SETTLEMENT MANAGEMENT: REAL TOOLS YOU CAN USE

ROBERT L. TOBEY, *Dallas*
Johnston ♦ Tobey

State Bar of Texas
25TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 18-19, 2013
Austin

CHAPTER 7.1

TABLE OF CONTENTS

I. INTRODUCTION 1

II. HISTORICAL PERSPECTIVE 1
- A. The Early 1980's. 1
- B. The Rise of Mediation in the Late 1980's. 1
- C. Mediation Loses Its Luster. 1
- D. The Great Recession/Depression of 2008. 1
- E. Why Mediation? 2

III. MEDIATION DO'S AND DON'TS FROM THE PLAINTIFF'S PERSPECTIVE. 2
- A. When to Mediate 2
- B. Preparation for Mediation 2
- C. Procedure at Mediation 2
- D. Making Offers and Counter Offers 2
- E. If You Settle, Make Sure Your Have an Adequate Agreement That Can Be Enforced in Court. 2

IV. WHAT PLAINTIFFS WANT FROM THE DEFENSE. 2
- A. Be Honest With Me Before Mediation About Defendant's Intent to Settle. 2
- B. Choice of Mediator 2
- C. Please Make a Meaningful Opening Statement. 2
- D. Bring Someone Other Than The Accused Wrongdoer as the Client Representative 2
- E. Having Authority at the Mediation 2

SETTLEMENT MANAGEMENT: REAL TOOLS YOU CAN USE

I. INTRODUCTION

I have been practicing law since 1980. Historically, 95 percent of all cases settle before trial. That percentage has not varied significantly even with the advent of mediation in the late 1980's. Knowing that the overwhelming odds are that each case that is filed will ultimately settle, the question is what is the best way to bring about settlement as soon as reasonably possible from the plaintiff's perspective. I believe that mediation is a valuable tool to facilitate settlement at the earliest possible time. In this paper, I will share my historical perspectives and since mediation remains the primary settlement tool today, I will list some tips for mediating effectively from the plaintiff's perspective.

II. HISTORICAL PERSPECTIVE

A. The Early 1980's.

When I first started practicing law in 1980, life was simpler. Cases were generally less factually complicated than they are today, lawyers seemed to be easier to work with than they are today, and lawyers seemed to be more candid about the merits of their client's positions than they are today. These factors led to settlement being explored at an early stage of the proceeding with defense counsel frequently initiating the discussions. The lawyers would discuss what the case was about, what discovery had to be taken, and when they thought that settlement negotiations might be successful. Lawyers had a lot less fear about showing cards about their cases. Life was simple indeed!

B. The Rise of Mediation in the Late 1980's.

The ADR statute was enacted in 1987. Beginning in the late 1980's in Dallas, in particular, mediation caught fire as a settlement tool. Interestingly, lawyers who had always negotiated settlements on their own, embraced the idea of having a third party neutral handle that task. Mediation as a settlement tool also emerged at the same time as the real estate crash/S&L debacle in Texas. These events led to a huge surge in commercial litigation and kept trial lawyers in this state busy for several years. The success of mediation, not surprisingly, made it the darling of trial judges who loved the help in clearing their dockets. In large counties, mediation orders became standard in almost all cases.

C. Mediation Loses Its Luster.

In the mid 1990's, as the S&L litigation wound down, the business cycle remained in a downturn and fewer cases were filed. Perhaps, not coincidentally, the downturn in litigation coincided with a pushback against mediation. Judges who had fallen in love with mediation in the early 1990's continued to order all cases to mediation at least once before trial. Through case law it was established that a party could be ordered to mediation, but once there never had to make an offer or otherwise participate in the proceeding. Lawyers began manipulating the process so that although mediations would take place as ordered, they would not succeed. By way of example, lawyers would not prepare, defendants often would not send a true decision maker to mediation, and a lot of lawyers started doing mediation, many of whom were not effective. All of these factors resulted in wasted time, effort and money as well as hardened feelings. While this trend lasted a number of years, the cases that were going to settle continued to do so at some point in the proceeding.

D. The Great Recession/Depression of 2008.

It seems like the world as we knew it ceased to exist in 2008. The largest lenders and financial institutions in this country teetered and would have failed but for federal intervention. It also seemed like people, collectively, reacted like they had been hit on their heads with a baseball bat. Everyone was stunned and scared at what was happening on a daily basis.

The legal world was hardly immune from these events. From the plaintiffs' prospective, defense lawyers never wanted to try a case and never wanted to settle a case. It was like the old adage that "you don't shoot the last two buffalos, because there might not be another one over the hill." Cases began to drag on and on and neither mediation nor informal settlement discussions were even entertained. All the while, law schools continued to churn out new lawyers who could not find a job. Many of these beginning lawyers were forced to hang up a shingle so that they could pay their enormous student loans. This increased competition for cases worsened the problem of too many lawyers chasing too few cases.

In addition, states and local municipalities struggled to balance budgets due to a declining tax base caused by the housing crash. The last thing that any of them wanted to do was to settle with a plaintiff or even pay a judgment that a plaintiff received. Insurance companies, which invested heavily in the stock market, also circled the wagons and made paying claims a very low business priority.

It seems like it has only been in the last year or two that the collective malaise has started to lift. While things are certainly not back to the boom times of the middle part of the last decade, they are improving. As a result, it has become possible to settle cases again and mediation is a very useful tool in helping to accomplish that task.

E. Why Mediation?

Throughout, the past 30+ years, 95% if all cases that were filed, settled at some point in the proceeding. As a result of that fact, the question could be asked how does mediation help the process? In my view, the benefits can be very significant. It gives the lawyer his or her only opportunity to communicate directly with the decision maker on the other side. Further, I firmly believe that in many cases mediation with a good mediator expedites settlement. While the cases that are going to settle ultimately settle at some stage of the proceeding, mediation gives the plaintiff the best opportunity to get to the finish line quicker. With these facts in mind, I have listed some mediation tips from the plaintiff's perspective as well as what plaintiff's lawyers want from the defense to help mediation be successful.

III. MEDIATION DO'S AND DON'TS FROM THE PLAINTIFF'S PERSPECTIVE.

A. When to Mediate

1. From the Plaintiff's prospective, I like to mediate as soon as I have adequate knowledge of claims and contentions of the parties.
2. Ensure that the Defendant has all necessary discovery, otherwise, mediation will be a waste of time.

B. Preparation for Mediation

1. Always send a mediation packet to the mediator.
2. In a significant case, it is also a good idea to meet with the mediator beforehand.
3. Idea is to educate the mediator fully about the case before the mediation starts, so that mediation is more productive.

C. Procedure at Mediation

1. Always do an opening session—it is your only opportunity to speak directly to the other side—don't offend.
2. Don't be afraid to lay out your case in detail—there are very few real surprises in litigation—don't oversell your case.

D. Making Offers and Counter Offers.

1. Goal—Find out how much money the Defendant is willing to pay to make the case go away.
2. Rely heavily on what the mediator recommends—he or she knows what is going on in the other room.
3. Don't be afraid to get serious early in the day.

E. If You Settle, Make Sure Your Have an Adequate Agreement That Can Be Enforced in Court.

Government Entity—Vote up or down on settlement agreement.

IV. WHAT PLAINTIFFS WANT FROM THE DEFENSE.

A. Be Honest With Me Before Mediation About Defendant's Intent to Settle.

1. Wasting time in mediation has a very polarizing effect on subsequent litigation proceedings.

B. Choice of Mediator

1. If there is a mediator that your client will listen to, please let me know.
2. Even if this person is someone I don't know, I will give deference to what defense counsel tells me.
3. I don't want a courier—want feedback on merits of claim.

C. Please Make a Meaningful Opening Statement.

1. If there is a weakness in the Plaintiff's case, tell us so that settlement expectations become reasonable earlier in the day.
2. If I lay out my case and other side doesn't—affects future dealings.

D. Bring Someone Other Than The Accused Wrongdoer as the Client Representative

E. Having Authority at the Mediation

1. Always a problem with a governmental entity where a settlement must be approved by a city council or commissioners' court or the like.
2. Communication with Plaintiff's counsel before mediation is critical to get an idea about parameters for potential settlement.