MEDIATION TACTICS AND PROCEDURES: A MEDIATOR’S VIEW

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. INTRODUCTION

In the past 25 years, alternative dispute resolution (ADR) has become very popular as a supplement to the judicial system. ADR generally includes both mediation and arbitration in their various forms. Arbitration is generally an adversary procedure bearing many similarities to a trial, although much less expensive. However, mediation is an informal process in which a neutral third party (mediator) presides over settlement negotiations. Unlike arbitration proceedings, the mediator does not issue a decision, but rather facilitates settlement discussions between the parties. However, it is not unusual for an arbitrator to recommend a settlement amount at some point in the process, based upon the mediator’s familiarity with the case and arguments of counsel.

Courts, attorneys and clients are increasingly turning to various forms of ADR as a means of reaching settlement and avoiding the costs and potential financial exposure of trial. Courts are also issuing orders and rules either authorizing or requiring mandatory mediation as a means of relieving congested court dockets.

Illinois has adopted the Uniform Mediation Act. 710 ILCS 35/1 et seq. It applies to both voluntary and court or administratively ordered mediations. It provides that mediation communications are privileged and not subject to discovery or admissible in evidence unless waived by a party under the Act. A mediator cannot be called to testify as to any statements made by the parties during mediation. An exception is that a mediator may testify to prove the terms of an agreed settlement reached at mediation.

II. VOLUNTARY MEDIATION

A. Why Mediate?

There are several benefits to voluntarily engaging in mediation. While many cases are negotiated to successful resolution between the parties without mediation, mediation may be advisable when settlement negotiations reach an impasse. Benefits to mediation include:

- Reduced litigation expenses
- Timely settlement
- Privacy
- Discovery tool
- Reality check versus unreasonable expectations
- Strategic advantage
- Neutral second opinion and evaluation of case
• Avoid creating an undesirable precedent
• Good success rates

The most commonly expressed benefits to mediation are the reduced litigation expenses and the timeliness in which a settlement can be reached. Strategically, mediation can also be beneficial even if a settlement is not reached. One can discover strengths and weaknesses in their own case, as well as their opponent’s case, through the mediation process. This can potentially be both beneficial and detrimental once the case proceeds to trial. A successful mediation may also be advantageous where counsel foresees admissibility problems at trial on key issues in the case. Evidence in support of your position can be produced and argued during the mediation process and potentially influence the outcome, although admissibility during trial may be questionable.

B. When to Mediate

The issue of when to proceed with mediation can vary considerably based upon the type of the case and the parties involved. In a relatively simple case, mediation can occur prior to suit. Customarily, in personal injury cases mediation takes place after initial discovery has occurred and the parties and key witnesses have been deposed. Prior to this stage in discovery, it may be difficult for the parties to accurately evaluate their case. Generally, the greater the complexity of the case, the more likely it will be necessary to engage in more extensive discovery prior to mediation. The key for the timing of a successful mediation is when each side has exchanged sufficient information so that the case can be fairly and honestly evaluated.

Often, mediation occurs when the parties have begun settlement negotiations but have reached an impasse. When this occurs, mediation can be a valuable method to bring the case to a conclusion. Obviously, each party needs to come to the mediation prepared to further negotiate their position. Mediation is rarely successful when one party fails to move from their pre-mediation offer or demand. Accordingly, mediation should be undertaken when the parties still have room to negotiate, but do not foresee a settlement based upon the current posture of the case.

It is also important to identify goals prior to proceeding to mediation. If a party is unable to set a realistic settlement range prior to mediation, it is probably too early to mediate the case. Flexibility, however, remains the key to a successful mediation.

III. MANDATORY COURT-ORDERED MEDIATION

A. Purpose

Congested court dockets have led to an increasing trend by courts to require or recommend alternative dispute resolution. Illinois Supreme Court Rule 99 authorizes the judicial circuits to establish a mediation program and adopt appropriate rules. Those rules must address: what
type of case is eligible for mediation; the appointment, qualification and compensation of the mediator; confidentiality; scheduling of the mediation; and sanctions for the absence of a party at the mediation.

B. Court-Ordered Mediation Rules/Orders

At the trial court level, the Illinois court system is divided into twenty-one circuit courts. Each circuit court possesses authority to issue rules as to the administration of cases before the court, including rules requiring parties to engage in arbitration or mediation. Some circuits have not promulgated formal “rules” as to mandatory mediation, but have issued an administrative order authorizing counties within the circuit to order mediation. There is usually a jurisdictional limit for mediation, often cases having a value less than $30,000. This contrasts to mandatory arbitration rules and orders, which are customarily applicable to cases with a lesser value.

Selection of a mediator in a court-ordered mediation is usually left to the parties to agree upon. When agreement is not reached in a timely manner, the court will select the mediator. Customarily, only persons certified by the court can act as a mediator in court-ordered mediations.

When a mediation is ordered by the court, the parties are under time deadlines to proceed with mediation. Usually a mediation conference must be held within eight weeks of the court order. Typically, 10 days prior to the mediation, each side is required to submit a concise written summary of the case containing a list of issues as well as the names and addresses of all participants in the mediation.

Parties who object to the court-ordered mediation can file a written objection with the court within 14 days. Alternatively, a motion to continue the mediation, for specified reasons, can also be brought.

Sanctions also exist for parties who refuse to comply with a court-ordered mediation. Sanctions can include the mediator’s fees, attorneys’ fees, and other costs of mediation.

Confidentiality is also a key element contained in most, if not all, orders and rules pertaining to mediation. All oral and written communications throughout the mediation process are deemed confidential and inadmissible as evidence in the underlying case unless agreed otherwise by the parties. Mediators are strictly prohibited from disclosing any information obtained during the mediation process.

Once court-ordered mediation is completed, mediators are required by an order/rule to report to the circuit court the result of the mediation.
IV. THE MEDIATION PROCESS

A. Pre-Mediation

1. Choosing the Mediator

One of the most important decisions in the mediation process is the selection of a mediator. By definition, the mediator is to be a neutral third party. Strategically, it is important to select a mediator in whom you have confidence. This customarily requires that you select a mediator with whom you have prior experience or upon the referral of a reliable source. The style, demeanor, and procedures employed by mediators can vary considerably. Counsel experienced in mediation may very well select different mediators depending on the nature of the case and its settlement posture.

An important consideration in selecting a mediator is whether that person has the ability to effectively communicate with the attorneys and clients. The mediator should have the patience and skill to deal with the non-attorney parties.

The value of a case can be dramatically affected by the venue where trial will occur. Consequently, it is important to select a mediator who has knowledge of the locale where the case will be tried. It is also helpful if the mediator has experience in the subject matter of a case. This is particularly important if the case involves either complicated factual or legal issues.

2. Mediation Submission

Prior to mediation, each party will submit to the mediator a case summary and exhibits. The summary should include a discussion of the factual background of the incidents which give rise to the claim. The more facts that are in dispute, the more detail you should provide. You should also advocate the strengths of your particular case and point out weaknesses in your opponent’s case.

Along with the case summary, the parties usually submit a copy of key pleadings. Additional documents submitted to the mediator may include discovery depositions or excerpts, expert witness disclosures, photos and key exhibits. Selected potential jury instructions can also be helpful. The mediation submission will be kept confidential by the mediator if requested by the party submitting it.

If there are unusual questions of law, it is helpful to include applicable statutes and case authorities. This need not be as detailed as an appellate brief, but should give the mediator sufficient information to understand the disputed legal issues so that he or she can conduct additional research and analysis.

It is also helpful to include some history of past negotiations. This advises the mediator of what has transpired and who should make the next movement with respect to settlement.
Although many mediation submissions remain confidential at the request of the party submitting it, it can be helpful to send a copy to the opposition. By so doing, your opponent is advised of the strengths of your position on various matters and may help influence their evaluation of the value of the claim.

3. Preparation of Clients

Occasionally, an attorney will appear at mediation without preparing the client for the process and issues that will be discussed. That usually frustrates progress during the mediation. The attorney should review the mediation submission with the client and explain that not all of the claims made in the submission may be realized at the mediation. The client must understand the need to confront the possibility that a case may be lost at trial or that a jury could determine the award would be far different than the client may expect. The attorney should get the client to understand that one of the primary reasons to mediate is risk avoidance.

B. Mediation

1. Participants

In addition to the mediator, all parties should be present with their attorneys. Where the defendant has insurance, by agreement, it is often acceptable for the insurer’s claim representative responsible for the file to be present. The important thing is that the persons attending the mediation are those in a position to make decisions with respect to settlement.

2. Opening Statement

Similar to a jury trial, each party will be allowed to present an opening statement at the commencement of mediation. Although much more informal than a trial, the opening statement can be a valuable tool in persuading the mediator that your position with regard to settlement is the correct and fair position. In cases involving a client with unreasonable expectations, the opponent’s opening statement may well begin to persuade that client to reconsider their prior settlement position.

Some prefer not giving an opening as it can have a polarizing effect, particularly for the parties who have never been through the process. If the parties have given the mediator thorough submissions, the mediator should have a good understanding of the contested facts and legal issues. Therefore, an opening statement may not be necessary and the risk of generating emotion which may impede a reasonable resolution of the case can be avoided.

3. Joint Session

Following the opening statements, or at the beginning of the mediation, the mediator may engage the parties in a general discussion as to their respective positions and bases thereof. The mediator may further facilitate exchanges between counsel (although not argumentative) as to key issues or factual contentions in the case. The mediator will usually state what he or she sees
as the important issues and contentions in the case to ensure the mediator has an accurate understanding of the case and its key disputes. The parties will then be separated for negotiations.

4. **Negotiations**

The mediator usually begins a private caucus or discussion with the plaintiff and plaintiff’s counsel. Shuttle diplomacy commences and the mediator will meet throughout the remaining negotiations with each party in private. Customarily, the discussions between the mediator and the parties will be kept confidential. It is not unusual for a mediator to specifically inquire as to whether it would be agreeable to communicate to the opponent a particular statement, theory or argument presented during the private meetings.

As parties begin to make movement through the course of the mediation, the mediator may very well attempt to short circuit further negotiations by recommending a settlement for a certain amount or specified terms. This is typically called a “mediator’s figure.” The mediator may also engage in speculation as to what he believes the opponent may expect in a settlement if the sum were offered or demanded.

As with any negotiation, each party’s position will be re-evaluated throughout each step of the mediation process. Having identifiable goals for the settlement amount will allow parties some flexibility in monitoring the mediation and the degree of success being experienced through the course of negotiations. A degree of flexibility is necessary to most successful mediations and pre-determined increments of settlement offers or demands are often problematic. Tactics to be employed through the course of the mediation are often dictated by the degree of success being experienced through the course of negotiations. Accordingly, parties must remain flexible in determining their next move and any arguments they wish to further pursue and present during the course of negotiations.

C. **Post-Mediation**

In a successful mediation which results in a settlement, the mediator will likely bring the parties together and recite the settlement terms so that there is no misunderstanding as to the obligations of each side. At this point, there is a binding settlement. Although there is no written document, oral settlements are enforceable. *Lampe v. O’Toole*, 292 Ill. App. 3d 144, 685 N.E.2d 423, 226 Ill. Dec. 320 (2d Dist. 1997). Even if a plaintiff later claims he did not understand the settlement terms, it would be a unilateral mistake which would not void the settlement. *Brewer v. National R. R. Passenger Corp.*, 256 Ill. App. 3d 1083, 628 N.E.2d 331, 194 Ill. Dec. 834 (1st Dist. 1993). The post-mediation meeting is also an opportunity to discuss any particular issues, such as wording of the settlement documents, time for payment, and similar issues.

When mediation is unsuccessful, the mediator will often bring the parties together and explain why the mediation failed. Particular stumbling blocks will be addressed and the parties are encouraged to further reconsider their respective positions. The mediator will suggest that
settlement negotiations continue, either directly between the parties or by reconvening the mediation. Often during the mediation process, many figures are discussed by each side. It can be helpful for the mediator to write a letter to the parties confirming the last official demand and offer so there is no confusion as to the positions of the parties and the specific demands and offers.

V. TECHNIQUES IN MEDIATION

The goal of mediation is to help the parties reach a mutually agreeable outcome. There are many techniques mediators can use to assist in attaining this goal.

Avoid emotion-laden terms that communicate anger or frustration. Rather, the mediator should use neutral language, thereby diffusing highly emotional discussions. For example, the mediator might ask:

- “What fact or facts in your case would you like to change?” This helps a party to understand the potential weakness in his or her position should the case go to trial.
- “What are the potential consequences if you can’t resolve the case now?” This helps the client understand the potential delay in getting money, ongoing litigation costs and the failure to bring closure to the dispute.

A mediator should coach the parties.

- Help the parties identify their specific needs and suggest the best approach to achieve them.
- Acknowledge the positions of the parties in a non-judgmental manner.
- Employ body language that communicates attention is being paid, such as nodding the head, leaning forward, making eye contact.

Role reversal.

- Ask a party to “put themselves in the other’s shoes.”
- This helps re-focus a party’s thinking away from solely looking at their own position.

Stress the risks of going to trial. Every case has some potential risk for the parties.

- A case with good liability for a plaintiff usually has questions regarding damages.
- A case of clear and significant damages will often have liability issues.
Where there is both good liability and strong damages, a jury may still come back with a relatively low verdict.

Have discussions with attorneys outside the client’s presence.

- Allows the mediator to talk more candidly to the attorneys about problems with the case without the risk of hurting the mediator’s credibility with the client.
- Mediator can solicit information from the attorney that can be used to help convince a reluctant party to settle.

Consider paying the mediator’s fee.

- A plaintiff’s attorney will often take the position that settlement at a certain figure will result in his client receiving very little. This can help hurdle that obstacle.
- This should only be done at the very end of a mediation as your last offer.

Attempt to get plaintiff’s attorney to commit to an anticipated reasonable damage assessment by a jury.

- Once this is done, there is a ceiling on the position plaintiff’s attorney can take.
- Then attempt to get an assessment of the chances for a not guilty verdict and/or the degree of plaintiff’s contributory negligence.

VI. CONCLUSION

The cost of litigation and congested court dockets has popularized mediation as an efficient and economical way to voluntarily resolve a dispute. It affords an opportunity for dialogue through a neutral third party which can often be more comfortable than direct face to face negotiations. Some lawyers or parties feel negotiating is a sign of weakness, but can overcome that emotion by involving a mediator.

In most mediations, the mediator has only the power to listen, persuade and inspire. While those may not sound like strong tools, a good mediator can effectively use them to improve communication between the parties, persuade the parties to look at the situation from a different perspective, and eventually arrive at a mutually satisfactory agreement. Mediation works because in general, people hope to avoid conflict and uncertainty. Consequently, if parties participate on a voluntary basis, most cases can be resolved at the mediation. In those situations where the mediation fails, cases often later settle because the parties were moved closer to a resolution at the mediation.
Rex K. Linder
- Partner

Rex concentrates his practice in the area of civil litigation in federal and state courts, including the defense of professional and product liability cases involving potentially significant damages. He has represented numerous physicians, hospitals, medical schools and attorneys in professional liability matters. He is a recognized product liability authority representing many manufacturers and distributors in catastrophic injury cases.

Rex is frequently called upon to speak on product and professional liability issues before business and professional organizations. He is also a regular lecturer and author for various legal organizations concerning trial tactics and strategies.

Significant Cases

- **Pennington v. R.**, Obtained not guilty verdict in strict liability claim for manufacturer of aluma-plank scaffold after worker fell.
- **Hobson v. L.**, Obtained not guilty verdict for chiropractor whose manipulation allegedly caused herniated disc.
- **Wortz v. O.**, Obtained not guilty verdict in favor of orthopedic surgeon and nurse following bad result from surgery.
- **Baldwin v. R.**, Obtained not guilty verdict for aluminum ladder manufacturer when plaintiff fell sustaining a triple leg fracture and shoulder dislocation.
- **Vezena v. Cornbelt Electric**, Not guilty verdict for electrical coop when lineman fell from allegedly defective pole resulting in paralysis.
- **Garza v. A.**, - 97 L 43 (Livingston) Not guilty verdict defending wrongful death medical malpractice against a trauma surgeon for failure to diagnose bleeding pancreas in 20-year-old male.
- **Yeaman v. Shelby Electric Cooperative**, 00 L 42 (Christian) Obtained not guilty verdict in double wrongful death against electrical coop where a 38-year-old farmer and 14-year-old nephew moved auger into power line near grain bins.
- **Nye v. S.**, 00 L 367 (Peoria) Not guilty verdict defending a lawyer who failed to timely file a medical malpractice claim.

Professional Recognition

- Martindale-Hubbell AV rated
- Named to the Illinois Super Lawyers list (2005-2009). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- DRI Service Award

Professional Associations

- Lawyers for Civil Justice (President 2002-03)
- Bar Association of the Central and Southern Federal Districts of Illinois (President 2007-08)
- Defense Research Institute (Board of Directors 1997-2000)
- Illinois Association of Defense Trial Counsel (Past-Chair, Product Liability Committee)
- Seventh Circuit Bar Association (Central District-Illinois Liaison)
- Peoria County Bar Association (President 2005-06)
- American College of Trial Lawyers (Adjunct State Committee)
- Society of Trial Lawyers-Illinois
- American Bar Association
- Illinois State Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

Education

- Juris Doctor, Washburn University School of Law, 1973
- Bachelor of Science-History, Bradley University, 1969

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