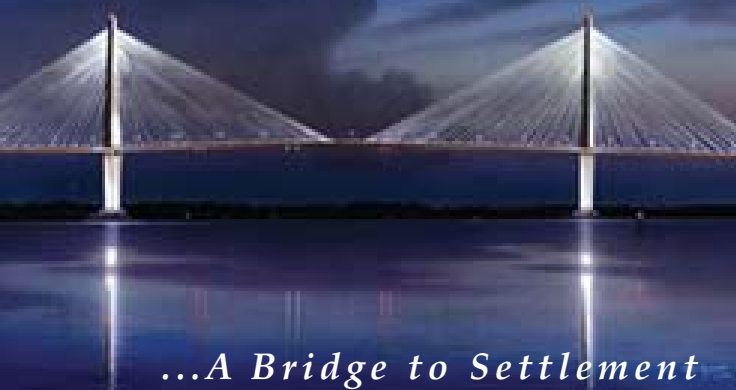


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Quarterly Newsletter

October 2009

Maximizing Mediation Results in a Challenging Economy

(Excerpts from Article by Devon Coughlan published in the Maine Lawyers Review, June 18, 2009)

Introduction

Settling a contentious case can be challenging in the best of times. In a recessionary climate, the pressures and difficulties present at mediation can be multiplied. Clients are more fee sensitive, and may push for an early mediation. Counsel must balance the need to meet this request against the danger of not having enough information to evaluate the claims at issue. The ability of a client to fund a case through trial, and of a losing party to pay a judgment if entered, must be considered more carefully than ever. When mediation does take place, the pressure to settle the case and avoid expense and uncertainty going forward is increased. Knowing how to balance, manage and evaluate these factors is critical to obtaining the best possible result for the client.



Devon Coughlan

Case Preparation: Asking the Right Questions.

Some of the greatest barriers to settlement are fees and costs incurred by a client prior to mediation.

What is needed to prove a case at trial is different from what is needed to present a claim or defense effectively at mediation.

Continued on next page

Murphy's Lesser Known Laws:

The 50-50-90 rule: Anytime you have a 50-50 chance of getting something right, there's a 90% probability you'll get it wrong.

Flashlight: A metal tube used to store dead batteries.

Nothing is foolproof to a sufficiently talented fool.

The shin bone is a device for finding furniture in a dark room.

When you go into court, you are putting yourself in the hands of 12 people who weren't smart enough to get out of jury duty

What Clients are Saying

...“I thought your co-mediation process was excellent. Despite a complex, multi-party case, there was little down time, all parties were engaged, and the case settled. I would fully recommend co-mediation to others...” KM

...“It is a remarkable tribute to Pat’s competence and fairness that he continues to be the most sought after mediator.. I recommend Pat without qualification for any position involving mediation of complex cases.” JS

...“Many times we got to the brink where we thought it was impossible for the case to be settled, but Mr. Coughlan would bring us back and make it happen. He has an intuitive sense of people and a tactical strategic mind that makes him very effective.” AI

Continued from page 1

What counsel needs to ask at the outset is “What do I need to evaluate my case and obtain the best possible result at mediation?”

Dual-Track Case Preparation

In order to maximize efficiency and settlement potential, a case should be analyzed, and discovery planned, on a dual-track basis.

Track One represents the typical discovery plan established to prepare a case for trial.

Track Two is a subset of Track One, and contains only the discovery needed to evaluate the strength of the claims and defenses at issue, and to present them at mediation.

Time it Right

Balanced against the need to avoid excessive pre-mediation discovery is the need of counsel to have enough information to evaluate and present the client’s claim.

Counsel needs to continually evaluate when mediation is appropriate and when it will be effective.

While engaging in mediation too late wastes resources and may make settlement more difficult, mediating too soon also has significant negative consequences.

Only by keeping the issue of mediation timing on the front burner, as discovery progresses, can counsel be in the best position to properly time the mediation session.

Preparation is Key

Your case is likely to settle at mediation. Prepare accordingly.

A better case is worth more.

Failure to present a case effectively at mediation (which includes an exchange of well prepared pre-mediation briefs) will result in a less favorable settlement for the client.

Maximizing the Take – Reasonableness Rules

An initial high demand from the claimant at mediation almost always results in a correspondingly low offer from the defendant.

A reasonable demand, on the other hand, will have a domino effect in the other direction.

The first party to be reasonable in making its demand or offer tends to end up relatively better off.

The ultimate settlement range tends to be influenced by the first ballpark number on the board.

The mediator will be forced to spend more time working on case evaluation and valuation with the party making the unreasonable demand, to the benefit of the other party.

Worrying about a midpoint based on starting positions, particularly unreasonable ones, is a fools errand.

It is always easier to make a bigger move up front and make smaller moves later, than to start too conservatively, and then figure out how to make bigger jumps.

Conclusion

Maximizing your clients’ settlement outcomes requires that a pre-mediation discovery and planning strategy be implemented from case intake to mediation conference. Targeted discovery, proper timing, preparation and “getting reasonable” will all improve your chances of getting a cases settled, with better results. ☘

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