REFLECTIONS ON PERSONAL INJURY MEDIATION

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INTRODUCTION

A couple of years ago a colleague in New York and I were talking about our mutual interest in ADR. He told me that he had served on a committee of the New York City bar which had been asked to make certain recommendations to the bar about the use of mediation. Their findings were that mediation is a suitable process for resolving almost every kind of suit except personal injury suits. When I asked him why his committee had drawn this conclusion about personal injury suits, he said they simply did not think that mediation would "work" in that context.

Contrary to my New York friend's hypothesis, mediation does "work" as a process for resolving personal injury claims. But personal injury claims present unique problems for the mediator because they are different from other disputes in several ways: the extent to which the parties have had previous experience with the resolution of personal injury claims; the extent to which negotiations are limited to a distributive process; and the extent to which the issues under negotiation are largely subjective.

The parties whose evaluation of the claim is so crucial, the injured person and the insurance company representative, naturally see the claim from entirely different points of view because of the vast degree of difference in the experience

each has had dealing with personal injury claims. For the injured party, it is likely the only law suit he has ever been called upon to evaluate, and, of course, he is very personally involved. For the insurance claims representative, the claim may be one of hundreds or thousands which he has handled during his career, and he may be wholly detached from any personal, emotional involvement in it. The mediator is thus challenged to bring about some balance in this unevenness of negotiation and evaluation experience.

In the mediation of a construction claim, there may be numerous components to the claim as well as a counterclaim by the defendant. In a divorce case, the parties often seek to resolve financial issues, property division, custody, visitation rights and a myriad of details connected with each of these issues. In these types of claims, there is the opportunity to have give and take in the negotiations, trade-offs on the issues. How does one have give and take in the personal injury setting when the negotiations are purely distributive in nature; when the parties come in to the process at settlement offers of $100,000 and $5,000 and the only question is how much the defendants will pay and how much the plaintiff will accept? Does the mediator employ the same approach in that situation that he would in a divorce? If not, what are the differences?

To make matters more difficult, this distributive process is often quite subjective. The plaintiff's medical costs and lost wages can be calculated with some degree of mathematical certainty, but the largest component of many personal injury claims, pain and suffering, is left to the enlightened conscience of the jury and is therefore very difficult to evaluate objectively in mediation. What is the value of a lifetime of low back pain? What is fair compensation to a person who carries a sponge in an internal organ for two years? What is a person's life worth? What would juries in various jurisdictions award for these kinds of injuries? What objective criteria can be found to assist in answering these questions? How can the mediator facilitate the resolution of such issues?

I have reflected on these questions and have some thoughts to share. These reflections, however, are just that. They are observations and theories which might or might not be helpful to other mediators. They are based on experience in personal injury mediation and study of the art of negotiation, not on any scientific or clinical findings. Some of these reflections may be relevant to the mediation of other types of claims; several of them are not. Underlying all of these thoughts is the premise that a successful personal injury mediator should be a student of human nature. And that is a course of studies which no one ever completes.

1. **Immediately establish communication with the plaintiff.**

It seems that no matter how reassuring a mediator is in his opening statement and no matter how much he emphasizes that the parties are in a safe environment during the mediation process, the average personal injury plaintiff is going to feel uncomfortable at first. As he looks around the room during the opening session, he cannot help but notice that everyone else, the lawyers, the mediator, the representative from the insurance company, appears to have been through the process before. They are all at work, acting in their professional capacities. He is not.

Many injured parties sit silently through the entire opening session, shifting in their seats to get comfortable, listening impassively as the defense lawyer states his case. Often it is not until the first caucus with the plaintiff's side that the mediator will hear the plaintiff say anything at all. Take this opportunity to establish communication with the plaintiff immediately.

In personal injury mediations, I typically meet with the plaintiff's side first and I typically ask the plaintiff: "How are you feeling?" or "How have you been doing in the last few weeks?" or "How much has your back been bothering you lately?" By opening with a series of questions about the plaintiff's injuries, the mediator accomplishes several things. He communicates to the injured party that he cares

about his injuries; he shows a willingness to listen; and perhaps most importantly, he gives the plaintiff a chance to talk and to participate fully in the mediation process. As the plaintiff begins to talk about his injuries, a topic which most people find fairly easy to discuss, his comfort level increases and the mediator has the opportunity to begin to evaluate the plaintiff as a witness. Does he appear to be truthful? Is he exaggerating or minimizing his injuries? Is there a psychological component to the plaintiff's complaints of pain? How articulate is he? How will he do in front of a jury?

In this initial caucus with the plaintiff, the mediator should not start to challenge the plaintiff's description of his injuries, except perhaps to request explanations of some of the points raised by the defense lawyer in the opening session or to clarify statements that appear to be confusing or contradictory in some way. Were the mediator to express his own doubts or opinions at this early stage, he might very well alienate the injured party, and thus break down the line of communication he is trying to establish. There is plenty to time later for the mediator to relate to the plaintiff the contentions of the defense and to ask open-ended questions which will make the plaintiff reflect on the strengths and weaknesses of his case as far as his injuries are concerned.

The initial caucus with the plaintiff is crucial. By getting the plaintiff to talk about his injuries first, the mediator commences the process of building the plaintiff's trust and confidence in him and of bringing the plaintiff in as a full participant in the mediation process. In this way, the mediator helps to overcome to a degree the inherent imbalance between the extent of the injured party's experience and that of the insurance claims representative.

2. **Identify the parties' interests**.

To suggest that the personal injury mediator should identify the parties' interests is certainly nothing new. Identifying the parties' interests is a step that any interest-based mediator will take early in any mediation. The unique thing about personal injury mediation is that this is often a difficult step because the parties are engaged simply in a distributive bargaining process; there is nothing more to achieve than the distribution of a sum of money from one party to the other. The plaintiff is bargaining for the highest lump sum possible and the defendant is bargaining for the lowest. The tendency of both parties to engage in positional bargaining is strong.

Sometimes, however, there are other interests at play and it is up to the mediator to identify them. These interests may be internal, personal, even unconscious, or they may be

external, societal, in the public interest. By internal, I mean some interest that is personal to the individual party. Examples would be: minimizing one's own feelings of being to some extent at fault in causing the injury; obtaining an admission of fault from the other party; obtaining a personal apology from the other party; finding a focus for blame for a number of unrelated things which are going wrong in the life of the injured party; or taking advantage of the situation to seek financial gain as a result of the fault of the other party.

External interests would be broader. They would be interests that the parties would have in common with others. External interests might include: improving safety procedures on a jobsite; improving a product with a safer design or more adequate warnings; having an employee dismissed in the interest of preventing accidents to others; having a young driver go through drivers' training school. If the mediator can get the parties to articulate their interests and discuss options for meeting those interests, he can to some extent steer the parties away from the positional bargaining which is so typical in personal injury litigation. He can get the parties to focus on interests, not positions.

Sometimes it is helpful to the process to test through negotiations the extent to which the parties' expressed interests are really important to them. A common example is

the interest in deferred medical treatment. A plaintiff presents himself at the time of mediation with a disc problem which he contends resulted from the accident in question. The defense contends that the plaintiff had experienced back problems for years and that at most he only strained his back in the accident. When the mediator inquires into the plaintiff's interests, the plaintiff says that he is concerned about the need for future surgery, and his ultimate settlement therefore needs to include funds to cover those costs. The defense refuses to include those costs in the negotiations because it does not believe the plaintiff will ever go through back surgery.

A suggestion for meeting the parties' interests in this situation is to have the insurance company offer to earmark an amount of the settlement funds equal to the estimated cost of surgery and subsequent physical therapy and to keep that amount in an account for a certain length of time, say two years, for the plaintiff's use if he undergoes surgery. If he does not undergo surgery within the specified time frame, the funds would revert to the insurance company. Although this arrangement would clearly meet the parties' interests, in my experience, very few injured persons accept such proposals. Most would rather have the cash up front. But by offering this arrangement to the plaintiff, the mediator tests the plaintiff's expressed interest and learns whether or not it is

a high priority. He also assists the parties in identifying a component of the claim on which there can be give and take. The defense, for example, could offer to put the whole estimated amount of the surgery in a contingent account for future use, or pay a lesser amount as part of the lump sum settlement of the case.

The mediator may identify interests which the parties would not admit to or which he would be reluctant to discuss with the parties. In such cases, he will have to take a subtler approach. He will have to continue to ask open-ended questions to try to get the party involved to realize on his own that there are underlying motives at work that the mediation process may not be able to address. Another example is in order.

A young man ate at the same restaurant every night after moving to Savannah. One night there was a foreign object in his food. He swallowed it, felt sick for a couple of days, then passed it. After he had passed it, he took the object to the manager of the restaurant. The manager picked up the object, in spite of the warning that it had not been thoroughly washed off, then advised his customer that he would report the incident to his insurance company and someone would get in touch with him. A claims representative called him a couple of weeks later and offered to pay the plaintiff's bill at the medical clinic he had visited. Unable to get the

insurance company to pay the amount he was seeking, the plaintiff brought suit.

In mediation the parties were negotiating at very low numbers, with the defense continuing to insist that the plaintiff had not been injured, except to the extent that he had felt queasy for a couple of days. The plaintiff wanted a sum of money that did not seem to be related to anything; there was no factor of legitimacy. As the mediation progressed, it became evident that the plaintiff was disappointed that he had not been treated with more care and concern by the manager of the restaurant. The restaurant was his home away from home, the place where he had his evening meal every night. The plaintiff could not accept that there had been a foreign object in his food, that the manager had handled it at the restaurant when he knew it was not clean, that the insurance claims representative had treated him just like any other claimant, and that no one really seemed to care that he had decided never to eat in that restaurant again, thereby forsaking his evening meal at "home". When the plaintiff was made to see that these were the real issues and that negotiations with the restaurant's insurance company were not going to satisfy his true interests, he agreed to settle.

3. **Where the only interests are financial, "increase the pie."**

As mentioned above, it is easier to negotiate several issues than it is to negotiate one, because with several issues there can be give and take. What does the mediator do when he has determined that the only interests of the parties are financial? The plaintiff wants to get as much as he can, and the defendant wants to pay as little as he can. In this situation, how does one avoid the pitfalls of positional bargaining? The answer is increase the pie: expand the number of issues the parties negotiate.

In the typical personal injury claim, the injured party may be entitled to recover past and future medical expenditures, past and future lost wages, and damages for pain and suffering. Often there is also a spouse's claim for loss of consortium. To try to move the parties away from positional bargaining, the mediator may find it helpful to negotiate each of these damage components separately. By negotiating the elements separately, the parties can begin to achieve some agreement and feel that they are making progress toward a final resolution, even though their bottom line figures remain substantially apart.

Suppose for example that the plaintiff presents a claim for $14,000 in medicals, $2,000 in future medicals for additional physical therapy, $18,000 in lost wages and

$100,000 in pain and suffering, for a total demand of $134,000. And suppose further that the defense wants to make an opening offer of $30,000. If the defense's offer is presented in a lump sum of $30,000, the plaintiff and his attorney will point out rather vehemently that there is not even enough money in that offer to cover the special damages, much less pain and suffering and attorneys fees. The reaction is often different if the $30,000 offer is presented as $3,000 for the unpaid portion of the medicals (assuming the rest has been covered by some form of insurance), $1000 for future physical therapy, $14,000 for lost wages (arguing that the settlement is not taxable) and $14,000 for pain and suffering. After a couple of rounds, the parties ought to be able to agree on the past and future medical expenses and the lost wages and to narrow considerably the pain and suffering component.

When the parties have agreed on individual components of the claim such as the medicals and the lost wages, they have the sense that they have made progress, that the process of mediation is working, and that there is willingness on the other side to be reasonable and to engage in active listening. There is also the practical advantage to the mediator that there are fewer and fewer issues to argue about as the parties begin to reach agreement on these components. If a loss of consortium figure has been agreed upon, for example, there is

no need to keep discussing how the plaintiff's spouse was impacted by his injury.

Often the parties will be willing to negotiate each of the components of the plaintiff's claim for a few rounds, then they will revert to positional bargaining in the final phase of the mediation. At this point the parties are usually arguing over pain and suffering and they may not want to break that element down, but it too can be broken into components. A creative mediator might suggest different levels of compensation for the pain suffered in the accident itself, the time spent in the hospital, time in therapy before the injured party returned to work, and the future expected duration of the pain or disability.

In many personal injury cases, this technique of increasing the pie facilitates progress and cooperation in the negotiations and enables the mediator to steer the parties clear of their natural tendency to engage in positional bargaining.

4. **Identify the decision-maker**.

Because the value of personal injury claims can be such a subjective matter, it is not uncommon to see the injured party as well as his attorney have very strong opinions about settlement value. It is also not uncommon to see that there is one principal decision-maker. It is crucial for the

mediator to know who that decision-maker is because he is the party that needs convincing and he is the person to whom arguments and issues should be addressed. When the mediator has identified the decision-maker, he can more easily formulate a negotiating strategy for the parties. Identifying the decision-maker, however, is not always easy to do.

It is interesting to view the attorney-client relationship from the mediator's perspective. At the same time that the attorney wants very much to give his client good representation and of course, good advice, he wants particularly to appear strong, zealous, and protective of his client. The attorney may often be the one to do the venting and the theatrics, storming, and fuming and threatening to go to trial, while pronouncing that the other side is not bargaining in good faith. On the other hand, the attorney may sometimes remain quiet while the client does the venting, a possible indication that the attorney might be having "client control problems."

The mediator should note who does the venting, because the person who does the venting is often the decision-maker. The attorney who almost walks out of the mediation after the opening session may be the person calling the shots throughout the process. The injured party who bursts into tears after hearing the defense's first offer and who then turns on the defendant with a vengeance may be the force to reckon with

when the parties are in the final stages of negotiations. The insurance claims adjuster who is adamant about the value of the case and who rants and raves about his theory that the plaintiff is really not injured will exercise tight control over all of the offers made during the process of mediation.

When the mediator is asked to leave a caucus while one side or the other formulates its next settlement offer, he cannot observe the formulation of negotiating strategy. In such cases, the "venting test" may be helpful. In many cases, however, no test is necessary at all; the identity of the decision-maker is perfectly obvious from the conversations in the caucuses. If the mediator is observant, he will be able to tell who is calling the shots.

Having identified the decision-maker, the mediator should frame his questions and the issues he thinks are important in a manner that will be convincing to that person. Save the legal arguments for the lawyers. Talk to the non-lawyers in plain language. And always watch for the invitation to be evaluative; an invitation that is sometimes extended in very subtle ways. In instances when there is more that one decision-maker on a side or a disagreement between the attorney and his client as to the proper settlement value of the case, the parties may be looking to the mediator for strong advice and direction.

Be mindful of the personal dynamics when there is more than one family member present. Talk to them all. Let each one vent. Try to find out why each is present. Do they have anything to gain by the outcome of the mediation? How have the plaintiff's injuries affected them? Is there something about the events leading up to the personal injury which might have made them feel responsible in some way? Are there other contemporaneous events for which a family member feels responsible and which have somehow had a negative impact on the life of the injured party?

The mediator should keep in mind the part that guilt may play in family dynamics. Family members who are pushing for what seems to be an unreasonably high settlement figure may have their own agenda or their own interests which are different from the injured party's. The mediator may need to establish communication with these family members and identify their interests too. They may be seeking to assuage their own guilt over something they have done or omitted to do. Subconsciously, they may feel that the higher the final settlement figure is, the more the defendant has accepted responsibility for all of the plaintiff's ills and the less they themselves are responsible.

5. **A word about venting.**

Most of us are told during mediation training that venting is an important part of the process. Whether it occurs in the opening session or one of the caucuses, venting allows the parties or their attorneys to let off steam, to rid themselves of some of the pent-up anger that they are carrying, to say the things they might not say when they are in a calm state. What we might not have learned during mediation training is that this venting is sometimes directed rather forcefully at the mediator.

The first time this happened to me I was completely taken aback. I returned from a caucus with the defense attorney and a representative of the liability carrier, told the plaintiff and her attorney what the defense was saying about the various issues in the case, and then revealed what the defense's counter-offer was. The plaintiff turned on me as if I had been the one who had caused her injuries. She looked as if she could have killed me, shook her finger in my face, told me that I had no idea what her life had been like since she had been injured, and burst into tears of anger and frustration. I kept thinking as this hysterical person was "venting" her anger at me that I should deflect it. I wanted to tell her that I was just repeating the contentions of the defense, not espousing them. I wanted to apologize for anything I might

have said to offend her. I wanted to assure her that I was expressing her contentions equally forcefully when I met with the defense.

This is the "killing the messenger" syndrome, a concept as old as Greek tragedy. The plaintiff was angry at me even though I was only the messenger. This phenomenon raises several questions for the mediator, including: what is going on here and how should I respond to this attack?

What was going on is that the injured party had identified me with the defense because I was articulating to her the defense's contentions. She had never had the opportunity to look the defendant in the eye and say to him what she wanted to say and what she had just said to me. As a matter of fact, as in many personal injury mediations, the defendant was not even there; he was being represented by his insurance carrier and its attorney. The plaintiff, probably quite unconsciously, had displaced her anger momentarily from the defendant and transferred it to me, in his stead.

In this situation the mediator should allow the venting to continue and absorb the anger as best he can without pointing out to the person doing the venting that he is not in fact the person on the other side. The mediator knows that and she knows that, but by allowing the venting to be directed at the mediator as a substitute for the other party, the mediator actually increases the chances that the venting will

be cathartic and constructive. And to the extent that the mediator is a substitute for the other side, he is giving the injured party an opportunity to settle her case with her "opponent," an opportunity which can be very empowering indeed. The mediator may find that empowering the injured party in this way facilitates settlement. The party who feels empowered in the process may be more flexible in accepting a final outcome.

CONCLUSION

To the extent that personal injury mediation is different from other types of mediation, it raises different challenges for the mediator. Hopefully, these personal reflections will help mediators who handle personal injury cases to meet some of those challenges. More importantly, I hope these thoughts will stimulate a dialogue which will contribute to our growth as mediators and our understanding of this interesting process of dispute resolution.

SUGGESTED READING

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