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## Advocacy in ADR: A Mediator's Perspective

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*Special to the Legal*

In all types of personal injury litigation, this scenario is happening more frequently: Discovery is complete, expert reports have been exchanged, settlement appears unlikely, and the case is headed to trial. Someone suggests mediation, or if settlement is not possible, a resolution through binding arbitration. Counsel must now prepare a presentation different from one before a jury, and determine what evidence to present and how best to present it. Most importantly, counsel's presentation is to an audience much different from a jury: an arbitrator or mediator.

This article will discuss issues counsel must confront to be effective advocates in alternative dispute resolution, and to give a mediator and arbitrator's perspective on these issues, which include, at mediation, what evidence, if any, should be presented, to whom, and what other information can or should be presented. At arbitration, they include matters such as whether expert testimony should be introduced through reports or live testimony. Finally, it will address how counsel can effectively represent their clients while still meeting goals of reducing the time and expense of trial.

### HAVE THE DECISION MAKERS PRESENT

The purpose of mediation from the mediator's perspective is to bring the parties together and resolve the case. For mediation to have the best chance of success, it is usually essential that the decision maker(s) for each party be present. In their presentations, counsel try to impress the other side with the merits of their case, the weakness of the opponent's case, and the benefits of settling. If the parties' decision makers are not present, effectiveness is reduced.



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In a typical personal injury case it is often assumed the decision maker for the plaintiff's side is the plaintiff herself, or that plaintiff's counsel controls the client. However, in many extremely serious cases, this is not true. For example, in a death case the surviving spouse may be the plaintiff, but another family member (an adult child, for example) may be advising plaintiff, and may actually control the decision. In a child death case, one or the other parent might be the real decision maker for reasons not immediately apparent to opposing counsel. Frequently, during the initial private caucus with the defendants' representatives, the first question asked of the mediator is, "Who is the decision maker on the other side?" The identity of the real decision maker can affect the approach of the defendants and the mediator.

It is important that the defendant's decision makers be present, and not merely available by phone. Evaluation of the plaintiff as a witness can be difficult to convey by phone. If the plaintiff's side makes an impressive presentation during an initial joint session, having the decision maker present can make all the difference.

For an insurance carrier or corporate defendant, the term "decision maker"

means the individual with sufficient authority to settle the case within the reasonably anticipated range. Having an adjuster with limited authority present defeats the purpose. Defense counsel often express concerns about recommending an increased settlement offer to an adjuster who is not present. When the appropriate decision maker is present, this concern is substantially reduced, as the mediator is the one questioning positions, raising issues, and making recommendations.

### HELP THE MEDIATOR

The more information counsel provides the mediator before the proceeding, the more effective the mediator can be. Sending the mediator pleadings, depositions, expert reports, motions and briefs is helpful, but mediators welcome information that will help them understand the underlying issues in the case. If there are underlying needs and concerns not apparent from the cold recitation of the facts, providing the mediator with that information may go a long way in helping to resolve the case.

For example, counsel's thoughts on why negotiations have broken down can provide important insights, and help the mediator adopt a different approach. If one of the parties has an unrealistic view of either liability or damages, providing that information and counsel's evaluation to the mediator can help the mediator discuss those issues in caucus.

Counsel can also help the mediator understand their own client. If the client is maintaining a rigid position, alerting the mediator to the perceived reasons for this can help the mediator engage the client in a meaningful discussion. It is important the mediator have an understanding of the client's anger, resentment, regret, expectations and hopes. If the mediator understands these areas, it may be possible for him to work with the other side and create solutions

that add meaning and value to the proposed resolution. Counsel can (and should) agree that both sides can submit a confidential memorandum discussing these issues.

## LINES IN THE SAND

In a personal injury or medical malpractice mediation, each side often begins negotiations with unreasonable opening bids. While both sides are entitled to test their position and that of the other side, starting with totally unrealistic demands or offers serves mostly to frustrate the process. Each side becomes angry or discouraged by the other's position, and it becomes harder for the parties to move into a zone where true negotiations can begin. If an extreme position must be adopted initially, counsel should be prepared to move at a reasonable rate toward figures that can achieve resolution.

If it appears impasse has occurred on a dollar amount, there may be other, non-monetary areas, where agreement and accommodation are possible. A decision about those areas may reduce tensions, and permit further discussion about monetary issues. Counsel should avoid drawing any firm line in the sand, or adopting an absolute position. The mediator is trained never to give up, and counsel should adopt a similar attitude.

## USE OF TRIAL EVIDENCE

Counsel frequently worry that revealing too much at mediation will prejudice them, should the case proceed to trial. They hedge their bets by not revealing evidence they believe will substantially affect their case. However, disclosing this kind of evidence can help the mediator move the parties toward settlement.

For example, the defendant may be reluctant to share surveillance videos that undermine the plaintiff's deposition testimony, or may want to "save" the videos until a pre-trial conference or for use during cross examination. The mediator may be able use the video to help the parties re-evaluate their position by showing its limited significance to the defense or by showing the plaintiff she needs to soften her position. Often the video is not as devastating as the defense perceives. Conversely, sometimes the plaintiff needs to know he will be forced to explain the video to a judge and jury. A mediator can effectively do what opposing counsel could never do.

Because mediations often occur close to trial, trial depositions of experts frequently

have been taken. Providing portions of the testimony and emphasizing the significance of direct or cross examination may help either side re-evaluate its position. Merely explaining to the plaintiff or the insurance representative that the deposition went well or badly does not convey the impact of actually seeing or hearing it. An experienced mediator can use this testimony to assist either side in re-evaluating its case.

Other significant evidence presented at mediation may help the mediator to convince the parties to re-evaluate their positions. For example, in a case involving the death of a jogger hit by a truck, plaintiff presented an animation of the accident. It was extremely effective in explaining plaintiff's version of the accident. Because the defense decision makers were present and could evaluate the animation's effectiveness, they were able to reconsider their position. In that same mediation, the plaintiff played a video of the decedent giving a talk to a group of his students, which allowed defendants to re-evaluate damages issues. This presentation permitted decision makers to understand what was going to happen at trial, and adjust positions accordingly.

Counsel are increasingly sophisticated and knowledgeable about the mediation process. The imagination and skill counsel bring to these proceedings continue to increase. Counsel need to focus on those aspects of the case that will help the mediator do her job.

## ARBITRATION

Binding arbitration has become a frequent method for resolving serious, complex personal injury and malpractice cases. The parties determine and control the process. The arbitrator is selected by agreement. Scheduling, evidence to be submitted uncontested, witnesses who will testify, and the presentation of expert testimony by deposition, live testimony or reports are all in the control of the parties. Parties can establish high/low damage parameters, confidentiality and matters important to them.

The savings in time benefit both sides and are especially appealing to physician defendants. Counsel can more easily accommodate parties and witnesses who have to travel considerable distances, or whose job requirements preclude them attending trial.

Complex personal injury and professional malpractice cases have become extremely

expensive to try. It is not unusual for each side to have at least two experts on liability, and several on damage issues. Usually, the parties have exchanged expert reports before arbitration. Often agreements are reached providing expert testimony will be by reports. Before agreeing, however, counsel must consider the consequences.

Counsel must carefully consider whether reports are adequate to stand alone as an expert's complete testimony. At trial, experts usually expand on their reports, explaining terms and procedures in greater detail, and expanding upon the reasons for their conclusions. Counsel must determine if supplementation is necessary to fully articulate their case in chief.

Both sides should consider submitting additional reports to dispute conclusions reached by opposing experts or to expound in detail why opposing experts are incorrect. Supplemental reports may reference important literature or standards which either side had anticipated using on direct or cross examination. If the reports only provide a summary of the expert's opinion, the arbitrator may be left without sufficient information to evaluate the full extent of the expert's testimony. Despite the expense, counsel should consider the need for one or more experts to be presented live.

This is also true for damage experts, who are often presented solely by written report. There is often a wide divergence on the various damage issues, and the expert's testimony, rather than just a report, may be more convincing to the arbitrator. In such a case, the cost of presenting the expert may be more than justified by a substantially higher — or lower — award.

Finally, both the arbitrator and counsel must keep in mind that the parties have an expectation and a right to have their case fully presented. At the conclusion of the arbitration, both plaintiffs and defendants must believe they had an opportunity to be heard and their case be fairly presented. They must be assured that offering important testimony through reports, or through deposition transcripts, has not reduced the effectiveness of the presentation, and the arbitration process has worked to the advantage of all. It is incumbent upon both the arbitrator and counsel to ensure these expectations are met. •