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BLUEPRINT TRIAL CONSULTING

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PERSPECTIVES

THE PSYCHOLOGY OF A SUCCESSFUL MEDIATION

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In-house counsel and claims professionals evaluate thousands of cases each year and make decisions concerning which cases to potentially take to trial, which to settle soon after a lawsuit is filed and which to settle before a lawsuit is even filed. In most instances, in-house counsel and claims professionals prefer to mediate in order to avoid the expensive costs of litigation. However, mediations are often unsuccessful due to the lack of groundwork and background research carried out beforehand.

The key to a successful mediation is to build rapport with your adversary well before the mediation and in some instances, prior to the lawsuit ever being filed. In personal injury cases, rapport can be easily established by making a prompt call to the party that was harmed and expressing empathy toward the accident victim. Plaintiffs frequently mention their dissatisfaction with how their claim was handled initially and often this leads them to pursue extensive and costly litigation. This experience is consistent with research

which has shown that physicians who had positive communication behaviours with patients had significantly fewer medical malpractice lawsuits filed against them. Similarly, though this can sometimes be difficult, good communication with and empathy toward the party filing the lawsuit will likely lead to a quicker resolution and at a lower amount.

Initial stages of litigation

After a lawsuit is filed, large corporations and insurance companies will typically forward the petition to defence counsel with little thought about resolving the dispute. Once a petition is received, there should be high-level discussions about the steps needed to resolve the lawsuit to avoid costly litigation which may include taking depositions or retaining experts. Even if the goal is to litigate the matter, the specifics on how this should be done are crucial. To paraphrase Victor Davis Hansen, war – and, similarly, litigation – is a measuring tool or device designed to show which side was stronger. However, if rapport is built with your adversary and

one effectively communicates their position on the front end, then the battle may be avoided altogether. If too much time is spent on the litigation, both sides may then become entrenched in their respective positions and no argument will move the other side toward resolution.

Whether court ordered or of their own accord, parties will frequently use mediation as a tool to resolve disputes earlier on in the litigation process. Often, there is little thought given to the reasons for the mediation, at which point in the litigation the mediation should occur and who the final decision maker will be.

Mediators used to be engaged as a last resort before trial when neither side could reach an agreement. Today, mediators are often used as an initial step for resolving litigation. This has led to the parties in dispute being less skilled at learning the concerns of the adversary and effectively communicating their position. Moreover, the parties often avoid having the difficult conversations often needed to resolve the dispute. Technology has also led to fewer discussions being held face to face, which are ideal for engaging in honest discussions and more diplomacy while reducing the likelihood of individuals engaging in offensive behaviour. However, parties involved in the litigation have outsourced the finesse needed to move the parties toward a resolution without regard to how they can play an active role in resolving the conflict themselves.

The timing of a mediation will depend on whether each side has developed its litigation story and the degree of the disconnect between the parties. In civil litigation, the parties must have positions on whether there was a duty breached and the amount of damages and determine the discovery needed to obtain this information. For example, if one simply wants to argue the negligence aspect of the lawsuit, then one or two key depositions may be all that is needed before both sides come together. However, if the nature of the dispute focuses on the injury, it may take longer to get to the point where settlement talks are productive.

"Matching the mediator's communication style to the decision maker is more likely to lead to a successful resolution."

Identifying the final decision maker for resolving the dispute is an often overlooked yet essential element of the mediation. It is critical to know

who the decision maker is in order to focus your arguments on him or her. Often, several hours pass during a mediation before parties learn who will make the ultimate determination for resolving the dispute. In our experience, it may be the litigants, his or her spouse, or even an attorney from whom final approval is needed. Also, having some information on the psychological make-up and background of the decision maker can help you better craft your arguments. Similarly, by knowing the nature of the dispute and the nature of the decision maker, a more effective choice of mediator can be made. For example, if the dispute involves a blue-collar worker from Philadelphia, one type of mediator may be used who better resonates with this demographic. However, they may not be the best choice for a more educated or sophisticated plaintiff. Matching the mediator's communication style to the decision maker is more likely to lead to a successful resolution. Having an aggressive 'Type A' mediator will be more effective with an aggressive plaintiff versus a timid decision maker who will likely be put off by the mediator's aggressive tactics.

Developing and testing litigation story

Inevitably, each side will have different views on liability and damages and, therefore, will value the case very differently. Each side's experts will have different views on the responsibility of the defendant for causing the tort. Moreover, depending on the assumptions used, damages experts will arrive at very disparate valuations. At an impasse, in-house counsel and claims professionals typically compare historical jury verdicts with the case facts to determine case value. However, there are several issues with this approach. First, each case is inherently different and thus relying on previous verdicts may not predict the trial outcome of another matter. Second, factors such as the effectiveness of witnesses and jury composition are unique to each case which will also impact jurors' verdict decisions. Last, jurors' attitudes about issues such as corporate conduct, personal responsibility and damage award levels are continually changing and thus, how juries decide cases may differ over time.

To best determine whether the litigation story resonates with jurors, in-house mock jury research exercises will inform which side jurors favour and the amount of damages they believe are warranted. In the typical in-person jury research exercise, two to four deliberation groups will observe presentations on behalf of each party in the dispute, which will include key evidence and testimony. Following these presentations, the mock jurors are read the jury instructions, given a verdict form, and divided into one of several groups to deliberate. Each mock jury will then render a verdict which will include any damage awards. The results of the jury research provide a few data points for assessing potential exposure (the damages verdict for each group).

However, to more robustly evaluate litigation risk, Bayesian statistics may be used to determine the

probability of obtaining various damage awards. Rather than considering only a few damage awards for making litigation decisions, we can use algorithms to simulate how hundreds of different jury configurations would have decided this case. In regard to the litigation story, this analysis informs the best- and worst-case scenarios and the probability of obtaining a damage award equal to or greater than potential settlement offers. With this information, in-house counsel and claims professionals have much more information to determine whether their litigation story will resonate and, accordingly, whether they should stay firm with their settlement offer or move toward their opponent's settlement demand. If the mediation is unsuccessful, the jury research has the added benefit of determining the key issues and storylines which will impact how jurors ultimately decide a case and identify the profiles of dangerous jurors for whom your litigation story will not resonate. At trial, the litigation story may then be delivered with more confidence to the jury.

Conclusion

To conclude, cases can be settled favourably and at a lower cost if one has fostered relationships with the opposing party, laid the proper foundation for their argument and prepared for the mediation. Also critical is knowing the hand you are dealt. Conducting jury research prior to mediation can provide critical information about litigation risk and potential value. Importantly, one can then save on litigation costs, either by not settling for too much or by remaining in litigation that should have been settled sooner. CD

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