The art of mediation in mass tort or complex cases:
Know your enemy and help your neutral

By Hon. Jennifer Togliatti (Ret.)

Sun Tzu said, "Every battle is won before it is fought." While preparation is important in every mediation, it is paramount to the successful resolution of complex litigation or a mass tort case. When you represent a client in a case of this magnitude you can help your mediator, and at the same time your client, by communicating to your neutral your insights into the three most important elements of the case: the players, the politics and the payment.

Define the Players

Every complex case has different dynamics on either side or sides of the aisle. Any mediator you choose in a complex or mass tort case should schedule a pre-meeting with the attorneys for the aligned parties. If for some reason your mediator does not schedule a pre-meeting, then you should request to schedule one. In each of my complex or mass tort cases, I have gained invaluable information on the dynamics of a case by meeting with the different sides to discuss the roles of the participants, the relationships between them, and the identification of decision-makers.

In the event of a mass tort or class action case, a meeting with the plaintiffs' counsel leadership group or class counsel is key to the mediator's understanding of the structure or make-up of the attorney leadership group and which attorneys speak to particular issues. For example, there may be divisions of labor by the attorneys, by client groups or particularly important legal, factual or expert issues in the case. Because a complex mediation will ordinarily involve many sessions, phone calls and emails, it is often not practical to expect to speak to all attorneys about each of the issues in the case when the mediator needs answers or communication is necessary. For example, while you may have lead counsel for a particular group, that attorney may not be the coverage counsel that you need to speak to discuss a finer point on coverage. Before your pre-mediation meeting, think about the divisions of labor among attorneys, and what if any client groupings by liability, injury or any other quantifier that you have in your case and be prepared to share all of that information with your neutral.

Regardless of who you represent, you will also likely have information your mediator wants to know about the participants for the other aligned parties. Whether it is what you know about the dynamics of the other parties' carriers and counsel, or the other parties themselves, sharing what you know about the relationships and personalities can be very helpful. Also, do not hesitate to tell your neutral speculations you may have into the dynamics of the opposing parties, their carriers and their counsel. No detail is too small! Your neutral is bound by confidentiality and will never share your speculation. Sensitizing your mediator to these dynamics will assist them in adjusting their approach to the case as needed. This includes your assessments of any particularly difficult personalities in the case or significant prior litigation interaction that may explain the posturing or intense emotions of other parties or their counsel. I have mediated several cases where very sophisticated parties express bewilderment to me at the lack of meaningful dialogue regarding settlement between their counsel with the opposing side, only for me to find out during the process that their counsel's intractable posture with the other lawyer has limited any meaningful conversations regarding a pathway to resolution. In my experience, the attorneys working the case day to day are, more often than not, spot-on in assessment of the dynamics of the opposing players, so do not hesitate to share all of your insights with your neutral.

Detail the Politics

It is very important for your neutral to consider the interests driving the parties. Oftentimes the interest of a party or parties is not necessarily a significant consideration for that party's carrier, and if that is the case, that is very important for your mediator to know. Whether the considerations of a party are adverse publicity and potential negative effect

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on business reputation, concerns about setting precedent with a settlement, the potential exposure of an excess verdict, adverse effects on long-term business relationships between parties or between parties and carriers, or a myriad of different interests, your mediator should know all of this before the mediation begins. You may think that opposing counsel will fill in your mediator on these salient details about the conflicting interests on their side of the fence, but in my experience that is not necessarily the case. There may be ethical or client authority considerations that limit opposing counsel sharing those types of details with your mediator.

To the extent you are authorized to share any specific political or practical concerns regarding your own client's political interests in the outcome of the case, beside the monetary result, this is also important information. While experienced neutrals will likely have a sense of political hot-buttons your client may have, knowing the sensitivity will help your neutral ensure an approach to the issue in a tactful way that will not result in loss of your client's trust in the neutral you likely agreed to or recommended. I can speak to this based upon my experience in handling the One October, Mass Shooting case in Las Vegas as trust was an essential component to its resolution. The politics involved in a case of this magnitude could have been insurmountable, however, the parties and counsel had trust: both in the process and in the mediators. Sharing vital information about the politics and driving interests of the parties at the outset of the case, in combination with keeping those lines of communication open throughout months of mediation truly assisted with facilitating a successful resolution.

Determine the Payment

The bottom line and getting to an actual number for settlement is often the most simple and straightforward aspect to a mass tort or complex mediation. Regardless of whether it is a mass tort or a construction defect case with hundreds of millions of dollars in dispute, my experience has been that coverage issues will be the crux of whether the mediation succeeds or fails. Pre-mediation there should be a presentation of the towers and layers of insurance coverage, along with a general description of the terms of coverage. A full briefing of the terms of particular policies may be quite helpful to your mediator, however, depending on your mediator it may be sufficient to detail the type of coverage, e.g. builder's risk, general liability, inland marine, etc. Waiting until the actual start of the mediation to get this information to your neutral is a mistake guaranteed to result in significant frustration of the process and, rightly or wrongly, potentially lead to distrust by the opposing party. Also be prepared to brief your neutral on any declaratory relief actions related to coverage and the status of those actions prior to the mediation.

If you know that the coverage issues in your case are so significant that you have hired coverage lawyers for your team, talk to your client about their willingness to have the neutral to retain a consulting neutral who is highly knowledgeable and experienced in the particular types of coverage in play in the case. I was lucky enough in the City Center Litigation over the now imploded Harmon Hotel in Las Vegas, to have parties that retained a neutral with decades of specific coverage litigation experience to assist me in working through the coverage issues with the parties and the carriers, which was crucial to the successful resolution of that case.

Attorneys who mediate successfully understand that it is not all about their case and their case alone. Share everything you know about all the players, all the politics and the payment. After all, Tzu tells us, "if you know your enemy and yourself you need not fear the results of 100 battles." So give your neutral the weapons to succeed. ■