WHEN THE CASE CANNOT BE SETTLED, USE A MEDIATION AGREEMENT TO SIMPLIFY THE TRIAL AND AVOID EXTREME RESULTS - National Arbitration and Mediation

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When a lawsuit is pending, there's no better, more practical and effective way to resolve the dispute than through alternative dispute resolution (ADR). What a great feeling when all issues are settled. The case is completely over and it's time to move on. After all, this is why mediation exists in the first place!

But what happens if you cannot settle everything at mediation?

It doesn't necessarily mean that mediation was a complete waste of time or that you have to return to an "all or nothing" trial strategy. Trial results always remain unpredictable and "Black Swan" events – which can have major negative effects – happen to the best trial attorneys. They can even happen to you! Even though you gave great effort preparing this case for trial, spent a lot of time and money on experts, and worked hard through nights and weekends, you still lost a case which you did not expect to lose. You came away from the courthouse with an unhappy client and your own regrets – and the fallout doesn't stop when you leave the courthouse. No, you will continually second-guess all your pre-trial decisions and even years later, when something triggers the name of that case in your mind, BAM! you will re-live your loss all over again, as a recurring, post-traumatic nightmare.

Isn't there some way to better manage the risk in your case when it doesn't settle before trial? Isn't there some way to avoid painful surprises from the jury? Yes, there is. Read on. A well-crafted Mediation Agreement can help you.

Before getting into the details, let's talk about other cases that won't settle at mediation, but will unexpectedly settle shortly after the trial begins. Typically, this occurs because one side or the other decides the risks are too great and agrees to a lesser deal. In the lead-up to these trials, all attorneys work like mad, review entire files, serve subpoenas, line up witnesses, and pay high expert fees in advance. The attorneys for each side don't hesitate to burn through their trial bankrolls, because trial is a war nobody wants to lose. Then suddenly the case settles, and everyone is relieved. But so much additional time and money was wasted!

A mediator can help you avoid this costly situation the next time a case can't completely settle at mediation. Don't rush out the ADR door; sit back and consider a pre-trial Mediation Agreement which saves time, money and aggravation at trial. It will take additional work on everyone's part, but it may be worth obtaining a Mediation Agreement to limit the issues for trial. Such an agreement can benefit everyone involved.

The Key: Negotiate a Mediation Agreement that allows you to only try that part of the case that needs to be tried and resolves the rest of the case pursuant to agreed terms.

- Explore if it is possible to reach a Mediation Agreement, to only try the liability part of the case, by agreeing in advance regarding damages.
- Once there is a liability verdict, the Mediation Agreement provides a formula which determines the specific damages award, with the amount of the damages award varying, depending on the percentage of culpable found against the plaintiff at trial.
- The Mediation Agreement can satisfy the plaintiff's attorney, who may be willing to accept a reasonable damages award if there is a guaranteed "low" number in the event of a defense verdict on liability.
- The defense should be willing to eliminate the possibility of a larger than anticipated award.
- By using this type of Mediation Agreement, the only questions that the jury will determine are whether the defendant is liable and what the percentage of culpable conduct, if any, of the plaintiff should be.
- The trial will only take 2 or 3 days. Nobody has to pay for, prepare, take direct testimony from, or cross-examine medical experts. Jury selection will be shorter as there are only liability issues to discuss.
- If the jury finds that the plaintiff bears a percentage of fault, the Mediation Agreement will determine the payout based upon the amount of culpable conduct.
- For each percentage point assessed for plaintiff's fault, the award is reduced by a pre-determined amount.
- By entering into an agreement at mediation, each side gets something they want. The plaintiff never goes home empty handed. The defense never has to pay a runaway verdict.

There is no need to gamble "all or nothing" if each side gains something by managing the risk with a Mediation Agreement. Considerable expense is saved for both sides, and the jury's task is to decide on the only issue which prevented the case from being settled in the first place. Now that is justice!

Recognizing and dealing with these issues at mediation makes trial less cumbersome for both sides. Everybody goes into the trial knowing that there is a safety net in place

to protect against the bad result.

Another benefit: It takes a lot less time to prepare for a trial where the only issue is liability. Attorneys – don't you want more of your nights and weekends to be your own? Risk managers – wouldn't it be nicer to have more trials where you have negotiated a reasonable downside and save considerable defense costs?

If you are interested in exploring Mediation Agreements further, just let me know. If we can't settle outright, let's get together to craft a Mediation Agreement which simplifies the trial, which allows everyone to sleep better at night, spend less time in the courthouse and more time with our friends and families!

Meet the Author

Bob Worden, Esq. is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and concentrates on high-exposure personal injury cases. In 2018, Mr. Worden was voted a Top Ten Arbitrator by the New York Law Journal Annual Reader Rankings Survey. He is available to arbitrate and mediate cases throughout the NY Metro area. Mr. Worden is also a member of Lawrence, Worden, Rainis & Bard, P.C. in Melville, NY

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