Reprinted from the Nov. 14, 2001 issue of Verdicts & Settlements

FOCUS ON ADR

# Out of Balance

**OPINION: Sending cases to mediation has been touted as a way to avoid trial, but many pitfalls exist.**

BY DAVID M. GREY

Mediation and other forms of alternative dispute resolution are praised as ways to avoid trial. Much is written in favor of mediation, yet little criticism of its downside, which can be significant, appears. Advocates of mediation list cost, uncertainty and the emotional trauma of trial as the downside of litigation. Proponents of mediation also argue that it allows the parties to maintain control over how their dispute is resolved.

Some dangers to mediation should be explored and recognized. These dangers flow from the very nature of the mediation process, which is contrary to the winner-take-all concept of trial. The all-out battle for victory that is trial forces each side to focus on the core strengths and weaknesses of the case.

In trial, the jury is forced to focus on the actual evidence, not what the lawyers say the evidence will be. The jury gets a firsthand view of the evidence, with the specific purpose of choosing one side to win. The jury is not charged with finding a compromise for some purpose extraneous to the facts of the litigation.

This difference between mediation and trial must be recognized and dealt with to maximize the client's advantage.

First, the mediator is not truly neutral. The mediator has a stake in settling the case. The success or skill of a mediator often is measured by the ability to resolve a dispute, not by whether the mediator helped arrive at the right resolution, assuming there is one. The jury decides its one case and goes home. The jury does not have to worry about marketing itself for future business. The jury is charged with making a decision based on the evidence and has no other agenda.

By contrast, consideration must be given to the mediator's agenda when evaluating the commentary during the proceedings. The mediator would not be there if he or she were not trying to help resolve the case.

Compared to a jury, the mediator may be too sophisticated. The jury's lay view of the law, frequently criticized, often can come closer to justice than a roomful of law books. As one grows more sophisticated, the ability to see gray areas and rationalize certain results increases. By contrast, the supposedly unsophisticated juror probably will have a better sense of basic right and wrong and may not appreciate legal technicality.

Most mediators are lawyers trying to encourage settlement, not trying to find justice or distinguish between right and wrong. Recognize the mediator's higher degree of sophistication and factor it into your evaluation; it is not necessarily bad, just one more thing to consider in the process. The technical issue flagged in mediation may result in summary judgment and never reach a jury, but carefully consider how a technical issue may play out differently with judge, jury or court of appeals.

The parties are at the mercy of the mediator's integrity. There are mediators whose ethics are beyond reproach, but because the process is nonbinding, the same high ethical standards imposed on a judge or arbitrator may not apply.

Counsel should not assume that neutral and ethical are the same thing. Advocates should be certain that the mediator has the appropriate ethical standards.

Trial is not always bad. The cost, uncertainty and emotional drain of trial are cited as reasons to settle at mediation; certainty is the trade-off for a settlement. It is incumbent on counsel to assess candidly the risk and uncertainty of trial against the settlement. Consider the value of the settled dispute over trial. Trial is a legitimate end to a dispute.

One of counsel's jobs in mediation is to evaluate and critique the relative positions and help the client choose the most prudent course of action. If a reasoned analysis dictates trial, do not be afraid to reject a mediated settlement. Counsel and client will know the nuances of their case better than the mediator. Advocates should listen to what is said but never stop analyzing in favor of accepting a position suggested at mediation.

Counsel needs to factor in the emotional toll of mediation on the client. For unsophisticated clients, mediation can be as stressful and emotional as trial, and they truly may not understand the difference. Counsel should not rely on the neutral to set the tone of the mediation.

Advocates should discuss with the mediator what approaches will be most helpful in proceeding. Counsel should consider doing this without opposing counsel, if appropriate to assist in a candid discussion about the problem with the mediator. Before agreeing to mediation in a highly emotional case, counsel must think through the relative merits of subjecting the client to mediation, which may weaken his or her resolve to achieve a satisfactory and appropriate resolution.

Aggressive opposing counsel may take positions in mediation to intimidate, which would never occur in court, for fear of alienating the jury. Particularly aggressive counsel may try to control the mediator, often overwhelming a less-skillful mediator and causing the unsophisticated client to fear and distrust the entire litigation process.

Cost and timing of the mediation also are critical for success. Mediation at the wrong time in a case may be counterproductive. Counsel should know enough about the dispute to argue properly for an appropriate settlement. On the other hand, an early mediation may be more conducive to successful resolution, particularly before the parties have invested time, attorney fees and energy in preparing their cases.

In the smaller case, the cost of mediating may outweigh the cost of trial, particularly if trial can be accomplished in one day. Consider the economic sense of mediation, including preparation time for both the client and counsel. The most effective mediations usually involve significant preparation.

The cost of litigation affects the perspective of each party. Does the other side have the staying power to litigate? Do they think you do not? Is the other side using mediation as a fact-finding mission or, worse, a means of impressing on its opponent just how hard it will fight?

Mediation, as with all negotiation, is part game. Mediators are just players in the game, and their comments must be evaluated carefully.

Mediation is not necessarily bad or something to avoid. Indeed, counsel are not doing their job if mediation is not considered and, where appropriate, recommended to the client as an option. Just as one method of ADR is not right for all cases, counsel needs to recognize that some cases may only be resolved appropriately through trial.

Finally, treat the mediation with the same fear and respect as trial. Prepare thoroughly and continually evaluate. Many of the so-called evils of mediation can be avoided by treating it like trial.

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Illustration by Margaret Scott