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Work Session 6: Mediation Strategies for Public Entities

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MEDIATION STRATEGIES FOR PUBLIC ENTITIES

By Hon. Patrick J. Mahoney (Ret.)

Public entities - whether state, county, city or special district - are not like other litigants. Government entities have a responsibility to the public as a whole and often to the other party to the dispute. In addition, the business of government is conducted in public and the conduct of government is scrutinized by the media which has access to records that need not be provided by other parties. As a consequence, how a public entity resolves a dispute has an impact beyond the case at issue and is subject to scrutiny not applicable to other entities. This combination requires government entities to resolve disputes taking into consideration a broader and informed constituency, the collective public, and the impact of the resolution on interests beyond the present dispute.

To discharge this responsibility, public entities are well advised to take advantage of the benefits of mediation. To maximize the benefits, it is critical that counsel and decision-makers have an understanding of mediation and how to effectively prepare for a mediation session.

What Is Mediation?

Mediation is a facilitated negotiation that enables the parties to examine the dispute from a variety of viewpoints, define basic issues and interests and explore mutually satisfactory options. With the assistance of a third party, the parties have the opportunity to examine their perceptions and to test them in a facilitated and confidential process that facilitates resolution.

Fundamentally, mediation gives the parties control over the resolution of the dispute. The process enables parties to be creative in crafting terms to resolve disputes and minimizes litigation costs. Since 95% of cases are said to result in settlements, it is advantageous to pursue mediation sooner rather than later. In the words of Abraham Lincoln: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time.”

Key to a successful mediation is to avoid impasse and the breakdown of the process. The greater one’s understanding is of the process of mediation, the greater the likelihood that impasse will not occur and if it does occur, what it will take to move beyond impasse to resolution.

Initial Steps

The first step is to determine the most effective time to seek to mediate a dispute. There are three important considerations: the issues in the case, knowledge of the central

facts and the willingness of the other side to negotiate. Public entity cases frequently involve an award of attorneys' fees either to the plaintiff only or to the prevailing party. When an award of attorneys' fees is part of the case, it is beneficial to seek mediation at the earliest realistic point so that attorneys' fees do not become a major stumbling block in the resolution of the dispute. All too often parties' insist that they need additional discovery before proceeding to mediation. When this is done in the contested litigation mode, it is cumbersome, time-consuming and often unsatisfactory. The gathering of the central facts can be facilitated as part of the pre-mediation planning. The final step is securing the agreement of the other side where the court is not ordering the parties to engage in some form of alternative dispute resolution. Securing this step should be a goal of counsel from the beginning of the case and counsel's communications with the other side either will foster or hinder this step. It is not a sign of weakness to proceed to mediation; it is a sign of wisdom reflecting a realistic understanding of the outcome of the overwhelming number of cases.

Selection of the Mediator

The selection of the third party, the mediator, is a matter of negotiation and personal choice where both sides make a collective selection. Parties approach the selection process in several ways. For example, "I will take any one the other side wants;" or if the other side proposes someone, "I will reject the person;" or "I will poll those who are familiar with mediators and get a recommendation;" or "I will ask a mediation provider for three names;" or "I want someone who is an expert in the field:" or "I will only agree to a judge;" or "I want someone who will push the other side;" or "I want someone who will simply facilitate the communications and refrain from recommendations;" or "I insist on someone who will evaluate this case and tell the parties what is a fair settlement;" and so on.

> Those who have written on the subject focus on what mediators commonly do and from there focus on individuals who can best accomplish the central tasks of any mediation: commencing the process, comprehending and gathering necessary facts, understanding the parties' positions and underlying interests, the ability to empathize with the parties, be an impartial participant, have the ability to communicate effectively with all participants, be able to assist the parties in exploring options, proposing appropriate options, and the skill set to move the parties to an agreement.[1[1]] Where the parties involved are from different cultures, a mediator's understanding of the cultural differences is a further factor that warrants consideration.[2[2]]

[1[1]] See generally, The Negotiator's Fieldbook, Andrea Kupfer Schneider and Christopher Honeyman, editors, published by the American Bar Association, Section of Dispute Resolution (2006) at 573-590: Mediation: The Art of Facilitating Settlement, Straus Institute for Dispute Resolution, Pepperdine University School of Law (1993-2009).

[2[2]] The Negotiator's Fieldbook at 591-602.

There are two predominant mediation styles. The first is purely facilitative, meaning the mediator does not critique the parties' positions, but facilitates the communications to enable the parties to find common ground. The other style is evaluative, where the mediator very quickly expresses a view on how the dispute should be resolved and moves the parties to that resolution. Most mediators working with civil litigants are both facilitative and evaluative at different times in the process and use both techniques to seek agreement.

In selecting a mediator, public entity parties should take the time to make an informed decision rather than merely opting for whomever the other side wants. In doing so, the negotiators need to focus on the primary skills necessary to resolve the dispute since no mediator is likely to be able to accomplish all of the central tasks to the complete satisfaction of all of the parties. In addition, consideration needs to be given to whom the elected or appointed decision-makers are likely to respect when seeking final approval of the settlement. This factor may determine whether a settlement reached only after difficult negotiations is finally approved.

Negotiation Planning

Avoiding impasse begins at the inception of the process. The first step is negotiation planning to clarify with the other side and the mediator the basic ground rules for the session. Who is to attend? Are briefs to be exchanged in advance? Are opening offers to be exchanged before the session? Will there be a joint opening session and if so, what are the ground rules: allocation of time, who is to speak lawyers or clients or experts? Is additional information needed and if so, how can that be obtained?

The second step is to be on top of your case, be prepared to address the strengths and to respond to the positions taken by the other side. Assemble key documents and testimony in a succinct format. Whether in a brief to be shared or an opening statement in a joint session, craft a focused argument that emphasizes what is undisputed and explains why your version of disputed issues is more persuasive. Write and speak in a way that you would like to be addressed by the other side. Being cool, calm and collected in writing and speaking is more effective than a hostile and vituperative presentation.

Third, identify interests of the public entity and the other party beyond the current dispute. Interests may involve process, substantive issues, continuing relationships and principles. For example,

- A claim of wrongful arrest may involve police crowd control procedures;
- An employment case may involve the substance of future tests, selections from promotion lists, layoff procedures;
- A zoning dispute may involve protocols for the approval of a variance;

- A contract dispute may involve the award of future contracts, the entity's award procedures;
- A tax dispute may involve the entire assessment process;
- An election dispute may be seeking to address how future ballot information is presented;
- A personal injury or property damage claim may involve a challenge to a practice or procedure that is widely used when operating transportation systems or jails or hospitals or other facilities;
- A claim of the lack of resources in a single school may impact every school in the district.

By identifying the broader interests beyond the facts at issue, counsel will be in a position to consider introducing the interests as a mechanism beyond mere dollars to fashion a resolution. In addition, counsel will be in a better position to be able to respond to the other side's concerns.

The fourth step is the most important, the most difficult and is rarely done - a candid assessment of the weaknesses of your case or the strength of the other side's case. Why is this so? The reasons are many: optimistic overconfidence, over-evaluation based on selective perceptions and self-fulfilling prophecies, fixation on a single position or solution, mistrust of the other side, linear thinking, fear of looking weak, loss aversion or the fear of giving up what you have or appears to be in our grasp, over-investment in the case, bad communication with the other side, personality clashes, self-righteous principles, and believing both sides want or value the same thing.[3[3]]

The following techniques enable you to begin to critically address step four for it is through the mediation process that this step is crystallized. Determine what is the best alternative to a negotiated agreement (BATNA), the likely alternative (LATNA) and the worst alternative (WATNA). Your instinctive focus is on the best alternative so spend most to the time on the worst alternative and assess how that could come about - for example, the poor performance of key witnesses, the inability to get into evidence key records, rejection of a legal theory, an unsatisfactory jury or a hostile jurist. In doing so be cognizant of the cost of litigation and the stress on the individuals involved in the case.

The final step is to develop a negotiating strategy. Do you want to make the opening offer as a way to define the issues or do you want to be in the responsive mode so you can assess the other side's objectives? How is the other side likely to respond? Put yourself in the other side's shoes. Understand distributive bargaining (a single pie to be cut up) and integrative bargaining (an expanding pie). Understand the client's interests that are rarely a single item, i.e. money. The opening positions merely define the zone of negotiations; the parties' first realistic offers define the zone of settlement. Consider

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[3[3]] JAMS Institute, Common Obstacles to Negotiated Settlement.

formulating a negotiating strategy that enables you to get to the other side's initial realistic offer.

Negotiation Planning with the Client

To avoid impasse, it is essential that the client be a knowledgeable participant. In public entity cases, the norm is for a proposed settlement to be presented to elected or appointed public officials for approval because these individuals represent the broader constituency, the public. Generally, these individuals are not participants in the mediation even though their policies or decisions are at issue

As a consequence, it is essential that the right staff person be involved, a person who commands the respect of the ultimate decision-makers. It may be in a complicated case this person will not be at the first session (for example the Chief of Police), but it is essential that this person is aware of the process before and after the initial session and is prepared to participate as needed. Who the right person is will vary but at a minimum, this person must have recommending settlement authority (since final authority is with the elected officials) and the ability to go beyond those parameters if appropriate as the mediation process unfolds.

Counsel must spend time with the client to explain the mediation process and the agreed upon ground rules. Explain who will be present and the difference between joint sessions and caucuses. Although the terms of a settlement will be public, it is important that the client understand that the mediation session is a confidential proceeding. The goal is to encourage candor to see if a resolution is possible. It is not a process to learn about the other side's case although that will be a consequence.

Prepare the client to be a participant. This is the client's case and any resolution is the client's decision. By being an active participant, the client's position will be clarified and more effective. Stressing the confidentiality of the meditation should enhance the representative's willingness to be an active participant.

Understand not just what the client would like to get but the range of both parties' interests that may enable a settlement to be crafted. By focusing on these issues in advance, counsel will be able to provide a framework for a settlement that satisfies an interest of the other side and facilitates getting to financial resolution. This is commonly referred to as integrative bargaining or expanding the pie as contrasted with distributive bargaining, i.e. dividing one pie.

Review the BATNA and the WATNA as a means of helping the client understand the strengths and risks of continued litigation.

Explain the mediator's role as a facilitator of the process, not an adjudicator of the merits. Explain that it is common for mediators to be the devil's advocate to test the

parties' assumptions and to be evaluative where the parties' desire it and/or as a technique to move the negotiation forward.

Discuss with the client the negotiating strategy, the pros and cons of opening and what a comprehensive settlement would look like.

Insurance Coverage Issues

Where insurance coverage is available, government counsel must address the carrier's need for information about the case and coverage issues in advance of the mediation. There are many different insurance policies available and so the first step is to be clear on the type of coverage. This requires an examination of the policy, an analysis of how the other side's claims warrant coverage and that timely notice has been given of the claim.

It is important to remember that a duty to defend policy is broader than a policy to indemnify. It also is often the case that the carrier selects counsel where there is duty to defend coverage. In such cases, a public entity needs to consider retaining its own counsel if there is a concern that carrier's counsel is more focused on the carrier's exposure than the public entity's interests.

Insurance companies are in the litigation business and litigation costs are a regular part of that business. As a consequence, it generally is true that the carrier is more focused on the merits of the claim and less concerned about litigation costs. This means that counsel must be certain that the carrier has the information necessary to evaluate the case and that the information is available well enough in advance for the carrier to have it reviewed by those who set settlement authority.

Where there are multiple carriers involved, it often is beneficial to have a separate session with the carriers in advance to address coverage issues.

Opening Offers

The opening briefs and/or presentations in the opening joint session articulate the parties' opening positions. The briefs should describe what the case is about, identify the issues to be addressed, disclose the basis for a party's position and provide a forum of having one's day in court. The tone of the presentation will affect the initial phase of the mediation. An unduly hostile opening will mean that the mediator will have to begin by moving the party or parties past hostility to a realistic assessment of what is possible and the risks of continuing the litigation.

It is common in public entity litigation that the opposing side is hostile and indignant. The most effective strategy in response is an even tempered and measured reply. It is important that public entity counsel allow the other side to have their day in

court and to have their views heard; this allows the discussion to move forward. It is the responsibility of the mediator to insure that the anger and hostility is expressed where appropriate while keeping a boundary on the proceedings. Experienced mediators know how to do this.

The conventional wisdom is that the plaintiff or complaining party makes the opening offer. However, there is an important advantage of opening in that it gives you the opportunity to affect the opponent's expectations about the negotiations. An opening offer may be said to fall into one of four zones: the zone of agreement, reasonable zone, a credible zone or an insult zone. An offer in the zone of agreement is one that is acceptable to both parties, the final step in the negotiation; an offer in a reasonable zone is one perceived by the other party to be indicative of a likely resolution, often said to be a point half way between this offer and the other side's first reasonable offer; an offer in the credible zone does not set the bargaining parameters but it is not so unreasonable to end the negotiations. An offer in the insult zone may cause the other side to cease bargaining; this is particularly true where the other side begins the proceedings in a hostile manner.

It is common for parties to begin at the extreme edge of the credible zone based on a position that every issue will be decided in the offeror's favor. For negotiations to continue, such an offer must be soft, i.e. it is just an opening to test if the other side wants to bargain. When making such an offer, you must be prepared to make concessions to the response and so indicate to the mediator.

Parties who elect to make a reasonable opening offer must be clear on having limited flexibility to move from that position. This can be done by making little movement in reply to the other side's counter or by articulating a credible consequence if no agreement is reached. For example if the case cannot be settled near the reasonable opening offer, the party will award the contract to another entity.

In making an opening offer, it is helpful to put on the table material terms of any resolution. This is not essential if the offer is in the zone of credible but once the negotiations move into the reasonable zone, it is critical to get all issues on the table. This also has the effect of moving from distributive bargaining to integrative bargaining and provides more alternatives to structuring a resolution that works for both sides.

Any negotiation involves issues, identifiable concrete concerns, positions, a party's perspective and interests, and needs to be satisfied. When making an offer, it is important to be soft on people and hard on issues, i.e. separate people from the problem by understanding the problem from the opponent's perspective and recognize the party's emotions. Emphasize the substance of the dispute with concrete facts supported by objective evidence. Identify whether there is a desire to continue the relationship or to achieve a broader result; if there is, a party is more likely to be accommodating. In contrast where there is no interest in the relationship, the negotiations will be a

competition. Consider how the offer will be perceived by the other side. Parties will continue to mediate as long as they believe the process is fair and the bargaining is in good faith.

Where the parties do not share a common culture, it is critical that counsel have an understanding of the common characteristics of the other culture. This will enable counsel to grasp the other side's negotiating style and positions taken. With that understanding, it becomes possible to make a more compelling response to positions taken by the opposition.

Joint and Separate Caucuses

Mediators and parties have preferences for conducting joint or separate caucuses. However in any negotiation, it is likely that both forms will be used and so it is helpful to have an understanding of the common dynamics in each format.

Joint opening sessions are commonly used to introduce each of the participants, review the ground rules and emphasize the confidentiality of the process. Where the parties give opening statements, it is important to understand that it is a format for a party or the parties to have their day in court. This often involves venting in addition to a discussion of the issues and counsels' opportunity to demonstrate their skills to the client.

The mediator's task is to set the tone for moving forward by stressing the purpose of the mediation to resolve the issue in a confidential forum. This includes the ability to facilitate venting and the expression of emotion without derailing the process all the while maintaining the position of neutrality. Generally, the mediator will seek to give the participants a human face by questions designed to elicit personal information unrelated to the dispute such as a party's interests or family or comments about the home town sports team. The key task for the mediator is to assess how long to remain in joint session and what issues would benefit from a joint discussion. This generally turns on the parties' interaction and the willingness of the parties to explore their interests and not just the substance of the dispute.

The benefit of the joint session is for both sides to see and hear the other side and to understand how the other side views the dispute. It is an opportunity for the parties to demonstrate credibility, sympathy and empathy and to feel acknowledged. The joint session also affords both sides the ability to demonstrate that the respective clients are the decision-makers and that the case is not driven by the lawyers. To the extent the benefits are realized depends on how counsel approach the joint session in terms of substance and tone. It is a real opportunity for public entity counsel to give the other side the opportunity to feel heard in an emotionally charged case, which will facilitate the subsequent discussions.

When the parties are in separate caucuses, it is common to begin with a facilitated discussion of each party's case. Through open-ended questions and engagement of the principals and counsel, the mediator confirms their understanding of the party's position and seeks to identify interests beyond the present dispute and the obstacles to settlement. All the while, the mediator is working at gaining the trust of the participants. In the early sessions, this generally means accepting and understanding the party's position without directly challenging the underlying assumptions. The goal of the early caucus sessions is to build the parties' trust in the mediator and in the prospects for settlement. It is not simply to carry offers and counteroffers between rooms.

As the process moves forward, the mediator will facilitate the exchange of information and begin to move each side toward alternatives to their opening best case scenario. The mediator's questions become more probing as the mediator becomes more evaluative than facilitative. Alternatives may be proposed to encourage the parties' to consider the dispute in a new way and to consider offers and counteroffers other than a tit for tat negotiation format.

Impediments to Resolution

There are several common problems that arise that impede resolution[4[4]]:

- Failure of communications
    - Believing opponents want or value the same thing
    - Not hearing the underlying message
    - Hidden agendas
- Poor negotiating skills
    - Valuing what you have higher than others do
    - Linear thinking
    - Focus on your case, not the other side's case
    - Demeaning responses
- Lack of needed information
    - Selective perceptions
- Emotional investment in a principle of the litigation itself
    - Mistrust of the other side
    - Fear of looking weak

[4[4]] See Jay Folberg, Psychological Traps and Professional Objectivity, JAMS Institute (2009).

    - Embarrassed to accept new facts
    - Not feeling heard
    - Personality clashes

- Disagreement over likely results

    - Optimistic overconfidence
    - Over-evaluation of the case or an item
    - Reliance on an expert opinion that is disputed
    - Ignore litigation risks

- Lack of authority with those present
- A need for an authoritative ruling

Overcoming Impasse

Impediments can be addressed by skilled mediators. Facilitating communications and having the parties focus on the problem will enhance communications. It will also enable the parties to become more effective negotiators through a series of techniques described below. The lack of information can be addressed by identifying what is needed and establishing a process to obtain the information. Emotional responses need to be put on the table and acknowledged before they can be overcome. Disagreements about a legal outcome can be reduced by exploring the best and worst outcomes thereby creating some level of doubt if the litigation proceeds. Lack of authority is easily addressed by getting the right person to the table. The only issue that cannot be resolved by mediation is the rare case where an authoritative ruling is needed but a procedure can be negotiated to facilitate and clarify the issue to be decided.

Questions and Tasks: When approaching impasse, mediators use the facts and logic to cause the parties to examine their perceptions and use inconsistencies to create doubt in their perceptions. The mediator acts as a reality check for the parties. Costs and risks of litigation are highlighted as well assumptions about the persuasiveness of key witnesses or documents. The mediator seeks to move the parties to consider future opportunities and not dwell on the past.

Mediators rely on a set of common questions to engage the parties in a collective effort to overcome impasse. For example,

- What is the most effective thing we could do now?
- What strategies do you see to move the negotiations?
- How would you expect the other side to respond to your suggestions?
- How will your position or statement or document or testimony or assumption or threat be helpful?
- Why will a new issue at the eleventh hour help resolve the case?

Additional techniques to facilitate movement are:

- Having the parties develop criteria for a good settlement.
- By asking "If you were the other side, do you think this proposal would work?"
- The use of "what if" hypotheticals to test assumptions.
- Examine BATNA, LATNA and WATNA.
- Use of objective data such as jury verdicts or settlement history of comparable matters.

The Apology: The use of an apology can be an effective tool in public sector litigation. It enables the victim to feel heard without the need to rely on money to do so. To the extent there is a concern that an apology may constitute an admission and thereby impact insurance coverage, language can be crafted to address that concern. An alternative is to agree to modify a policy or practice that is involved in the litigation. For example, agreeing to change a crowd control procedure.

Bracketing: This is a common technique with several variations. For example:

- "If they were at X, where would you be?"
- "Would you move to X if I could get B to move to Y?"
- "If I could get them to X without them knowing that would you be willing to do so, would that work?"
- "Would you continue the negotiations if the range was between X and Y?"
- Blind bidding where the parties submit confidential "final" offers with agreement as to how the offers are to be treated:

    - If the difference in positions is X, the mediator discloses where the parties are and negotiations continue or the parties may agree to split the difference.
    - If the difference is Y, the mediator does not disclose the numbers and negotiations continue.
    - If the difference is Z, the positions are not disclosed and the mediation ends.

An interesting strategy where only money is at issue is where the mediator does not convey offers and counteroffers back and forth. Rather, the mediator holds alternative discussions with each side raising points and getting ongoing indications from each side as to what they would be willing to do. By not disclosing where the other side is, the mediator is working toward each side's reasonable offer and then zone of agreement. By maintaining the parties' position in confidence, the mediator is preserving each side's bargaining position if no agreement is reached.

Multi- party Assessments: Use of the Creo Pie Chart (named for the creator Robert A. Creo) is a useful technique to break impasse in a multi-party case. Briefly, it works like this: The individual plaintiffs and the individual defendants work separately and in confidence with their lawyers to draw a pie circle that is then sliced by a percentage representing their distinct view of each party's share of liability or the pie. The confidential pies are given to the mediator to assemble the results based on the average of the multiple assessments. The mediator then presents the pie sliced based on the collective average. This is followed by continued negotiations in separate caucuses and it provides each party with the collective thinking of all of the parties, not just one side or the other.

Principles or Counsel Only: On occasion attorneys may hinder the process for a number of reasons. When that occurs and it appears the principals desire a settlement, convening a joint session of the principals with the consent of all parties may break the impasse. This is particularly true where it appears that the principals have the capacity to talk to another; it also is a particularly useful technique where there is a prospect of some form of continuing relationship.

Alternatively, where the parties have a seeming inability to grasp the opportunity of resolution and the risks of continued litigation, the mediator may convene counsel without the clients in an effort to fashion a collaborative strategy for settlement. To do so requires a level of confidence and objectivity on the part of both counsel and the willingness to be perceived by the clients as less than a pure advocate. In convening such a session, the mediator will appeal to the attorneys' role as counselors and not mere advocates.

Mediator's Proposal: A mediator's proposal often is viewed as the final tool in the mediator's tool bag.[5[5]] There are several variations of the proposal. The most common is to solicit the parties' consent to a proposal; the mediator then presents the proposal in confidence to each side; if both say "Yes," there is a settlement; if one party says "No," the negotiations end; and neither side knows if the number was acceptable to the other side. Before presenting the number, the mediator may disclose that the number will be within a specific range and thereby establish a willingness on each side to consider such a resolution. Where there is one "Yes" and one "No," some mediators in certain cases will go to the affirmative side and suggest that negotiations be continued and that the mediator disclose the "Yes." In such an instance, the mediator must have a high level of confidence that a "Yes" will be secured either at the mediator's number or one the first party could accept.

There are two schools of thought on the formulation of the number. One is that the mediator selects a number that the mediator believes each party would stretch to for

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[5[5]] Margaret Shaw, "Mediator's Proposals: Let Me Count the Ways," Dispute Resolution Magazine, Winter 2012.

resolution. This assumes the parties have negotiated in good faith and have not been trying to game the number by their negotiating strategy. The other approach is for the mediator to base the number on the mediator's evaluation of the merits of the dispute and the likely outcome. This assumes the mediator has the ability to make such an assessment from what has been presented in the course to the mediation.

When making the proposal, the mediator may provide only a number without an explanation; provide the number with an explanation; or provide the number with a lengthy analysis as to why this is an appropriate resolution of the case. Upon receipt of the number, the parties may agree to respond that day or several days later after consultation with others.

Mediator's proposals are effective in public entity cases primarily because the proposal is a recommendation from a respected and independent party. This provides the public decision-makers with an additional rationale apart from their counsel's recommendation on the wisdom of resolving the dispute on the proposed terms. The mediator's proposal may include a resolution that addresses interests beyond the current dispute that the parties would be reluctant to address but affords a further basis for resolution. Where the mediator's proposal is accompanied by an explanation, it carries the additional benefit of articulating the critical issues that are entitled to persuasive weight in considering a proposed settlement. The mediator's proposal generally is the last tool in the mediator's tool box because the mediator ceases to be the facilitator of the parties' agreement and becomes the evaluator. Where a party disagrees with the evaluation, the mediation comes to an end; whether it resumes depends on subsequent events in the case and/or the parties' reconsideration of their positions.

Confidential Advisory Opinions: Where the parties' assessment of the strength of the case is the primary obstacle to settlement and the risk of error is significant, the parties may agree to have a mediator prepare an advisory opinion. This is akin to neutral evaluation; the difference being that it is within the framework of a confidential mediation. It is a more elaborate form of a mediator's proposal because the mediator meets with the parties and gathers information beyond the mediation briefs and disclosures to date. After doing so, the mediator prepares a tentative advisory opinion; the parties appear and are given the opportunity to challenge the tentative decision; and the mediator then issues a final advisory opinion. A further mediation session is held to determine if either side has changed its position.

The advantage of this process is that the opinion is crafted after substantial input from the parties; the opinion is written and available to decision-makers who may not have participated in the mediation process to date. The opinion also is confidential so that if the case does not resolve, the advisory opinion is not subject to disclosure. The benefit for public entity litigants is that it gives the elected or appointed decision-

makers the carefully formulated views of an experienced mediator on the merits of the dispute.

The Consequences of Failing to Resolve the Dispute

If a case does not settle, the parties proceed with the litigation and obtain a result. The result of any one trial is anecdotal information in subsequent cases whether to accept or reject the offer on the table. There is, however, a study of more than 4,000 cases where the researchers' findings warrant consideration.[6][6] The researchers examined more than 9,000 settlement decisions and compared the decisions to actual results at trial. They found that 61% of the time plaintiffs recovered less than the last pre-trial offer and 24% of the time defendants paid more. However, plaintiffs' error rate cost on average $43,100 whereas defendants' error rate cost an average of $1,140,000.

The researchers considered 19 classes of case variables and found that "context" variables were more predictive of adverse outcomes than "actor variables," Examples of "context" variables included the type of case, damages, forum and statutory settlement procedures. "Actor" variables included level of the attorneys' experience, size of firm and the gender of parties and counsel. Error rates increased in contingent fee cases and where insurance was not available, both factors being consistent with the well-established finding that parties take greater risks when they have something to lose. The researchers also found that the error rate declined when the parties were represented by counsel with mediation training.

Public entity litigants would be wise to consider this study where the case is being prosecuted on a contingent fee, insurance coverage is unavailable, the damages sought are high, the merits are vigorously disputed and decision-makers may be focused on factors not a direct part of the litigation.[7][7]

Conclusion

It is undisputed that the vast majority of cases resolve prior to trial. That is reason alone to seek to settle a case sooner rather than later and where the parties are unable to do so to seek the assistance of an experienced mediator. That alone is not enough. To achieve the best result requires preparation, critical analysis of the merits, a willingness to listen to the other side and in the final analysis the ability to appreciate what is obtainable as contrasted with what is desirable.

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[6][6] See, Journal of Empirical Legal Studies, September 2008, "Let's Not Make a Deal: an Empirical Study of Decision Making in Unsuccessful Settlement Negotiations; New York Times, August 8, 2008, "Study Finds Settling Is Better Than Going to Trial.

[7][7] Examples include concerns of setting a precedent with even a modest settlement, publicity as a result of a settlement regardless of the amount, the perceived need to reexamine policies or procedures, adverse publicity for a public figure.

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