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Appreciating the "Culture" of the "Other Room"

By: Don Kelley, Mediator

INSIDE THIS ISSUE

Typical personal injury mediations bring together individuals who have been injured in motor vehicle accidents or other events and the commercial casualty insurance companies or other risk management entities representing the party against whom the claim is being made. Each side brings to the mediation a "culture" which, if better appreciated by the parties, will greatly enhance the chances of success at mediation.

The Culture of the Plaintiff's Caucus: "They just don't understand what it's like not to be able to pick up my grandson." In this room, the culture is decidedly built around more "personal" or "human" considerations. The plaintiff has experienced a personal injury or loss that has resulted in pain and disruption of his or her normal lifestyle. The injuries have resulted in consequences ranging from minor irritations lasting over a few months to wholesale life-changing and/or career-changing permanent injuries. The Plaintiff didn't ask for any of these things and feels that the right to lead life the way it was the before the incident has been "violated." To equate dollars with the injury that was suffered is an intensely personal matter. Because of this personal aspect of the injury, plaintiffs will be "culturally" reluctant to think in terms of an "objective valuation" approach to settlement.

The Culture of the Defense Caucus. "This business is so much about numbers I feel I have to weigh in when I show up for work." At the heart of the defense caucus is a risk management organization. It is a business designed around an objective, more calculated analysis of the plaintiff's loss. The defense caucus tries to weigh the "value" of the plaintiff's "claim" by incorporating known measures, such as the amount of medical expenses incurred to treat the injuries. A judgment about the reasonableness of medical care costs and factors such as the time it has taken the plaintiff to recover from his/her injuries will also be considered. The defense caucus places heavy emphasis on fault considerations such as comparative negligence and statistical possibilities that the plaintiff will not prevail if trial is necessary. In the end, the defense caucus tries to "evaluate" the case using a risk-spreading analysis – what is the likelihood that the plaintiff will prevail at trial and, if the plaintiff gets a verdict, what is the average value that a jury might award based on hundreds of similar cases? The defense will be "culturally" reluctant to think in terms of a "subjective valuation" approach.

Communicating with the Other Culture. A mediator should try to serve as a translator between the two cultures. Each caucus should endeavor to be as receptive as possible to the language of the other room. Avoid stubborn or "oppositional" tactics. Try to understand the case from the other room's point of view. Assist the mediator by framing the discussions in a way that will be more easily accepted by your counterpart in the other room.

Respect for the Process

By: Larry Levy, Mediator

As I begin my twentieth year as a mediator, I have become concerned that we mediators may forget what the mediation process is all about. A successful mediation demands more than the often predictable back and forth waltz of offers and counters. Lawyers rely on mediators to carry "the message" to the adverse parties in mediation, but should the communication of that message be limited to a four-hour time slot when conflict resolution is the goal? Are mediators at risk of losing an opportunity for meaningful risk analysis by focusing too much on efficiency, economy and expediency in mediation?

Consider the following mediation submission summaries describing the plaintiff, for a recent case:

Plaintiff: Lucy was the victim of a horrendous trauma. Since then she has
experienced devastating emotional and crippling physical pain. She has had her
musculoskeletal joints fused, resulting in permanent residual disability. She now suffers overwhelming debt and lost employment opportunities. Lucy's initial settlement demand: $1,215,000.

Defendant: Ms. Dollarseeker (Lucy) was intoxicated when injured. She had years of prior symptomatic degenerative musculoskeletal complaints, many of which have previously resulted in workers compensation claims. She last worked two years before the current accident. Medical records reference "symptom magnification", "disproportionate non-anatomical symptoms" and "drug seeking behavior". At some non-formulaic interval in the negotiation process, the defense will authorize the mediator to "offer Ms. Dollarseeker: $25,000.00 ("our cost to defend"). Settlement offers of 5% of the initial demand now occur with increasing frequency.

These very different perspectives of the case are typical in mediation, but however the explanations may vary for what happened, Lucy's life was undeniably and tragically altered by an event that no one wanted to occur. This case was not one that could quickly or easily be reduced to mere dollars, yet at some point, whether by settlement or verdict, injury equates to monetary compensation.

Lucy obviously had to be given an opportunity to be heard at the mediation. Whether she cried in anguish or stoically recited her ordeal, there could be no shortcuts to prevent Lucy from telling her story. Nor could the defense be summarily limited in doing its job by time or format. Each side deserved an opportunity to present its position and respond to what was communicated from the adverse party.

As the negotiation process began, the parties were one million dollars apart – and I only had four hours to work with toward resolution. Experienced mediation participants know that scheduling a mediation session in a half-day time slot is akin to an amateur throwing darts at a dartboard. Sometimes the target is hit, but most often, the aim is far from the mark. I recently wrote to colleagues that "multiple parties, contentious relationships, complicated issues and protracted post-mediation telephone follow-up are now the rule, rather than the exception."

In complex, multi-cultural disputes, there is no precise formula for determining how long it will take to reach resolution in mediation. There is probably a correlation between time spent in mediation and each participant's knowledge of an opponent's case. For instance, did Lucy's attorney review and discuss the defense medical report (CR 35) with Lucy prior to the mediation? Did the defense claims representative

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...WAMS Buzzz

WAMS would like to welcome Mike Nigrey, Staff Attorney, to our office. Mike started at WAMS on October 9, 2006 and will be working primarily on arbitration administration. Catlin O'Halloran has left WAMS to pursue different interests.

We are pleased to announce that Cindy Morgan is a new addition to the WAMS Mediator Panel. She has been on our arbitration panel since 2005. Cindy specializes in personal injury, insurance, product liability and wrongful death.

Thomas V. Harris was also added to our panel this January. Tom will handle a wide range of cases, with special emphasis on insurance coverage matters and serious personal injury claims.

Cindy Morgan **Tom Harris**

For more information about these mediators or other panel members, please visit our website at www.usamwa.com.

Respect for the Process continued from page 2...

review and evaluate Lucy's employment records/tax returns and correlate them with a medical expert's assessment as to whether time loss was warranted? A timely pre-mediation exchange of information can greatly contribute to mediation efficiency.

Suppose Lucy's attorney had called defense counsel prior to mediation scheduling and asked the following questions:

Is there any information that your principal doesn't have in order to have full authority in place prior to the mediation?
Can we schedule a conference call with counsel and the claims representative at least several weeks before any mediation date to ensure that you'll have an opening settlement demand?
Will the claims representative participate in the mediation either in person or by telephone?
Will you agree to exchange all submissions sent to the mediator?
Will you extend a settlement offer at least 10 days before the mediation date (so that the mediation can be cancelled without penalty if deemed appropriate)?
The nature of Lucy's case is such that a full day should be reserved to provide adequate time to engage in meaningful risk assessment with the mediator. Do you agree to reserve a full day for the mediation?

Mediation sessions are only one part of the dispute resolution process. Mediators, mediation schedulers and counsel should continually be alert to whether pre-mediation preparation has included adequate communication with adversaries regarding attendance, submission exchanges, subrogation, authority and client preparation. My experience has been that when parties and attorneys have received all information necessary to evaluate risk before the mediation, chances for a successful mediation experience rise dramatically. A lack of sufficient time and unexpected information produced at mediation

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generally result in a lost opportunity for meaningful risk analysis and a lost opportunity for settlement.

Parties who have agreed to engage in the mediation process have essentially made a promise to each other to make a concerted effort to obtain resolution. Inadequate settlement authority, preparation or time are but a few of the ways in which the mediation covenant can be broken. Lucy and her adversary needed sufficient time to be heard, whether four hours or longer.

Mediator's Tips

"One of the most important things in personal injury cases is to make sure that the plaintiff has his/her subrogation situation under control before coming to the mediation. The subrogation carrier, usually PIP, should have been made aware that the mediation is occurring, and contacted about being ready to discount their claims (if appropriate), etc. They should be ready to receive calls from the plaintiff's attorney and/or mediator, if warranted by the case. Too often plaintiff's counsel has not gotten on top of this and it can be a problem at the end of the mediation as the case is getting ready to settle."

◈ *John Cooper, WAMS Mediator/Arbitrator*

"Mediators generally do not need a full set of the medical records. Bring them with you, and perhaps consider submitting only the key record(s) for the particular injury in dispute."

◈ *Michele Sales, WAMS Mediator/Arbitrator*

"It really helps if the lawyers get me their materials at least three business days prior to the mediation, so I'll have time to review and make pre-mediation calls, if warranted."

◈ *Kathleen Wareham, WAMS Mediator/Arbitrator*

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