The "M" Word Cometh — Just How Prepared Are You?

By John M. Noble

I recently authored an article for the local bar association reporting that the "M" word was finding its way beyond the usual literature piled on my desk. "Mediation" was now prominently featured on the front page of the *Pittsburgh Post-Gazette* as well as the *Parade* section of the Sunday newspaper. No longer an infrequent discussion among a few lawyers, the "M" word is not just creeping up on your practice — at this point, consider yourself surrounded.

"The days of wine and roses ..."

Once upon a time, a settlement inquiry was a badge of weakness — a suggestion to negotiate *before* a pre-trial conference was met with silent "glee" from the opposition ("Ah, ha! They must think their case stinks!") More recently, cases settle well before the judge's chambers as early-stage settlement discussions are fast becoming the rule and no longer the exception. Clearly, parties now seek to resolve the war long before paying for the price of one.

So how did our litigation practice become a "settlement" practice of law? Simple. "Winning" or "losing" has simply gotten too expensive. Combine the economics with the distaste of "risk" and the "M" word comes to thrive. Winning (or losing) the "big one" almost automatically awards the other side with a lengthy appeal and — let's face it — we're just not that happy with juries. Certainly, there will always be cases that must be tried — but that doesn't mean your litigation journeys will not include mediation whether raised by the opposition, your client or the court.

"ADR is here to stay — and mandatory mediation is on the near horizon."

Yes, there are still those of you who mock my mediation "attire" (see photo) while confidently relating to me, "I can settle my own cases." "I'm a *litigator* — I try cases!"

I've actually heard the above *during a mediation* although I am hearing more frequently from attorneys that they are "mediating cases *all over the country*." Plainly, mediation is less and less a suggestion of counsel — it's a mandate from the courts removing the typical posturing posed by the non-requesting attorney ("I'm only here because *they* wanted this mediation ...").

"CAUTION: Federal court mediation program under construction."

While not yet mandatory throughout Pennsylvania, the District Court for the Western District of Pennsylvania has developed a detailed "pilot" program which you can peruse on its Web site. Just as the mandatory electronic filing has thrust itself upon your practice, you *will* find yourself mediating federal court cases and, sooner than later, Common Pleas matters as well. In fact, don't be surprised that your next bench-bar conference or bar association meeting includes a presentation of the federal court mediation program.

John M. Noble

"So how do I learn how to mediate a case?"

In my travels throughout Western Pennsylvania, I find — infrequently — that there are still some of you who have not mediated a case. On occasion, a plaintiff's attorney will ask me moments before the mediation, "How do these things work?" or "How are you going to do this?" While this is the exception, it does highlight the fact that attorneys are agreeable to mediation *even when they aren't clear on what it is or how it works*. They just heard that "cases are settling" and, after muddling through the first mediation, immediately start thinking of other cases they would like to mediate.

The "process" varies somewhat among mediators — a typical session begins with the mediator explaining the process while inviting each party to present an outline of their respective positions. In some instances, plaintiff's counsel may present an opening statement by Power Point. More frequently, counsel presents a summary/outline of the claim and, on occasion, will elicit informal testimony from the client. Photographs, diagrams, exhibits and medical/economic reports are routinely submitted.

Parties also typically submit confidential mediation statements or pre-

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trial memorandums in advance of the conference along with pleadings and/or certain discovery. While I accept and review any and all material in advance, I also welcome hearing a case "cold" without any preconceived notion of the nature of the dispute — placing me in the "first impression" perspective of a jury rather than sitting as "private judge" familiar with the case.

On occasion, the defense often "defers" its presentation during the joint session on the premise that defense counsel does not wish to further "polarize" the parties so as to "hinder" the negotiation process. While each case requires its own particular course, I generally feel that the plaintiff needs to see the defense lawyer become the "advocate" — showing some "teeth" — since, typically, the plaintiff has only seen the defense attorney as the "interviewer" in the deposition setting. The same goes for the defense client who may benefit from a well-presented plaintiff advocate sitting across the table. No matter the case, the format has become individualized since — in mediation — the parties are beyond the rules of evidence and the formality of the courtroom. In this confidential setting, the parties informally present evidence and arguments that might never see a courtroom all-the-while seeking to "win" the negotiations.

"Just what are the rules for mediations?"

Time for a joke: an engineer, a scientist and a lawyer are each placed in different rooms and offered $1 million if they can answer one simple question — What's one plus one? The engineer spends hours diagramming his path until nervously giving his answer "two!" He receives his cash and now the scientist is seen sweating over his formulas and, after extended effort, he also answers "two!" and receives his cash. In the third room, the confident lawyer hears the question and calmly strolls over to the window. As he closes the blinds, he leans into the ear of his examiner and whispers, "*what do you want it to be?*"

It's an old joke but it *does* fit since ADR is whatever you want it to be — binding, non-binding, high-low, med/arb — you name it — that's the beauty of it. Mediation is voluntary, confidential, cost-efficient and flexible so that the process can be tailored to fit your particular case. It is whatever you — the litigator — feel is the best format for your client's legal position. No two cases are exactly alike — why shouldn't the settlement process fit the case?

"How do I find a good mediator?"

It is somewhat ironic that, in Pennsylvania, there is no consensus on mediation qualifications and requirements. In fact, non-lawyers (counselors, psychologist, social workers) are active in conflict resolution throughout the commonwealth. While there are many attorneys and retired judges who have obtained the approved 40-hour training, there are not that many "working" mediators, at least in Western Pennsylvania.

So how do you find a good mediator?

The same way you found that "tax guy" or patent attorney — you talk with your colleagues for the good word-of-mouth. While you may find a mediator by coming across an article or searching the Web, the more likely scenario is that you will call someone you know to see "if they know" a good mediator. It is no different than your law practice — nothing beats a good referral.

"Will the other side mediate?"

Getting the other party to the table is a dilemma that will ultimately disappear with the advent of mandatory mediation — for example, it wasn't too long ago when ADR was foreign to the health care profession. The pendulum has swung so far that the Supreme Court directed the Common Pleas Courts to develop medical malpractice mediation procedures and, currently, the folks in Harrisburg are considering legislation that would encourage health care providers to *apologize* to their patients for medical mishaps without fear of later being punished in the courtroom by the disclosure of same. The success of the Philadelphia-based mediation programs is reaching Western Pennsylvania and the mediation of the medical malpractice claim is no longer uncommon. Plaintiffs' attorneys, once fearful that mediation was merely a defense discovery "ploy," now seriously welcome the process as more cases than ever are resolving via ADR.

True, not all cases are "mediateable" (a new term). If you are finding that the other side "won't mediate," consider this: It just might be a big "red flag" that should cause you to re-evaluate your position. (Translation: your case may not be as good as you think it is.)

"Do I need to prepare as much for a mediation?"

As with any case, being prepared is a given. However, too frequently, attorneys appear at the mediation without necessary documentation in-hand, such as a letter confirming the waiver of a substantial lien, an expert report or incomplete medical/economic records. More often, attorneys fail to prepare their clients for the mediation "process" neglecting the fact that, to the clients — this is *their* "day in court." What may feel

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informal to the attorney is an unfamiliar situation for the client — facing the opposition at nearly arm's length while looking to the mediator as the authority figure. Undoubtedly, the parties want a sense of fairness, impartiality and, more than anything, the "intangible assurance" that they have been *heard*. In order to "win" the negotiations, do not take the mediation process lightly — be prepared, act in good faith and never underestimate the process. Mediation is here to stay. Hopefully, the process will work for you — and your clients. ◆