positions and have the mediation session. The IADC interviewed and selected professional mediation providers who submitted proposals and resumes. Several providers were selected that have agreed to provide volume discounts to program participants.

Upon receipt of a Request To Mediate with an approved provider and signatory company, the provider will assign a mediator who is acceptable to all the parties. The parties are always free to request a particular mediator if they choose. However, since the process does not involve a decision by a neutral and is non-binding, the idea of locating a neutral who favors one side or the other has been eliminated.

A mediator profile is provided to any party upon request. The mediator provider will then schedule the case for a convenient location and time. Notice of the Mediation Session will be mailed and the case is heard.

The IADC encourages signatory companies to pay up to 75% of the cost of the mediation up to \$1,000. This has occurred successfully in such jurisdictions as San Antonio and on the East Coast. In Southern California, the signatory companies have agreed to share the cost equally with the trial bar, unless

otherwise agreed.

The Program has achieved award winning success in a pilot program administered by the San Antonio Bar Association in 1992. Out of 300 cases that were submitted in the pilot program, 85% of the mediations resulted in settlement, avoiding costly litigation. The State Bar of Texas awarded the San Antonio Bar Association with the 1994 Public Service Project Award and the 1994 Partnership Award for local bar association.

In order to gauge ongoing success of the National Pre-Suit Mediation Program, all mediation providers are required to provide written statistics of the number of cases submitted, number of cases mediated and the number of successful mediations conducted. The experience in San Antonio is being duplicated in other regions in the country.

Who Supports The Program?

The IADC, the oldest and largest organization of defense counsel in the United States, obtained seed money from several major insurers. The insurers that want to participate in the program sign pledges or "Position Statements" in which they commit to the spirit of mediation before a case goes to litigation. At the same time, the trial lawyers in the cities where the program has been implemented evaluate the program and endorse it as a membership benefit.

The National Pre-Suit Mediation Program Director, Jim Readey of Columbus, Ohio, is a former litigator who has spent the last several years as a neutral mediator. He is the past president of the Columbus Bar Association, and helped conceive and develop the popular concept of Settlement Week, an idea that now enjoys success throughout the country.

Conclusion

The National Pre-Suit Mediation Program commits insurance companies and trial lawyers to exercising an efficient and cost-effective option before placing matters into litigation. Clients are best served when their interests are managed quickly and in a fair environment. Mediation provides both, and contributes to the

welfare of the court system at the same time.

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