ADR UPDATE: SOME THINGS I NOW THINK I KNOW

Now that I am closing in on ten years as a full-time Mediator/Arbitrator throughout Pennsylvania and beyond, I feel that - just maybe - I'm starting to get the hang of this ADR thing. Having watched a different episode of the same show more than twenty-three hundred times, I offer the following observations, thoughts and a few recommendations that may, hopefully, assist you along your own mediation and arbitration travels.

Sole Binding Arbitration - The ADR "Evolution" Continues

Recently published numbers in Allegheny County alone are both a little startling and yet not surprising, where civil jury trials over the past ten years have diminished by nearly 75% - down to just 72 in 2013. For me, it's really no big secret why the numbers have fallen off so drastically, since most non-lawyers/litigants I encounter express that traditional litigation "takes too long, costs too much and is way too public". In my experience, no client on any side of protracted litigation can easily justify spending years (and years) in discovery, while incurring more (and more) expense than ever intended and - win or lose - facing the near-certainty of lengthy appeals. I also find that most people I meet simply don't like being *on the record*, particularly given the immediate reach of social media. As a result, I have witnessed an "evolution" toward a cost-effective litigation end-game that continues to gain widespread popularity, namely, the Binding Arbitration option.

Without question, more and more of your clients out there are choosing Binding Arbitration, primarily in personal injury matters, UM/UIM litigation and medical malpractice cases. In the first instance, case value is often the only remaining issue, but litigation is still too costly where the parties have: (1) already paid their experts once for their reports

and (2) are now faced with paying these same experts a second time to *perform* their respective reports on the courtroom stage. Costs aside, given the likelihood of appeals, clients are prone to ask "why spend the money on a trial when the verdict won't end the litigation?" As a result, the clear trend over the past several years has been to submit the case to a Binding Arbitration proceeding presented essentially in a Summary Trial fashion. i.e. limited "live" testimony, if any, stipulated submission of deposition transcripts/medical records/reports and oral argument - all subject to a high/low agreement. More and more, the Binding Arbitration option is becoming the preference given the significantly reduced costs, capped damages and, even more significant, a binding decision - *closure* with no appeals.

Regarding UM/UIM matters, both claimants and the carriers seem to prefer the Binding Arbitration option primarily to avoid the certainty of appeals, with the great majority of these claims heard before a single arbitrator. This decision seems to come from the general sense that the third arbitrator "makes the decision anyway", making the cost of plaintiff and defense arbitrators unnecessary. Also, while there is almost always a high/low damages stipulation in Binding Arbitration, the parties remain split on whether or not the agreement should be disclosed to the arbitrator. While this decision appears to be based essentially upon the comfort level of respective counsel, I prefer that the attorneys disclose the existence of the agreement via a sealed envelope so that the ultimate "Findings of Fact, Conclusions of Law and Binding Arbitrator's Determination" that I prepare - following deliberations - incorporates the high/low terms and, if necessary, a molding of the award. I find that this practice removes the ambiguities in "how" or "why" I reached the decision rendered - all within one document. While a minority have resisted this approach, I

invariably receive a call a few days following the decision, where either or both lawyers confess “I know I told you I didn’t want the Findings of Fact, etc. but *my client* wants to know why you decided the case the way you did . . . “

On the medical malpractice front, the decision to proceed in Sole Binding Arbitration is similarly driven both by the ever-increasing costs and the near-certainty of multiple appellate issues. For example, one claim I recently arbitrated involved a stable of very high-priced experts on both sides - the costs to try the case would have been exorbitant given the damages involved. In a gall bladder malpractice claim - which had resulted in a hung jury - the parties chose Binding Arbitration, mutually acknowledging that they did not want to incur the extreme costs of paying the many experts yet again. These are just two of many examples where Sole Binding Arbitration was the obvious cost-effective choice given the circumstances where the parties were beyond ready for closure.

Frankly, given the ever-increasing costs of traditional non-binding jury trial litigation, it seems any more that very few people can stomach the likely appeals that accompany *any* jury trial, although there is always an exception. Believe or not, I mediated a case recently that was initially filed in 1984 - yes, 1984 - and the parties are *still* fighting like it’s 1984. Regardless of the type of case, there is clearly a common theme guiding the choice of private arbitration over the public confrontation - contained costs, confidentiality and closure.

Who Has The Authority?

On the mediation front, there is often prickly debate when plaintiff’s counsel insists that the *person with authority* appear at the mediation, particularly since the mediator has

no authority to require any individual's attendance and it is a rare day when a Court Order commands the appearance of a specific representative. Nonetheless, the effort in securing this elusive authority figure at mediation is often a wasted exercise since, in practice, I rarely see the individual with *final* authority. Instead, someone "with authority" attends and, in almost every case, that person is "capped" - requiring him/her to call someone else who subsequently has to call someone else and so on . . . Once in a while, the appearing representative tells me "*I'm* the phone call", however, the final authority typically rests with someone remotely situated upstream.

While many plaintiff attorneys resist the following notion, I find that the person on the phone - on just as many occasions - chose not to incur unnecessary travel expense since, in fact, they know they have enough authority to settle the case over the phone. Of course, in every unsettled case where the defense authority does not personally appear, that failure is typically the singular "blame" for non-settlement. In my experience, however, this is not always the case. My advice to plaintiff's counsel? Always request in writing that the defendant have the person with authority attend the mediation - but don't waste too much time demanding it as that person rarely has the *final* say anyway. Where defense counsel otherwise informs you and/or seeks your consent that the claims representative appear by phone, request that the defense agree to pay for the full expense of the mediation. While it *sometimes* makes a difference - despite the perception of plaintiff's counsel to the contrary - the absence of a personally appearing individual with authority is typically not *the* reason that a case does not settle.

Still Thinking About Being a Mediator?

Where the demand for mediation and private arbitration continues at a very healthy pace, so goes the notion of converting one's practice to "being a mediator". I published an article on this subject years ago, providing practical advice for those thinking about making the transition. While hundreds out there have since taken the certified training and/or have marketed themselves as an unbiased neutral, the reality unfortunately remains that a limited few are actually seeing much, if any, neutral work. In my opinion, here is why.

Of course, litigation by its very nature is a win/lose proposition start to finish. But past litigation is also something more - just how one conducts themselves in litigation over the years typically translates into their individual potential as a mediator. In other words, it is not whether you won or lost previous discovery, pre-trial or courtroom battles, but *how you played the game*. For example, if your historical *modus operandi* was very aggressive (in the old days, that was called "sharp" practice), there is little likelihood that your then-opponents would ever consider hiring you *now* as their trusted neutral. Even if you were simply a passionate advocate who was routinely "more than fair", a mere negative *perception* arising from your past actions/inactions can prevent your current placement in the neutral position. Remember - your mediator selection is doubly difficult as *both/all* sides have to agree to you.

As an example, one of the best lawyers I have ever known - who practiced on "both sides of the fence" - should be an obvious choice as a mediator for any civil case. Unfortunately, due to his zealous advocacy over his career - regardless of which side he was on - plaintiff attorneys perceived him as being *too defense oriented* while defense attorneys ironically found him to be *too plaintiff oriented*. Clearly, there is no science to

exactly why one mediator is hired over the other, but it certainly seems to be based on perception more than anything. I feel the old phrase applies: "others may forget what you said or what you did, but they will always remember *how you made them feel*." As subjective as all of this may be, how you made the other side *feel* during the course of past litigation pretty much determines whether or not that past-opponent would hire you now or even consider recommending you to others. Bottom line - if you are still thinking about marketing yourself as a neutral, first *realistically* assess how you have historically promoted yourself - or not - as a potential future mediator. Some advice - solicit those friends and colleagues who are encouraging you to become a mediator to hire you. If you get no takers, don't waste your money on advertising, speaking engagements and yet another article on mediation as it is probably too late. If you still otherwise feel that you have a future as a working neutral, by all means keep after it as there is always room for effective mediators and arbitrators.

Understanding the "me" in Mediation

Finally, one of the most important things that I have come to understand after all of these years is appreciating the "me" in mediation - the individual point of view of everyone involved in the process. Aside from settling the case, what do you think I see as the common theme underlying any mediation? Hint - it's one of the seven deadly sins. No, it's not greed - it's *vanity*. In other words, everyone involved in the negotiation process - whether they are in the room or not - wants to *look good* when all is said and done.

Let's go back to that "it's how you played the game" thing. For you plaintiff attorneys out there, do you really think that the claims adjuster can settle your case in the first few

moves? Conversely, do you defense attorneys think that the plaintiffs will take your $5000 of authority based upon a persuasive mediation statement? Do you both really think that telling the mediator that you are acting “in good faith” and that the other side “needs to get reasonable” is going to be effective? Let me relate to you a few examples if you don’t already know where I’m heading.

I recently mediated a case where the claims person - who was attending by phone - proceeded to micro-manage the mediation process, directing me to spend “twelve minutes” with the plaintiffs while specifically commanding me to explain that “they have no case”. (How do you think that went?) In another case, plaintiffs demanded $850,000, then later confiding to me that their “settlement goal” was $750,000. (How do you think that went?) From my standpoint, neither of the above had any real appreciation for the other side’s point of view. That is what I see all to often - too much focus on one’s own position while not taking into consideration the motivation underlying the other side’s negotiations.

Here is the point. If you are a plaintiff’s attorney - having never worked for an insurance company or a defense firm - you must understand that there is simply no way that the insurance representative will settle a case with a demand of $850,000 for $750,000 *even if they have $750,000 in authority*. Why? Because it doesn’t *look good* upstream. The rationale for the above demand was the well-considered notion by plaintiffs’ counsel that the “message” they were sending to the defense was that they were very serious about settling this case - which had significantly much more value - and that the value was obvious to the defense. In reality, the reverse occurred - the defense interpreted the demand as an acknowledgment by the plaintiffs that there *actually were* stronger liability defenses then the defense counsel believed themselves. The result? The defense

translated the $850,000 demand as a signal toward a $300,000/$350,000 range and the case did not settle. Unfortunately, both sides left *verklempt* - the plaintiffs were frustrated that the case did not settle and the defense - particularly the adjuster - was frustrated that the case could not settle for the authority in hand *merely because of the way it would look*.

Going back to the first example above, how could the experienced claims person ever think that, following very extended litigation, the plaintiff would suddenly change their minds even if the mediator told them they had no case? In reality, the reverse would occur - with the plaintiffs "digging in", feeling that the mediator has now "chosen sides". For those of you on the defense side, you should always consider the "math" before you decide to mediate. i.e. the plaintiff's "what do I end up with?" number. Frankly, if you haven't figured out the "sea level" amount - what it takes before the plaintiffs put money in their pockets - I can't help you. My advice? If you don't think that there will ever be enough authority to take care of the attorney's fees, costs and the negotiated lien - and still have a sufficient net to get a green light for settlement - seriously reconsider recommending mediation.

One Last Look

At the end of the mediation day, whether or not you agree with your opponent's point of view, you must consider that everyone involved in the process has to justify the decision they are making - all the while looking good at day's end. Plaintiff attorneys certainly want to look good to their clients. The insurance representatives similarly want to look good to their superiors. All lawyers want to pronounce victory to their colleagues and partners and, rest assured, that person who is fielding the calls all day from the mediation wants to look just as good further upstream to the CEO or President. Plaintiffs themselves often demonstrate a need to "save face" so they don't *look* like they are

“settling short”. All too often, I hear that “the best settlement is when everyone is unhappy”. From my point of view, mutual unhappiness is never my goal. From my perspective, happiness is a personal decision separate and apart from *justifying* resolution - as you certainly can be unhappy settling as well as happy not settling. Can the decision be *justified*? Can the end result be *justified* - whether settling or not - and how will you look wearing that decision? At the end of the day, I find that most people write their own justifying headlines. As the well-intentioned neutral, my goal is a justified, good-looking end-game for all.