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Mid-value cases get short shrift in mediation

By Cynthia F. Pasternak

Through the years, the Los Angeles Superior Court and other judicial entities in California have attempted to incorporate trial alternatives to alleviate an already overburdened and often underfunded court system. Among these processes, the most successful and widespread has been mediation. But how well is it being utilized for mid-value personal injury cases ranging from $50,000 to $150,000?

LA mediation program

In 2000, an early mediation pilot program was established in the 10 civil departments in the Central District of the Los Angeles County Superior Court.

In 2001, the court was awarded state funding whereby the court paid its mediators at the rate of $150 per hour for up to three hours of mediation time. This source of funding expired, but administration of the ADR department continued with funding from the Dispute Resolution Programs Act. Mediators, however, were not compensated as the court resumed its pro bono mediation panel.

In 2004, the court established a "party pay panel" comprised of highly qualified mediators who met designated standards. If parties selected a mediator from the court's panel, the parties were obligated to pay for up to three hours of mediation services at $150 per hour. Additional time was compensated at the mediator's regular rates.

By the time this program was in place, most people knew the difference between "mediation" and "meditation." They realized the tremendous value that the mediation process had in facilitating early, less formal, and economical resolution of disputes. Consequently, professional mediators criticized the court's programs for obligating court mediation panelists to provide services for little or no compensation. It is unreasonable for the courts or anyone else to expect that quality mediation services which have become so vital to court operation will be provided free of charge in sufficient numbers to serve the needs of the court.

Impact of the funding crisis

The mediation program operated in Los Angeles County Superior Court with increasing success until May 10, when unprecedented budget cuts necessitated a complete and abrupt disbanding of the ADR department. In addition, 10 courthouses and numerous courtrooms were closed. Court staff were laid off, took pay cuts, moved to different locations, or had their jobs completely eliminated.

Currently, all personal injury claims arising in Los Angeles County must be filed in the Central District and assigned for trial based upon availability. After a case is filed, the plaintiff must serve all defendants with the summons, complaint and the court's general order. The order states that there are no case management conferences, provides information regarding new law and motion procedures, and allows motions to transfer complex personal injury cases to an independent calendar court. Notably missing is any consideration of mediation as an alternative to trial.

Now with severe budgetary restrictions and no mediation incentives for mid-value personal injury cases, the court has been forced to regress and decades of progress have been lost.

Concurrent with closure of the ADR department, other pro bono mediation programs were established. Private ADR providers started offering low-cost mediation for cases valued at less than $50,000. Commencing July 1, the Los Angeles County Department of Consumer Affairs' Court-Connected Mediation Program (DCA-CCMP) established a mediation panel of volunteers to provide services for limited jurisdiction civil cases. Under the DCA, mediators are required to commit to 150 volunteer hours, submit specified documentation, be interviewed and, if accepted to the program, complete an orientation prior to their first mediation assignment. All mediations are conducted outside the courtrooms of the Stanley Mosk Courthouse for cases appearing on that day's court calendar. Mediators are expressly prohibited from seeking compensation from the parties.

Suggestions

Since elimination of the ADR department, there are no public resources for mediating mid-value personal injury or other cases. Low-value cases may be diverted to small claims courts; cases valued at $50,000 or less handled through the DCA-CCMP, low-cost ADR provider or other pro bono programs; and large-value cases may proceed to costly private mediations. Mid-value personal injury cases between $50,000 to $150,000, however, are bearing the brunt of a beleaguered judicial system. Oftentimes, plaintiffs are forced to abandon their rights as disproportionate costs render plaintiff attorneys wary of undertaking their cases, even at high contingency percentages. Savvy insurance defense firms recognize plaintiff's cost burdens and offer undervalued settlements.

Cases valued between $50,000 to $150,000 should not, and rarely do, go to trial. The costs and risks of trial for all parties do not justify the potential rewards.

What can be done to encourage early settlement of mid-value personal injury cases to keep them out of the court system?

For plaintiffs, in 2003 the personal injury statute of limitations was increased to two years. Because the medical condition of most plaintiffs in mid-value personal injury cases is stable in less than two years, their disputes are ripe for resolution long before expiration of the statute of limitations.

On the defense side, if promptly notified of a claim, an insurance adjuster conducts informal discovery and sometimes resolves a dispute before the complaint is filed. Once the complaint is filed and counsel assigned, prior to engaging in settlement discussions the defense attorney must do due diligence by undertaking basic discovery, obtaining the plaintiff's deposition and reviewing medical and other special damage records. Had the insurance adjuster and/or defense counsel received prompt notice of the claim and an opportunity to engage in rudimentary discovery, settlement discussions may commence long before a lawsuit is filed.

The simple solution to unnecessarily delaying resolution of mid-value disputes is to implement pre-litigation procedures that encourage mediation and other diversionary processes so that fewer lawsuits are filed in the first place. Statutes and/or pre-litigation court rules should be developed to promote early notice of claims and the utilization of informal remedies. Parties who engage in informal, pre-litigation processes as documented under penalty of perjury by court registered mediators or other neutrals would receive a meaningful credit towards their initial filing and response fees. Thereafter, even if a case is filed, it is likely that this pre-litigation discovery process would streamline litigation and expedite resolution.

These suggested pre-litigation processes would be neither mandatory, nor limited to mid-value personal injury cases. Clearly, not every case is so complex that it cannot be informally settled by sitting down face-to-face, early and often before personalities rile or discovery takes on a life of its own. Through these cooperative efforts, many lawsuits that did not belong in the trial court system would never get there.

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The Los Angeles County Superior Court was at the forefront of mediation when it first created court-ordered programs. Now with severe budgetary restrictions and no mediation incentives for mid-value personal injury cases, the court has been forced to regress and decades of progress have been lost. The judiciary, the third co-equal branch of government, has been historically mistreated. It appears that so too is mediation, one of its most significant and successful programs.

Just because we have come to depend on the courts to resolve disputes does not mean that courts are the best alternative. Extensive studies have shown that mediation is an effective, productive and inexpensive way to resolve conflicts at an early stage. Now is the time to develop a pre-litigation process that dissuades court filings and encourages appropriate, informal handling of disputes commensurate with their complexity. It is time to move to the next level by fully incorporating early pre-litigation mediation procedures into the judicial system so that their significant benefits may be appreciated by all.

Cynthia F. Pasternak *is a professional mediator and shareholder of Pasternak, Pasternak & Patton, A Law Corporation, in Century City. She specializes in personal injury, product liability, employment (ADA, discrimination, wrongful termination, sexual harassment, wage and hour), business, professional malpractice, construction defects and real estate. She can be reached at cfp@paslaw.com.*

CYNTHIA F. PASTERNAK
Pasternak, Pasternak & Patton