MEDIATION – A MEDIATOR'S VIEW & NUANCES OF THE PRODUCT MEDIATION

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A. When to Mediate: Is it the Right Case?

Whether to mediate a products liability case involves a number of considerations that are different than those involved in the "garden variety" auto accident, slip and fall or labor law case. It is axiomatic that in order to mediate any case, the parties must be able to have evaluated the merits of the case realistically and have engaged in a cost/benefit analysis of continuing with litigation and proceeding to trial, versus resolving the case prior to trial.

The timing of mediation is important to ensure both cost effectiveness and an increased likelihood of settlement. Successful mediation of a products liability case is more likely once discovery has been concluded and the parties and their attorneys have had, and have taken, the opportunity to assess the strengths and weaknesses of their client's case and draw conclusions about its reasonable range of settlement value. For the plaintiff's attorney, this means that he has discussed at length with his experts their analysis of the strengths and weaknesses of the case after they have completed review of the depositions, exhibits and other discovery material. For the defense, this point is reached after careful reconsideration is given to the strengths and weaknesses of the anticipated defenses to the plaintiff's case, and, counsel (in-house and local/regional attorneys) and claims managers have communicated with each other.

Whether dealing with *Daubert* in federal court, or *Frye* in state court, for the products liability case to be "ripe" for mediation, the parties should be able to come to the table either with challenges having already been

decided, the decision that no challenges will be made, or with a realistic ability to agree with the adversary that a challenge yet to be made could have a roughly equal chance to be decided in either party's favor.

A second important ingredient to success of the products mediation is a true desire on the part of the parties to settle the case and, within that context, a willingness to listen to the other side's position at the mediation hearing and to be willing to modify evaluation of the claim as a part of the process. If each party, or even one party, arrives at the mediation hearing intent on continuing only to advocate their client's position, there is a much greater likelihood that settlement won't be reached. In addition to the case being "ripe" for mediation, this also requires preparation by the attorney, preparation of the client and the decision to have all necessary persons with authority present or readily available, as discussed more fully below.

B. Special Considerations in Mediating the Products Case

In this writer's opinion there are four considerations that are particularly important to appreciating that a products case is different than many other kinds of cases when mediation is being considered. They are:

- the product at issue is the "creation" of people and resources within a company;
- challenges under *Daubert* or *Frye* should be considered;
- the presence of multiple defendants and liability/money apportionment should be considered beforehand; and
- confidentiality may be an issue.

- *The Product at Issue is the "Creation" of People and Resources Within a Company*

As most cases litigated are design defect cases (or analogously in many respects the failure to warn case), the plaintiff is claiming that the development a product that presumably involved thousands of hours of

work by engineers, designers, testers, management, marketing personnel and assemblers – resulted in an entire product line that is flawed – in essence, that the result is a product that is unsafe for use by many or arguably most of the very individuals for whom it was made. Manufacturers take these claims seriously for two important reasons. First, the "snowball" effect of one and then potentially many cases being settled or tried successfully to plaintiff's verdicts may mean millions of dollars to the corporate "bottom line." Second, the time, energy, competence and integrity of the individuals who designed, developed and assembled the product is being called into question. Thus, there is both an economic as well as an "emotional" component that weighs in the "mind" of the company's board and other in-house decision makers and which is imbued to national and/or local counsel defending the product. Additionally, in some cases, where a product is designed and manufactured overseas, the cultural "mindset" may evidence difficulty in accepting the American legal system in which persons who are injured or killed during use of a product even have the right to pursue claims for pain and suffering and economic loss. In these situations, dealing with the decision makers during the course of discovery and in the mediation environment can be challenging.

- *Challenges Under Daubert or Frye Should be Considered*

Because expert proof is a critical factor for both the plaintiff and the defendant in a products liability case, the challenge to that proof has grown in frequency and sophistication since *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579)was decided on June 28, 1993 and has forever changed the complexion of litigating and resolving the products liability case. New York State's corollary decision in *Frye*, though much older and still less often employed, has provided the "door" through which the state court equivalent of a *Daubert* challenge is pursued in the state court action, principally by a foundation based challenge to the expert's qualifications/opinions. However, as many products liability cases are litigated in federal court, the *Daubert* hearing is a familiar and expected piece in the life of a products liability case.

If one or more *Daubert* challenges have already been made and the claims have survived their decision, this variable in the parties' evaluation of the

case has been removed, at least to the extent to which the question of whether a claim or defense will be aired in the courtroom has been resolved. Further, the parties have also had the opportunity, through the submission and hearing process, as well as in the content of the decision, to develop a better appreciation of how the "battle of the experts" may go in the courtroom. Finally, if no challenges are contemplated by the parties, *Daubert* and *Frye* are not fulcrum points as to whether or when mediation should occur.

A pre-mediation conference by the mediator with the parties is a useful tool to assess how, if at all, the *Daubert/Frye* challenges may or may not impact the ability of the parties to engage successfully in the mediation process. There is certainly a higher likelihood of success in mediation if the challenges have been brought or decided, or if the parties have determined that there is no realistic likelihood of success for either in pursuing a *Daubert* or *Frye* challenge.

- *The Presence of Multiple Defendants and Liability/Money Apportionment Should be Considered*

Whenever there is more than one defendant in a products case, it is helpful for the mediator to know in advance, again, through a pre-mediation conference among the attorneys for the defendants (without the presence of the plaintiff's attorney) to candidly discuss whether there has been communication to arrive at an agreement as to percentages of contribution to a settlement from each. In doing so, the mediator can be educated about the issues between the defendants and develop an understanding of where the problems lie on that side of the table and hopefully, lay the groundwork for compromise and a possible agreement <u>before</u> the mediation hearing takes place.

The mediator's ability to facilitate settlement is made considerably more difficult when it only first becomes apparent on the day of mediation that there is "in fighting" among two or more of the defendants. The worst case scenario is where, for the first time, a defendant takes a "no pay" position at the hearing, to the surprise and dismay of the co-defendants.

- *Confidentiality May be an Issue*

For a number of reasons, including the concern of not opening the claim "floodgate" through disclosure of a settlement of a particular case, as well as preventing public disclosure of a settlement that may damage sales or a brand name, manufacturers frequently attempt to obtain agreement to confidentiality in the settlement of a products liability case.

For the mediator, knowing whether this will be insisted upon by the manufacturer, whether there is flexibility on the terms of the agreement and what the "value" of confidentially is are important issues in the mediation of a products liability case. Again, the pre-mediation conference may provide a vehicle for this issue to be aired and hopefully removed as an issue of contention or disagreement by the day of mediation. If not, understanding it is something the manufacturer desires and which may have a value in settlement can be important to know as a part of the negotiation process.

C. Preparing the Submission

Consider this: the mediator's entire perception and knowledge about your client, the law supporting his claims (or defenses) and the pain and suffering, economic loss, and diminution in the quality of his life is communicated entirely through your submission in advance of the mediation. While you may be able to provide some additional information if a pre-mediation conference is held, it is the written submission that the mediator reads, highlights and which provides the first and most significant impression upon him.

The mediation submission provides an opportunity to present a thorough, visually attractive and persuasive presentation of the facts, law and argument to the mediator. As the mediator will almost always be a retired judge or practicing attorney with significant trial experience in the substantive law involved in your case, the submission should be tailored to focus upon the strengths of your case and the weaknesses of your opponent's case, through the use of all forms of written and demonstrative proof that would be used at trial.

The submission should not simply be a tabbed compilation of the medical records, deposition transcripts and exhibits. Careful consideration should be given to how the liability and damages material can best be presented to the mediator to lead him, point by point, through the liability, causation and damages issues. Incorporation of the client's deposition testimony, statements from family, photographs, documenting hospitalization, scarring, changes to accommodate convalescence at home – memorialized through videotape and photographs, can have the intended impact on the mediator.

At the same time, the entire submission should be "flavored" to communicate your knowledge, and perception of the relative weight of weaknesses in your client's claims or defenses. By being willing to acknowledge and address these issues, you let the mediator know that you have thoroughly considered them in the evaluation of your case and can give him insight into the relative impact you believe an issue has on the settlement value of the case.

A useful technique for either side is a "show and tell" at the beginning of the mediation. Most mediators will not encourage, and some will not allow, an "opening statement;" but an offer to present a visual demonstration (e.g. short PowerPoint presentation) or "bullet point" presentation (through PowerPoint or handout), will generally be welcomed.

A word about confidentiality: mediation submissions are typically disclosed by each party to the other side. Sometimes an attorney will choose not to disclose his submission because it contains information that the attorney has no duty to disclose but may be helpful to his claim or defense, and which he plans to use at trial for tactical advantage. There is nothing wrong with this. However, in my experience, if the parties' true goal is to make every effort to resolve the case through mediation, the "lay your cards on the table" approach works best. Obviously, there are situations where a piece of evidence or bit of information is chosen to be withheld, but in general, unless it is believed that such disclosure would significantly alter the course of the adversary's game plan at trial, it probably makes more sense to disclose it for the "value added" it may have during mediation.

One other point: disclosure of an attorney's true case evaluation should take place during caucus with the mediator on the day of the hearing, rather than through the mediation submission. Putting an evaluation in the submission will be assumed by the adversary to not reflect a "real" number, but one supplied for strategic purposes – and therefore there is really no point in doing so.

Finally, subrogation interests and liens should be provided in the submission and updated so as to be current at the time of the mediation itself.

D. Preparing Yourself and the Client for the Mediation

- *Preparing Yourself*

Much of the material that I have read over the years about preparing for a mediation, by both mediators and attorneys who utilize the process, strongly recommends that the attorney prepare for the mediation day itself as if he was going to try the case.

Thorough preparation sends a message to the other attorneys and the mediator that the attorney is knowledgeable about his case and serious about resolving it. Depositions should be carefully reviewed and tabbed for quick reference. Pertinent photographs, even if provided in the submission, should be available for reference.

Mediation should be seen as an opportunity to present your case to the other side in an informal setting but one in which the decision makers are present and in which they are willing to reassess the value of the claim. Credible, well prepared presentations can significant affect the other side's settlement valuation through knowledgeable and articulate presentation of the case by the attorney on the other side.

- *Preparing the Client*

Preparing your client for the mediation process is as important as you being prepared. Explaining the mediation process as a means to resolving

your client's case, particularly for the plaintiff's attorney, is a critically important education process. Your client may have developed some knowledge of the litigation process as his case advanced through discovery. However, the concept of mediation is foreign to most individuals and must be explained, to the client by more than "we are going to see if we can settle your case through a process called mediation" or similar superficial and vague explanation of what is involved. Think about it: preparation for trial involves time and meetings with the client and is a process that unfolds over days and perhaps weeks. Often there is settlement discussion with the client before and during the trial and the ability for an "evolution" of the client's perception of the value of his case as you discuss its strengths and weaknesses during trial preparation and as witness testimony unfolds in the courtroom.

Proceeding to mediation should involve the same opportunity for "evolution" in your client's thinking. The concept of mediation should be explained as should its mechanics. Your client should be educated to appreciate, as he would if the case proceeded to trial, that "value" is a fluid concept and that just as the preparation for trial and courtroom proof impacts your valuation of the case, your preparation for and participation in mediation will likely have the same effect. If you are truly preparing for mediation as you should, you will see what you would otherwise see if you were preparing the case for trial – strengths, as well as weaknesses – providing you with the opportunity to re-evaluate an earlier settlement range by critically analyzing the evidence to enable issues to be given the relative weight that your experience deems appropriate.

For the plaintiff, the client's journey is in significant part an emotional one: the moment of the accident altered whatever life he had and brought painful change. The strengths and weaknesses of the client's case from a purely legal standpoint should not be divorced from your client's emotional reality. You are the client's "counselor" (i.e., therapist) as well as advocate and you have a responsibility to shepherd him through the mediation process, just as you would if it proceeds to trial.

For the defendant, the scenario is different. The plaintiff's claim is one claim among hundreds or thousands that an insurance company or product manufacturer, through its in-house counsel and local or regional

counsel, deals with each year. There is no emotional component and no "therapy" involved. What is necessary to promote success at mediation is communication among the decision makers to ensure that when negotiation begins, everyone is on the same page. Finally, the ability of defense counsel and the insurance or product manufacturer representative at mediation to be sympathetic, as well as prepared and knowledgeable, is paramount.

For both sides, a thorough "risk analysis" before mediation should enable each party to communicate with the other side, at mediation – through the mediator, and in part directly, in a manner that conveys both position and flexibility, both necessary ingredients to a successful mediation.