Monday, January 21, 2008

A Still-Rising Trend

It is essential to master the fine points of mediation and arbitration

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Special to the Law Weekly

Continuously expanding backlogs in the calendars of overburdened trial courts coupled with the uncertainty as to what a jury will do in with particular case have fostered an increasing trend in civil litigation matters of resolving cases by way of a mediation or a binding high/low arbitration prior to trial.

As a result, various mediation/arbitration companies have prospered through the use of attorneys and retired judges to assist parties in bringing their matters to an amicable resolution.

One such retired jurist is Judge Thomas Raup, who served ably on the Lycoming County Court of Common Pleas for over 20 years before retiring and becoming affiliated with ADR Options, Inc., a mediation/arbitration company. Since 1998, Raup has gathered valuable practical experience from presiding over approximately 800 mediations or arbitrations. The following practice tips for these forms of alternative dispute resolution were generated from an interview with Raup as well as from prior personal experience with these types of proceedings.

The Opposing View

All too often when preparing for an arbitration or a mediation, attorneys get so wrapped up in their own cases that they forget to view the theory of the case from the perspective of their opponent. There are many benefits from looking at a case from an opponent's perspective.

Most importantly, in doing so an attorney may be able see problem areas in one's own presentation. Once problems are realized, an attorney may prepare efforts to steal opposing counsel's thunder by raising or clarifying such troubling issues in the first instance and attempting to minimize or explain away the difficulties with the case in a credible fashion. For example, from a plaintiff's perspective, the credibility of a plaintiff's claims of injuries from the subject accident may be bolstered by plaintiff's counsel addressing, as opposed to ignoring, issues with a client's prior medical history, or post-accident medical history, from other trauma. It is also wise to anticipate an opponent's opening statement and/or closing argument in one's own statement or argument. By raising anticipated issues, opposing counsel may be put on the defensive. As such, opposing counsel may spend a majority of his time defending his case from a weaker position as opposed to forcefully advocating his position from a higher point of power.

Disclose All Documents

Raup agreed that every effort should be made to secure and produce any and all updated medical records and expert reports as far in advance of the mediation/arbitration as possible. For plaintiffs, the production of such records could serve to increase the value of the claim presented, and vice versa for the defense. Obviously, the production of the records could also foster additional settlement discussions such that the expense of a mediation or arbitration could be avoided altogether.

The prompt production of updated or supplemental materials may also serve to bolster one's credibility and trustworthiness with the arbitrator/ mediator. Furthermore, the production of records may also prevent a need by opposing counsel to postpone the meeting between the parties.

A Good First Impression

The arbitration memorandum and submissions represent the first impression of the case for the arbitrator or mediator and, therefore, should be presented in the best light possible.

Raup indicated that he prefers a concise summary of the liability and damages issues along with a succinct identification of the essential issues in dispute between the parties. He also noted a preference of knowing whether there was any high/low agreement in place in terms of binding arbitrations, but not the actual high/low parameters if they are to be confidential. The Judge further noted that a concise chronology of the medical treatment as opposed to a regurgitation of each and every medical visit was the preferable manner of relaying the extent of treatment.

It also appears to be advisable to provide a one-page summary of the case at the beginning of the memorandum when the entire brief begins to exceed ten pages in length. Such a one-page summary may consist of a simple but forceful presentation of the case as might be told to a lay person in everyday conversation when asked what the case is about. Again, this summary may serve as the first, and lasting, impression upon the arbitrator/mediator and should therefore contain the compelling information that supports the theory of the case presented.

Analyze Life Expectancy

The all-important element of life expectancy is often overlooked by plaintiffs' counsel, particularly in permanent injury cases. The relevant life expectancy of any given person can easily be found in the Suggested Standard Civil Jury Instruction 6.21.

A presentation of an injured party's life expectancy can have a substantial impact on the extent of that person's wage loss claim, claim for future medical expenses, and the claim for future pain and suffering. As such, it is wise and beneficial for plaintiff's counsel to always remember to include this compelling information not only in the written submissions but also during his or her opening and closing statements during the proceedings as well.

Organize Medical Records

Raup also indicated that he generally did not need to receive stacks of documents comprising of every available medical record or every deposition transcript to review as part of his analysis. Rather, he indicated that it was more helpful to receive the most pertinent medical records as well as only those relevant and important pages of the deposition transcripts necessary to support a position taken.

In those cases where it is incumbent upon the party to provide multiple medical records and other documents in order to fully explain the case present, Raup noted that it was always helpful where duplicate copies of records have been removed from the pile and when the records have been put in chronological order. He also found it advisable for attorneys to yellow highlight the very specific important parts of each of the records that the attorney wants to emphasize to the mediator/arbitrator for quicker reference.

Raup further noted that in motor vehicle accident cases, it was helpful to review copies of the police report and photographs of the damages to the vehicles, assuming the admissibility of these items was previously agreed upon by counsel. Similarly, in products liability cases, it was helpful to review photographs of the product involved. Obviously, photographs depicting the damages sustained to a plaintiff's body may also prove compelling.

It was further indicated by Raup that the use of a computer powerpoint presentation was helpful to display the relevant evidence. Through the use of a powerpoint presentation, photographs of vehicles or damages to a person's body could be powerfully displayed on a larger screen. The powerpoint presentation may also be used to create a timeline to emphasize a significant prior medical history or lack thereof. The timeline may also be used to more fully describe the extent of a plaintiff's post-accident medical history.

Prepare Your Client

One should not assume that his or her client, a lay person who likely has had little or no litigation experience, will know how to dress or act appropriately at the arbitration or mediation. The importance of appearance and demeanor should be impressed upon the client. Perhaps the client could be advised to dress as he would if he were attending religious services or an important function. It also never hurts to advise the client to treat opposing counsel and the mediator/arbitrator with the respect and common courtesy that they would expect to receive themselves. Client should be advised to keep their voice up and to speak as clearly as possible in response to the questions presented. They should also be notified that they are being assessed by others at all times during the mediation/arbitration and not just when they are speaking and should, therefore, always be on guard to act accordingly until they are well out of the presence of the participants. Attorneys should also fully prepare the client for both the direct examination as well as every aspect of the expected cross-examination. With respect to the cross-examination, the layperson client should be advised that such question can be asked in a leading form and that it is, therefore, even more important to listen to the very question being asked in order to give an appropriate response. The client should also be advised not to argue with the opposing counsel or respond to questions with questions of their own as that will only serve to hurt their credibility. While responses to both portions of the examination should be practiced to some extent, every effort should be made to prevent the actual testimony from appearing to be rehearsed. Perhaps the client could be advised to pause before answering some of the questions so as to convey that additional though is being put into the responses.

Admit Improvements

Raup also indicated that plaintiffs who admit improvement in their condition with medical treatment over the time since the accident, particularly when years have passed between the date of the accident and the eventual mediation/arbitration, appear more credible than plaintiffs who refuse to admit any improvement at all. Accordingly, clients may be advised to describe the variations in pain they have had, comparing their pain from immediately following the accident, to that over the course of their treatment, as well as the current status of their pain by the time of the arbitration. From the defense perspective, it is advisable to point out the various points in the medical records in which it is documented that the plaintiff had admitted to improvement in his or her condition at particular visits. This will prove more effective where defense counsel has already previously confirmed with the plaintiff during a deposition or a statement under oath that the plaintiff recalled making such admissions of improvement. Defense counsel may also be wise to seek out any initial patient questionnaires filled out by the plaintiff as a source of admissions of improvement in condition by the plaintiff. A wealth of information regarding improvements in a plaintiff's condition and functional ability are also typically found in job applications filled out by the plaintiff after the date of the accident. Plaintiffs will typically drop their guard, not realize the impact such a document could have in their lawsuit, and fill out such documents with candid admissions that could serve to defeat their claims of ongoing pain, suffering, and limitations.

Get to the Point

With the fact-finder in an arbitration/mediation being a judge or an attorney, there is obviously no need to dwell on basic information that may be necessary in a jury setting. Unlike a jury who comes into the case with no knowledge of the facts, arbitrators/mediators, such as Raup, typically have already thoroughly reviewed the materials submitted and are well versed in the facts, the applicable law, and the relative value of similar types of cases.

Getting quickly to the point on the facts and the law supporting one's theory of the case only serves to bolster the credibility of the position being advocated. This applies equally to the written materials submitted and the testimonial evidence and argument presented. Raup also stated that flexibility in one's position is obviously crucial for the success of a mediation. He further noted that attorneys should not be reluctant to confide with the mediator about certain issues about the case that may be an impediment to the resolution of the claim such as, for example, difficulty with one's client.

Promptness Counts

Obviously it is always a good idea to be on time for the arbitration or mediation as part of the effort to make a good first impression with the arbitrator or mediator. The better practice may even to be to arrive at least a half hour early so as to be able to enter the arbitration/mediation conference room in an effort to get set up and comfortable. By arriving one early, one can have all their materials set up and arranged on the table

in front of you in an orderly fashion and thereby prevent a shuffling of papers later during the session in a desperate effort to locate a particular item.

Arriving early will also enable the opposing counsel to deal with any issues that may have come up, evidentiary or otherwise. Agreements and stipulations can also be reached or reaffirmed which may serve to streamline the proceedings. In binding arbitrations, last minute settlement efforts can also be attempted.

Perhaps most importantly, by arriving early, an attorney may be less rushed and, therefore, calmer going into the session which will inevitably prove beneficial to the client. Clients, who are lay people already nervous about venturing into an entirely new and scary experience in which they will have to do some public speaking, may be reassured by the calm, cool, and collected demeanor and presence of their own attorney.

Make Sure to Close Strongly

Raup also emphasized that it is not advisable for attorneys to give up their right to offer a closing argument as it represents the last opportunity of counsel to forcefully present their theory of the case. However, it is important to keep in mind that the more concise and to the point the closing argument is, the more compelling the presentation will be.

Typically at arbitrations, the finder(s) of fact on the panel will assert at the close of the evidence that they understand the cases presented and do not need a closing argument. To avoid this peer pressure not to take up additional time with a closing argument, it is advisable to mention, at the very beginning of the proceedings that you wish to have an opportunity to present a brief closing argument at the conclusion of the arbitration.

Again, with the closing argument, counsel should view the case from the opponent's perspective and attempt to raise and dispel expected arguments. By doing so, one can steal the thunder from the opponent's closing argument and also put the opponent on the defensive for most of their closing argument. Last but not least, it is again recommended that consideration be given to the use of a PowerPoint presentation to drive home your theory of the case to the arbitrator/mediator in a compelling fashion. n