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FOCUS

ON LAW: PERSONAL INJURY

Evolving nature of personal injury mediation

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Commentary

The mediation dynamic in personal injury litigation is not readily affected by trends. Although there are a number of factors that narrow the focus of the process and make it challenging for everyone, some aspects of the dynamic will not change.

For instance, there is no relationship between the parties that will live into the future. There is little to no opportunity to "expand the pie," as is often taught in mediation classes. Rather than generate options, the parties are focused on how to distribute fixed resources from an insurance policy or reserve account.

Thus, competition is fierce, and trust between the parties is usually nonexistent. Early bargaining rounds are often misleading and frustrating, prompting mediation participants to exclaim, "We are wasting our time!"

Despite these constants, I believe mediation of personal injury claims has changed in a number of ways.

First, mediators are fond of saying, "mediation is a process, not an event" because it is not unusual for rapport-building and substantive negotiating to occur before the participants meet. More cases are not settling at the first (or sometimes the second) mediation. Thus, the process continues afterward by email, phones calls, or on Zoom.

Second, the way in which many, if not most, mediation sessions begin has changed. In my practice, I often bypass a joint session or opening statement from me. Scripted opening statements from mediators are tedious. By now, most lawyers and claims professionals can recite them from memory.

Instead of wasting time with statements everyone has heard before, your mediator can convey important points about the process during early caucus conversations.

Joint sessions can be volatile, and for that reason most lawyers want to avoid them and prefer to "meet and greet" the participants instead. For whatever it's worth, do not write off joint sessions in every case just because they may be "difficult." You should be able to trust your mediator enough to manage a difficult but necessary conversation and make it serve the process effectively.

I can report that a few difficult injury mediations settled recently because we made deliberate and extensive use of joint sessions. The takeaway is this: Context matters to the process (i.e., who's involved; what are the problems; what are the outcome goals at that stage of the process; does a particular process choice have a good chance of success; etc.).

Talk to your mediator ahead of time to discuss how the process should begin in order to best manage communication and interpersonal dynamics.

Another change concerns the prevalence and intensity of personal animosity between opposing parties and counsel. What we see in our national politics is common in mediation.

This is not merely a reflection of distrust between the participants – it's more intense than that. Name-calling and personal attacks have grown customary because opponents see each other as "bad" people from the start. Even if parties and counsel agree on what happened (i.e., the light was red), there is plenty of room to dispute the character of another participant or what is morally significant about what happened.

To be fair, the parties may be functioning from a difficult and painful place. Obviously this makes negotiating more difficult and time consuming. Good mediators will bring patience, the capacity to build trust, and savvy bargaining skills to manage this dynamic.

Also, the role of mediators in personal injury matters has changed. Mediators are expected to assume and assert more authority by offering evaluative opinions about the case and to coach the parties when the going gets tough.

The use of quasi-arbitration techniques, such as a mediator's proposal or blind bidding against the mediator's number, has become common.

Some mediation purists may take issue with this development, believing that mediators should not express opinions or evaluate settlement options. Regardless, parties and counsel usually want the mediator to help them settle the case.

And if the parties want the mediator to act in a way that delivers that outcome by offering a number that they are free to accept or reject, I see no ethical problem. Self-determination is a bedrock principle of mediation.

I have one last point that predicts future changes. I believe technology will progress to the point where artificial intelligence will aid the decision-making capacity of all participants, asynchronous communication will be become more common when bargaining (de-emphasizing mediation as an "event"), and blind-bind negotiations will dial down the reactions parties have to their opponent's offers or demands.

Perhaps an event like the COVID-19 pandemic will prompt changes. Otherwise, it is only a matter of time before younger clients will look for lawyers and mediators who work and live like they do, using technology that they use.

While some parts of personal injury mediation will remain the same, technology will continue to develop and change the ways in which we communicate, assess risk, and make decision.

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