Using Jury Research and Visual Advocacy for More Effective ADR.

Chris Dominic

President & Senior Consultant, Tsongas Litigation Consulting

Jill D. Schmid, Ph.D.

Consultant, Tsongas Litigation Consulting

September 20, 2006

It is no secret that we are in the midst of a significant trend toward the use of alternative dispute resolution (ADR) practices. Perhaps nowhere is this trend more pronounced than within governmental bodies, which were pushed in that direction by the adoption of the 1990 Administrative Dispute Resolution Act, later amended in 1996 and 1998. The 1998 ADR Act not only supported, but also actively encouraged the use of ADR in federal cases stating, "Litigants in all civil cases [are required to] consider the use of an alternative dispute resolution process at an appropriate stage in the litigation."[1]

It was not just federal courts that took this mandate to heart. State, county, and city governments were swept along and now there are few local government attorneys who do not feel "encouraged" to use ADR in nearly all cases. Attorneys representing a city or county now find themselves preparing for mediation or arbitration, which has forced them to re-think many of the ways they practice and, perhaps, forgo some of what they considered appropriate preparations for *trial* only. This way of thinking, however, might actually create more problems than it solves. Whatever one might think about his or her chances of actually getting to trial or his or her desire to mediate or arbitrate instead, the strategies and preparations pre-*ADR* should be in many ways similar to the strategies and preparations pre-*trial*.

To understand why this is so, consider the communication processes involved in ADR. Mediation and arbitration, by design, require information to be delivered with powerful advocacy in a short amount of time. In arbitration, the arbitrator is your jury and judge so many of the same tactics used in trial can be used in arbitration. In mediation, of course, the audience is the mediator instead of a jury, but ultimately the mediator must ask, "What would a jury do with this case?"

[1] Steienstra, Donna "The Alternative Dispute Resolution Act of 1998: Seeds of Change in the Federal District Courts," on the National Center for State Courts website: http://www.ncsconline.org/.

The American Society of Trial Consultants (ASTC) celebrated its 25th anniversary this past June at their annual conference. Each year, the conference provides an excellent opportunity for examination of litigation trends. One of the clear trends this year was that trial consultants are being engaged earlier in the litigation timeline, with a key focus being on clients' needs prior to ADR. It appears many attorneys and their clients have figured out that developing a strategy (including key themes and theories of the case) early in the litigation timeline is essential and aids with deposition witness preparation and the creation of effective demonstratives. Additionally, consultants are being hired for jury research such as mock trials or focus groups pre-ADR. This paper will look more closely at ADR preparation that utilizes demonstratives and jury research.

Demonstratives

Demonstrative exhibits are often one of the last things considered for use in ADR (if considered at all). Attorneys often assume that a mediator or arbitrator will not need or want visuals used during the sessions. Obviously, mediators and arbitrators are people too, and the fact is that most people are visual learners. Good graphics reduce complexity, help deliver themes, and ensure effective communication in a short period of time. While the use of demonstratives for ADR should be a given (just like in trial), how they are used or the demonstrative's specific purpose might be *slightly* different. Here are a few important points to remember when preparing your ADR demonstratives:

- The focus should be on explanation and clarification of your case (key points, events, processes, etc.). You want to educate and elucidate. For example, if the timing of events is critical or difficult to follow (there are a lot of dates, a lot of documents, e.g., letters or

emails), a timeline that clearly lays out what happened and when will be crucial to the mediator's/arbitrator's understanding of the case.

Mediators and arbitrators are no different than jurors when it comes to an important communication principle: people like those who can make sense out of the confusion, bring order to the chaos. If you are contributing to the chaos and the other side is not, the mediator/arbitrator has an easy choice to make—turn to your opponent for guidance. Obviously, it is better if you are the one controlling the presentation of the information. If the mediator/arbitrator relies on your timeline or your process-graphic to help him or her understand the case, you are one step ahead of your opponent *and* it sends the message that you are more in control of the proceedings than they are. This message might be subtle, but in a mediation where you are trying to convince the other side that they should not risk going to trial, appearing in control is crucial.

- Keep in mind that explanations of basic or fundamental principles or processes are not needed. For example, a tutorial on the patent process will probably be viewed as a waste of the arbitrator's time; however, a tutorial on how the hydrogen fuel-cell technology was created and operates, for example, is not a waste of time since the technology itself is complicated and generally not well understood outside of the industry.
- Because one can be more argumentative during mediation or arbitration, an effective demonstrative should include persuasive and/or argumentative elements when appropriate. There are times when the argumentative element should be subtle. For example, a timeline should appear neutral if you are hoping both sides and the mediator/arbitrator will use it as a reference. However, there are other times when the persuasive elements can be quite blatant, for example, on a chart showing how it was the

plaintiff's poor choices that led to the accident. The mediator/arbitrator is not likely to see this as overt "blaming of the victim" like jurors in a trial might. Essentially, one has more leeway in ADR because the mediator or arbitrator is more likely to respond to these types of arguments more rationally than emotionally.

- Pure "theme-building" demonstratives might not be as important for a mediator/arbitrator as they are for a jury. If there is no specific information included in the demonstrative and it is purely being used for "show," a mediator/arbitrator is likely to disregard it. Knowing that your use of time is critical, you will not want to waste time by using low or no-impact graphics.
- The format of your demonstratives for ADR might be different than what they would be for trial. While a large 8' by 4' board is appropriate in a large courtroom, in a small mediation room, the board could be in the way and cumbersome. PowerPoint and smaller boards are often more practical for ADR venues.

The benefits of using demonstratives for ADR were recently made clear when an attorney called to share with us how the arbitrator repeatedly referenced their timeline and explanation boards (the other side had no visuals), even asking to keep them while he made his decision. These visuals were critical in relaying the key themes and were helpful in leading the arbitrator to view the case in their terms.

In summary, remembering that for ADR time is of the essence and that the mediator or arbitrator does not want his or her time wasted with repetitive or unstructured arguments, demonstratives can be one of the most effective ways to persuasively summarize your points and effectively condense your presentation.

Jury Research

We have also seen a significant increase in the use of Mock Trials and Focus Groups before mediation and arbitration. Specifically, with regard to mediation, there was a time when mock trials were only done *after* mediation failed. It is now more common for mock jury research to occur prior to mediation to provide insight into liability, causation, damages, as well as the impact of demonstratives, witness testimony, jury instructions, and a verdict form.

Research can provide the following benefits pre-ADR:

- For mediation, jury research can help set your and your clients' expectations. Either higher or lower, it is always a benefit to test your expectations against what jurors actually think and say. Whether you are pleasantly surprised or unpleasantly dismayed, it is far better to have some foundation for your expectations than to just base them on what you or your clients think is the case.
- Knowing how much jurors might award in damages is invaluable. While the mock jury award should not be considered perfectly predictive of what the actual jury would do, it does give you insights into what direction the award could go. At the very least it provides you information, and information is power when it comes to negotiating.
- With information also comes confidence. In mediation, one goal can be to convince the other side that you have a strong case and that you are not going to back down. With valid research, you are more likely to negotiate from a position of strength. We have had numerous attorneys tell us that because of the research, they negotiated differently; they were more confident and firm during mediation because they had some sense of what a jury might do with the case and the award. These attorneys expressed that without the

knowledge gained through the research; they might have given into the other side's tactics and increased (or decreased) the award.

- From the mock jury deliberations, a highlights video can easily be produced, which the trial team may want to show to the mediator. Since one of the primary issues the mediator is considering is "What would a jury do with this case?" a 15 to 20 minute video can give him or her a succinct, but powerful look into a many juror's minds. This video would show what aspects of the evidence were considered significant, how certain witness testimony was perceived, which arguments were the most influential, and how damage awards were calculated. The video should include both strong and weak elements of each party's case, thereby increasing the validity and ultimate power of the video to influence a mediator's opinion.

    If a video is unfairly biased against your opponent, your case is made to look weak and your position with a mediator is seriously compromised. Of course, the decision to disclose any form of jury research results to the mediator is dependant on your mediation strategy and warrants thoughtful consideration.

In summary, whether you are preparing for mediation or arbitration, mock jury research gives you all the same advantages it would if you were preparing for trial. Additionally, walking into mediation or arbitration with the trial team and the client on "the same page" is quite possibly the greatest benefit of pre-ADR mock jury research.

One should be aware that the use of jury research in mediation also highlights the importance of understanding the indicators of quality in jury research. Without the mediator understanding the difference between how presentations were done, jurors obtained, or process used, a "dinner party focus group" could be considered on the same plane as serious research.

Effective preparation for ADR is not unlike effective preparation for trial. Increases in the use of trial consultants pre-ADR is an indicator that attorneys around the country are aware of this and making a greater effort to utilize the many tools at their disposal such as demonstratives and jury research to garner a competitive advantage.