Data Dumping and Other Problems in Mediation

By Joe Epstein, Esq.

Introduction

Mediation should generally settle personal injury cases satisfactorily in just one session. Usually, when that does not occur it is because one party or another is not prepared to resolve the case. Last minute data dumping by one party or another, last minute motions, lack of client preparation, the failure to educate the opposing party and the mediator, and the failure to engage in pre-mediation lien reduction are the main preventable problems. To help address these problems, one can effectively use a personal injury mediation checklist, such as the one in the sidebar, to facilitate "one-step" mediations.

Data Dumping

When plaintiffs' attorneys provide medical records, employment files, medical bills, expert reports and a demand letter or mediation statement to opposing counsel and the mediator 3 days before mediation - it is too late! It is simply too late for defense counsel and the carrier to process this information in time for the mediation. It is also too late for proactive mediators to call with questions they have about this last minute data production. Similarly, last minute production of independent medical evaluations, which leave no time for a response motion, negatively impact mediations. The same is true for summary judgment motions and motions in limine filed by counsel at the last minute. The task for all counsel is to avoid the last minute data dump. The parties should provide important data 30 days before most mediations.

Lien Resolution

As a practical matter, medical lien resolution is a critical part of the mediation and case settlement process. Satisfactory lien resolution enables settlements that would not be practical otherwise.

Attorneys should contact health care providers who provide medical care on liens in advance of mediation and work out a deal based upon anticipated outcomes. When that is not possible, make arrangements to have the provider available during mediation. Address Medicare benefits providers in a similar fashion. Settling first and dealing with liens afterwards is not as effective and can put clients into a breach of the terms of Medicare requirements, their private health plan or ERISA.

Consider outsourcing your lien resolution headaches to a company with expertise in the field of lien resolution prior to the mediation in cases involving Medicare, Medicaid, health care insurers and hospitals. These companies marshal the lien information, save staff time and provide preliminary lien reduction figures in advance of mediation. During mediation, they can provide a one-point of contact service. Plaintiffs' counsel has the option of passing along this information to defense counsel.

Plaintiffs' counsel and their lien resolution service providers should not overlook the fact that the defendants' independent medical report can be a valuable tool in the lien resolution negotiation process. These reports often raise issues with the reasonableness and necessity of the care provided, as well as causation and permanency issues, in a way that the lien resolution service provider can use effectively. Counsel and the provider can also use such data to educate lien holders about the compromise nature of the settlement process.

Failure to Educate

In "Cool Hand Luke," the warden famously said "*What we got here is failure to communicate."* In the context of mediation, the plaintiff's attorney may categorize this failure to communicate as a failure to educate clients about expectations, opponents about risks and mediators about each party's leverage in advance of mediation.

Experience shows us that the exchange of non-confidential mediation statements between counsel enable both sides to come to the mediation with fewer surprises and with a more balanced perspective of the case. This exchange also enhances the likelihood of realistic client expectations.

Mediators work best with parties when all counsel educate them by providing their leverage points in advance and reiterate them (while acknowledging weaknesses) again at mediation. Keep in mind, mediation is all about the persuasive and effective utilization of leverage.

Mediation Checklist

Most people, attorneys being no different, do best when working from checklists and with deadlines. Accordingly, it is best when attorneys set their case for mediation 60-90 days in advance, so they create anticipated deadlines for the exchange of information with plenty of room to spare. The best-case scenario is to complete the exchange of required information 30 days in advance of mediation. This allows both sides to analyze the "same" case and determine their best case, worst case and likely result at trial. The information exchange enables parties to determine their realistic settlement evaluation. It is when parties come to mediation with "different" cases (due to their failure to adequately and timely share data) that they do not settle.

As a device to assist parties, we have developed the checklist in the side bar.

Conclusion

Two-step mediations-one for discovery and one for negotiations- is too costly, financially and emotionally, for most personal injury cases. Parties and mediators should be proactive. All should work together in advance of mediation to make the mediation "dance" a one-step process. Utilizing our checklist and working together, we can make ours an effective and efficient dispute resolution process. ▲▲▲

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Mediation Checklist for Personal Injury Case

1. Have you taken the necessary depositions? ❑
2. Have you exchanged the necessary expert & medical reports been exchanged? ❑
3. Have you provided the necessary medical and other economic special? ❑
4. Have you made arrangements to have all necessary parties at or available for mediation? ❑
5. Have you exchanged pre-mediation demands and offers? ❑
6. Have you put Medicare and Medicaid on notice? Have other liens reduced or released their claims or will lien holders be available at mediation? ❑
7. Have you exchanged and emailed "non-confidential" mediation statements to the mediator? ❑
8. Have counsel prepared their respective clients for mediation? ❑
   a. Has plaintiff counsel obtained informed input from the plaintiff? ❑
   b. Has the adjuster evaluated the case and obtained authority? ❑
9. Have counsel alerted the mediator to any special circumstances? ❑
10. Have you filed required motions well in advance of mediation? ❑