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Mediation Notes

September 2016

Don't Make Mediation a Surprise Party

One of the recurring problems in mediation is the disclosure of new information that alters the economics of the case. This most frequently occurs during mediation of personal injury claims, but the problem exists across the board. New information can come in the form of insurance coverage revelations from the defense or liens or new damage theories from plaintiffs.

Here is a typical scenario: the parties have propounded discovery, received interrogatory answers and in federal court received Rule 26 damages disclosures. Some time later, the parties go to mediation, and the defendant has gathered and reported in advance this information to their client and insurance carrier (if any) to set reserves and authority. Within the first hour of mediation, the defendant is surprised to learn that the damages are greater, there are unreported liens and now the "math" of the case is very different.

This is invariably a product of simple oversight. However, it is a recurring problem that I have been writing about for some time. The mediation rules do not require the defendant to request, nor the plaintiff to disclose, all new information prior to mediation. There is no advance disclosure obligation by rule, nor by mediation order. If, by some mechanism, the parties were reminded to make disclosures, the practice habits would become better and the frequency of this problem would greatly diminish.

Sometimes one side or the other is pre-occupied and does not focus on the mediation far enough in advance. There is typically no mandated date for the plaintiff's attorney to provide updated medicals, costs, expenses and other numbers. Just because the mediation rules do not require you to update discovery

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responses does not mean you should ignore the economic interests inherent in mediation. Fruitful settlement negotiations that involve insurance carriers or other decision-makers require access to key information in advance of the mediation date.

To maximize the chances for a more productive mediation, attorneys should consider establishing a due date for making premediation disclosures of new material information so that the other side can digest the economics of the case in advance. This may seem elementary, but when it does not happen, settlement becomes difficult. If there are coverage revelations or important exclusions or defense-related considerations, these, too, should be shared in advance. Early disclosure by the defense of key facts or legal defenses before mediation may help temper unrealistic expectations.

We see largely avoidable communication deficits that can be fixed by better mediation practice habits. The type of information withheld and not disclosed in advance can vary and may include newly asserted business interruption damage claims, the existence of litigation loans that create a lien, or the purchase of insurance for proposals for settlement that also creates a small lien (the premium) and changes the dynamics when PFS insurance is in place. Litigation loans are not much different than other liens, but are too often not disclosed in advance.

To maximize the chance for a fruitful negotiation, attorneys and clients should schedule a due date on the calendar for making premediation disclosures of all expenses and material information, including claims not raised in the pleadings or new defenses, so that the other side can digest the economics of the case in advance. Mediation is not an adversary proceeding. Attorneys need to switch gears and be in the habit of volunteering information you expect or should know the other side will want to consider during mediation. Surprises at mediation are not helpful —they are a nuisance at best and too often a poison pill leading to impasse.

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