Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2008 Issue

Caroline C. Vincent

Why and how to stay in the mediation process: A plaintiff's primer

For a variety of reasons, many parties and counsel devote insufficient time and effort to the process of settlement, marching on through expensive and time-consuming litigation. Parties unable to settle at a specific mediation session often throw in the towel, and their settlement hopes with it. A more positive and productive approach is to consider mediation a process, not a one-time event. The overall goal of the mediation process is to increase the possibility of achieving settlement.

Interim goals of mediation include:

• Development of a cooperative, problem-solving relationship with the other side that serves to minimize the cost of continuing litigation and facilitates further negotiations.

• Discovery of the respective parties' "true" settlement positions so that as parties move forward they can make an informed choice about whether to settle or litigate.

Getting to the table in the first place

The counsel-to-counsel approach is the most effective way to get to mediation. Expressing a willingness to go to talk about settlement is a positive step and demonstrates interest in resolving the dispute informally. Counsel can ask the other side if they have enough information to get to the table, and identify what key information may be needed to evaluate the case. If the lawyer fears looking weak to the client or the other side, counsel should explain that it is the lawyer's policy to go to mediation as soon as possible, because the benefits have proven themselves repeatedly. If the case cannot settle, the lawyer will aggressively litigate the matter.

Plaintiff's counsel should refrain from conditioning mediation on a particular offer by defendant because this can have a chilling effect. Willingness to negotiate should be the only requirement.

If there is an arbitration clause in a contract, the parties can choose to schedule mediation first, before or after selecting the arbitrator.

In Los Angeles, parties in litigated disputes are routinely ordered to court-supervised mediation by the local state and federal courts under a variety of programs that provide panels of court-approved mediators. Parties may or may not be "ready to settle," but attending the process itself affords the opportunity to develop a collaborative problem-solving environment. Selecting an experienced mediator will likely enhance the results.

In many of these courts, parties can request mediation other than at the initial case management conference. Many a receptive judge will encourage mediation where counsel's outreach alone was not successful.

Overcoming hurdles

When the obstacle in mediation seems insurmountable, find ways to stay in the process, and express a desire to keep the dialogue open.

The other party won't budge, and the money on the table isn't enough.

What is the next step in the litigation, and is there an alternative? For example, if the plaintiff is going to notice 10 depositions, and the defendant has even more to take, counsel can ask the mediator to help each side agree to reduce the number of depositions, or take witness statements informally. Then, parties can return to mediation, speak to the mediator individually or convene a conference call, to share the results of that information and keep the negotiations moving.

The other side does not want to return to mediation.

Before ending the session, plaintiff's counsel might ask if defendants can provide a range of settlement figures that defendants might be willing to discuss. Even discovering that the amount is larger than a breadbox but smaller than a house can be useful information. Instead of walking away, the mediator can help explore what possible next steps might aid the parties to achieve readiness to re-establish settlement talks. If the cost of the mediator is an issue, lack of information, or other reason, address what can be done to overcome the problem. Asking why the other side does not want to return to mediation is an obvious question, but an offer of specific solutions gives the other side an opportunity to meet the suggestion to continue in the process with counter-proposals. Ideas might include:

• Creating a cooperative discovery schedule;

• Agreeing upon a series of dispute resolution processes (e.g., discovery referee, arbitration of narrow issues);

• Scheduling a conference call or separate calls with the mediator.

The mediation seems like a waste of time.

A plaintiff's counsel who feels that he or she would be better off working on the opposition to the Motion for Summary Judgment back at the office, should consider what specific steps or information would make the mediation a more productive use of time. Exploring this question with the mediator can help keep plaintiff and plaintiff's counsel stay focused on what can be accomplished, instead of focusing on what seemingly cannot.

There is insufficient authority.

Plaintiffs rightfully demand that defendants have sufficient authority at

See Vincent, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2008 Issue

the table. Often defendants do not. Defendants and their counsel regularly report that they possess sufficient authority but rarely report the limits of that authority, even to inquiring mediators on a confidential basis. Plaintiffs should demand that defendant's representative have sufficient ability to obtain the needed authority or the clout to have the representative's recommendation accepted or seriously considered. Counsel can use the mediator to find ways to solve the authority problem and make the negotiations productive, even when the needed authority may not be present during the session. What can be achieved in the session? Are the parties able to discuss a range of possible outcomes? Is the defendant willing to recommend a higher settlement offer if defendant feels it justified? What will it take to get there?

Discovering the opposition's settlement range

Patience and willingness to make moves toward a target settlement range are tried and true techniques for keeping the plaintiff in the process, and keeping defense at the table. Select a target settlement range by evaluating the evidence, strengths and weakness of the case, the likely range of verdicts, procedural hurdles and the costs of further litigation. Giving hints, messages or signals about what plaintiff is willing to do, as well as what plaintiff would like the defendant to do can be productive, provided the messages and signals are realistic. It is the nature of the process that plaintiffs begin by asking for far more money than they are willing to accept, and defendants begin by offering far less than they are willing to pay. Sometimes when the mediator conveys numbers alone, the recipient of the move places far too much emphasis on what the recipient thinks the number means.

Mediators spend an inordinate amount of time keeping parties in the room for the first few moves, because the reaction to the moves is often quite negative. Consider helping the mediator by sending a message that you are willing to continue to make moves, but expect the other side to also make moves. Be willing to signal a range of values you are willing to settle within, in the hopes of getting a mirrored response and discovering the defendant's settlement range.

For example, in a case that might settle for $75,000, the plaintiff demands $400,000, and the defendant's first move is $5,000. Rather than walk out of the room insulted, use your mediator to help you find out a range that defendant might come to. Defendants are reluctant to offer substantial sums as opening offers against high demands for fear that plaintiffs' expectations as a result of the opening offer will be overblown. Plaintiff can initially make several moves toward (but not below) plaintiff's target range, and send a message such as, "This is a six-figure case"; "We need to see a substantial move on your part"; or "We are willing to negotiate, but your offer is way too low." A good mediator can help the plaintiff understand that to get moves from defense, the plaintiff must move as well.

Hopefully the mediator will successfully encourage the defense to give a message back. The message might be, "We have more money, but you are way too high"; or "We are here to negotiate but we are not paying six figures"; or "Please make a significant move." All of these messages imply that there is more money to be offered.

Counsel should look at moves and messages as positive steps forward. Messages, as well as numbers, can be tested. It is the movement that matters. The plaintiff should be encouraged to care about the last number, and not the many numbers that are put on the table to get there. It pays to help focus the plaintiff on their own targeted settlement range, so that moves toward that range can be seen as creating incentives for defendant to keep putting money on the table.

When parties approach their settlement ranges in the negotiation, they can still be motivated to continue as long as they see movement from the other side. As negotiations continue, both sides are more likely to readjust their initial settlement target ranges. By continuing to make moves, both parties become invested in the process.

The mediator can increasingly focus the plaintiff on the certainty of a settlement in the target range (or adjusted target range) that puts net dollars in the plaintiff's pocket and that also fills the plaintiff's underlying needs. As the monies build closer toward the plaintiff's target settlement range, counsel can help the plaintiff compare the net dollars that plaintiff might receive in settlement, to the recovery (or net cost) in the range of likely outcomes at trial or arbitration.

In many cases the gap will close, and the case will settle. The worst thing that will happen is that the parties will not budge from their last moves. However, the parties now possess a great deal more information about settlement possibilities, and have learned more about the case and their opponents. Counsel are better able to advise plaintiffs of the risks and benefits of settlement versus continuing litigation.

The stalemated mediation is still not over, however. Will the parties benefit from a mediator's proposal or additional discovery? Is a summary judgment motion or determination of the forum for tribunal required before resuming discussions? Can the parties agree to ways to streamline these next steps?

It now makes sense to actively consider a return to the table in the future because staying there in the first place created a realistic expectation that settlement could occur.

Mediator proposals

Asking the mediator to give a mediator's proposal can be an invaluable tool to move the parties together, especially to that last big push to settle the matter. There are several types and styles of proposals:

Substantive proposals

Mediator proposals of a settlement amount are designed to achieve a simultaneous "yes." There are several styles and approaches, but timing is key to all of them. The parties need to have made enough settlement figure moves or given enough signals and messages about their moves, for the mediator to make a meaningful suggestion about a settlement amount.

See Vincent, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2008 Issue

The classic mediator proposal is done toward the end of mediation, when both sides have made their last move and each side refuses to make any further moves. Or, when both parties are tired of wrangling, and their respective moves are smaller and smaller, like splitting the last piece of cake so many times that only a crumb is left to divide. If the range of the differences is not too far apart, the mediator can ask each side if they are willing to consider a mediator's proposal. A confidential conversation about a proposal in each room can ferret out necessary nonmonetary details, and how much time the parties need to consider and ideally accept the proposal. Sometimes additional authority is needed or the advice of a support person to agree to a final move. The confidential conversation might even hint at the number the mediator might propose, but the safer practice (and more neutral approach) is where the mediator states that the number will be between the last two negotiated moves, and will be a number that the mediator feels that each party might be willing to move to in order to achieve a settlement.

The mediator then writes a number and any key terms on a piece of paper given to each side, with instructions to provide a response after a designated time period. The mediator asks each party to consider the benefits to the party of making one last and final move to resolve the matter. The details of the mediator proposal vary from case to case, and might include the mediator's confidential written reasons why that particular party should consider accepting the proposal.

In the classic model the mediator will announce "yes" if both sides accept the proposal and "no" if both sides do not. The mediator announces that if one side says "yes" and the other side says "no," or if both sides say "no," the mediator will announce only "no," thereby protecting a party who says "yes" from the other side knowing of the party's assent.

Softer approaches to the mediator's proposal can work as well. The mediator might casually float a number to both sides, and ask each party whether, if the other party agreed to that number, the first party would as well. Having received a nod from each side, the mediator can then formally present the proposal and ask each side to commit to the number if the other side will commit as well. With complete assent, the mediator announces a settlement. This approach of floating, then firming up a number, works well for moving the parties exactly halfway between their last moves.

Parties should suggest a mediator's proposal whenever there is a stalemate, but should not push the mediator to suggest them too early. A proposed settlement amount made too early will likely be viewed as the mediator's evaluation of the case based upon its merits, and is just as likely to be the last chance for the mediator to serve the party who disagrees with the value. A mediator's proposal that is designed to bridge the negotiated gap between the parties, framed as a proposal based upon the mediator's best sense of the number the mediator believes that the parties might each be willing to accept in order to settle this particular case, given all of the dynamics present, will have more play value. Parties often continue negotiations after a rejected mediator's proposal made later in the process, because the proposed number is seen more as an anchoring number, rather than an evaluation.

If plaintiff accepts a proposal and the defense does not, plaintiff's counsel can still contact the mediator to continue the negotiations, and discuss whether it is useful to reveal the plaintiff's acceptance of the proposal.

Process proposals

The mediator can float in a joint session, or confidentially to each side, a suggestion for a next step in the process. Fact-finding processes and discovery agreements can be discussed as ways to get past specific evidentiary hurdles. In some cases, one key fact drives the parties' negotiations, and getting some shape around that evidence can help the parties make further moves.

Using agreed-upon experts, appraisals or broker opinions, instead of each side retaining experts can save time and money. A joint session at the end of the mediation can result in case planning and calendaring agreements in just a few minutes.

Staying in touch with the mediator

Even when parties have left the table and no future settlement steps are planned, keeping in touch with the mediator can help counsel and parties think about settlement. Most mediators do not charge for routine followup calls, and are delighted to have the opportunity to continue to work with the parties. Ask if there is a charge for a conference call or extensive further negotiation efforts.

In today's busy litigation environment, it is perhaps not surprising that many counsel do not return phone calls initiated by the mediator. This is counsel's missed opportunity to explore further settlement opportunities in a short phone conversation. E-mail followup with the mediator can be a very effective tool. Consider using the phone and making phone appointments where needed, because the value of the mediator is maximized in voice-to-voice dialogue. The interactive conversation can take into account the evolving dynamics in the case and generate a variety of creative substantive and procedural ideas to move settlement discussions forward.

Contacting the mediator is a good way to find out if the other side is interested in continuing discussion. If plaintiff's counsel perceives that letting the other side know of plaintiff's continued interest will signal weakness, the mediator can be asked to approach defense counsel and indicate that the mediator initiated the idea for the call.

Conclusion

There are many ways that counsel can be proactive in getting to the table and staying there. The key is to consider mediation a process, rather than a one-time event. Application of positive, collaborative, problem-solving techniques helps build relationships with the other side that serve to minimize the cost of continuing litigation and facilitate further negotiations. Staying in the process long enough to discover the defendant's "true" settlement position will help the plaintiff

See Vincent, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2008 Issue

make an informed choice about whether to settle or litigate.

Caroline C. Vincent is an attorney mediator and arbitrator with ADR Services, Inc. in Los Angeles. She specializes in employment, personal injury, probate/elder abuse, complex business, real estate, professional liability, and family business disputes. She is a 1978 graduate of the USC Gould School of Law where she served on Law Review.