STRATEGY: MEDIATION VS. TRIAL

Monday
December 5, 2022
12pm - 1:30pm

Moderator

David Casselman, Esq.
ADR Services, Inc.

Speakers

Vince Bartolotta, Esq.
TBM Lawyers

Bruce Broillet, Esq.
Greene Broillet & Wheeler LLP

Charles Grebing, Esq.
Wingert Grebing

Peter Meier, Esq.
Paul Hastings, LLP.

Moderator: David Casselman, Esq., Neutral at ADR Services, Inc.

Panelists:

- **Vincent Bartolotta, Esq. of Thorsnes Bartolotta McGuire**
- **Bruce Broillet, Esq. of Greene Broillet & Wheeler**
- **Charles Grebing, Esq. of Wingert Grebing Brubaker & Juskie**
- **Peter Meier, Esq. of Paul Hastings**

This experienced panel will discuss how skilled plaintiffs and defense lawyers prepare their cases for mediation vs. trial, with an emphasis upon the similarities and the differences in each instance.

As a generalization, absent some unique consideration, most experienced litigators prepare by adopting the worst-case assumption that their case will go to a jury trial.

With that default assumption, what preparation is required, in what order, and for what purposes? In most cases, the same preparation for trial is critical for a mediation.

How important is it to complete all or most of the discovery needed before mediating a case?
Even then, is there still more required to prepare for mediation?

For example, starting at the outset, what is the first focus of a plaintiff's lawyer when deciding whether or not to take a case?

Does defense counsel focus on the same issues following the assignment of a new case?

Is it necessary to understand the applicable coverage and defenses before mediation? How does knowledge regarding the scope and status of the applicable coverage play a part in effective mediation preparation? Strategy? Does this awareness matter as much during trial?

On the plaintiff's side, should you use what you know about the coverage issues during mediation or avoid coverage issues at that stage? When, if ever, should you use and lean into them? How?

Clearly, coverage can be a key issue for the defense. So, drilling down a little, assume that you are defending an insured under a policy with an outcome determinative reservation, and you are Cumis counsel. What is the significance of those factors and how might they affect your preparation for a mediation vs. trial in a given case?

Must a case be ready for trial before an effective mediation can take place?

Once a case is ready for mediation, should counsel have a goal or goals beyond just trying to reach a favorable settlement? What about learning from the opposition? The mediator? Instilling fear in the opposition?

In other words, if seasoned lawyers hope to gain something of value, even if they do not settle the case, how can they accomplish those objectives?

How important (and why) do you think the briefing for a mediation is important, and how does the preparation of a trial briefs differ from a mediation brief? Is admissibility key in both?

When in time do you start preparation for a mediation as compared to a trial? Plaintiffs?

Does the timing of the defense preparation for mediation differ from Plaintiffs?

What about focus groups? Have you used focus groups to prepare for mediation, not just trial? Why and how is that valuable?

How do you advise your clients about the outcome of a focus group?

In complex contract cases, with significant claims against the various parties, how does that affect your preparation for a mediation?

Generally, do plaintiffs look at the full gamut of issues for mediation, in the same way you obviously must when preparing for trial?

Do defendants employ the same analysis, or do you differ on this issue, targeting narrower issues in your preparation for a mediation?

The first decision which must be made in any mediation involves the choice of mediator, which counsel can usually control to some extent. How important is it to secure a mediator you really like, as opposed to letting your opponent select the neutral?

How do you arrive at numbers for a mediation demand/offer? How do they differ from what you might demand or discuss with a trial judge or jury at trial? Plaintiffs? Defense?

In general, there seem to be fewer mediators who use joint sessions at the outset of a mediation when compared with the approach used in the past. Is this an appropriate change in your view?

Do you use different or additional evidence during a mediation as compared to trial? Why?

Do you employ a different tone in front of a jury vs. a mediator? What do you change and why? Does the same hold true for both plaintiffs and defense counsel?

How do you decide how much to tell your mediator vs. the parties in briefs or during mediation?

Do you ever use all of your best evidence during a mediation? Do you share more or less with the jury vs. your mediator? Do you base that decision upon how much you trust the mediator?

Do the rules of Civil Procedure and/or Evidence enter into your decision as to how much to offer/accept during mediation? Do plaintiffs/defendants differ on this issue?

In cases which do not settle, do you use the mediator's comments or proposal to prepare your client for trial? Do you often use what you learned as a tool to prepare for trial?