Civil Case Mediations: Observations and Conclusions

By James A. Wall, Jr. and Suzanne Chan-Serifin

"You can see a lot by just looking," Yogi Berra once said, and this adage is quite relevant to civil case mediations. Currently, in the United States, there are approximately 250,000 civil case mediations per year (Wall & Chan-Serafin, 2009), but we know very little about what happens within them. The literature does describe mediation, offer advice to mediators, tout the value of mediation and list its outcomes. Yet there are no empirical studies that report mediators', plaintiffs' and defendants' behaviors in mediation or more importantly that indicate how the various participants' behaviors may influence the process or the outcome. We investigated 62 civil case mediations to address this deficiency.

We began with four predictions. First, we predicted that mediation would, in general, be successful. Second, we reasoned that mediators want plaintiffs and defendants to have realistic aspirations or goals so they will be flexible in making concessions. Thus, we predicted when either of these parties demonstrate high aspirations, the mediators will apply assertive techniques to lower their aspirations. Third, we predicted a chicken-and-egg cycle for the plaintiffs' and mediators' behaviors: plaintiffs typically make higher concessions than do defendants. Experiencing this over the years, mediators expect plaintiffs to make higher concessions in the current mediation and because of this expectation, the mediators apply more assertive techniques to the plaintiffs, which lead plaintiffs to make higher concessions. And fourth, we predicted that mediators would use more assertive techniques whenever they face nonagreements.

Observations Support Three of Four Predictions

To test these predictions, we observed 62 mediations in two cities. The mediators in these cases were 21 attorneys and eight judges who had practiced law for an average of 30 years, had mediated an average of 606 cases over the course of an average of nine years as mediators. One observer accompanied each mediator through every phase of the mediation, recording the mediator's statements, as well as those of the plaintiffs and the defendants, the demands of each party and the agreement (or nonagreement). To test our predictions, trained researchers coded and analyzed the parties' statements.

Our data analyses support most of our predictions. Specifically, we found that over one half of the cases settled but the settlement rate varied significantly according to the case type. Specifically, 89% of liability cases other than motor vehicle and medical malpractice (e.g., slip and falls, injuries from products, accidents on business premises), 69% of motor vehicle cases, and 75% of medical malpractice cases resulted in settlement agreements. Agreement rates for other case types were significantly lower, with 10% of the contract cases and 50% of employment cases ending in settlement. We also found the small cases settled more often than the large ones.

Our observations supported the second prediction as well. Mediators pressed the plaintiffs and defendants with assertive techniques/statements whenever they expressed high goals.
The chicken-and-egg prediction was also supported. Specifically, plaintiffs made higher concessions than the defendants; mediators expected they could get higher concessions from the plaintiffs; therefore, they applied more assertive techniques to the plaintiffs.

The most interesting results came from the test of our last prediction: mediators will use more assertive techniques when there were low concessions and nonagreement. The observations did not support this prediction. Instead we found that two processes unfolded when there was nonagreement. For one set of

cases, the plaintiffs opened with demands that the mediators felt were excessive; consequently, the mediators applied many assertive techniques but were not able to get settlements. Therefore, there were many assertive techniques and few agreements.

In another set of cases - employment and contract, which are very difficult to settle - the mediators became bogged down in the cases or became impatient and instructed the disputants to simply exchange numbers, rather than discussing their cases. Here, the mediators used few assertive techniques and obtained few agreements.

The Most Interesting Discovery: Limited Mediator Influence

While the tests of our predictions yielded insights into the mediation process, the most provocative discovery of our investigation was the failure to detect any effect of the mediators' behavior on the agreements (or nonagreements). This finding is quite noteworthy because mediators' techniques are intended and expected to increase agreements. To investigate this unexpected cleft between the mediators' behavior/techniques and agreements, we re-examined our data and closely read the transcripts of the mediations. When we did so, we found for 27 of the cases, the mediators' behavior had no effect upon the agreements. In 10 of these 27, the mediation stalled immediately because of a disputant's behavior (e.g., the plaintiff refused to make any concession) or an outside factor. And in 17 of the 27, the plaintiff and defendant quickly plowed toward an agreement independent of the mediator's tactics.

For the other 35 cases, the mediators' techniques affected the disputants' behaviors but even in these, there was evidence that the mediators' behaviors were occasionally reactions to - rather than a cause of - a plaintiff's or defendant's behavior. In sum, for about one-half of the cases, the mediators' behavior had no effect on the agreements and even when there was an effect, the plaintiff's or defendant's behavior frequently determined that of the mediator.

Practical Implications for Mediation Participants

When we reflect on our study and its results, we find civil case mediation is a lot like aspirin: it works, but we don't know exactly how. Consider that we found mediation frequently resulted in settlements but the settlement rate was dependent upon the case type. In attempting to obtain agreements, mediators pressed defendants as well as plaintiffs whenever they expressed high aspirations; however, they pressed plaintiffs more strongly than the defendants. But their pressing - like all of their other techniques - appeared to have little effect upon case settlements.

What are the practical implications of these findings? The primary implication - for mediators - is that they should acknowledge that the outcome of the mediation (e.g., agreement or nonagreement) is to some extent independent of the mediator's behavior. This suggestion is consistent with Judge Wayne Brazil's charge that mediators should not exaggerate their responsibility, ability or contribution to the mediation (Brazil, 2007). Rather, they should understand that they are hosting a negotiation process.

Secondly, mediators should anticipate and adjust to the disputants' behaviors in the mediation. Consider a civil case we observed. In a head-on collision between the plaintiff's car and a truck, the plaintiff's child as well as the plaintiff had been severely injured. The mediator anticipated the plaintiff would make a high demand and low concessions because his child had suffered, therefore, the mediator reviewed the "Court

Records" - which reported the amounts awarded in similar cases - prior to the mediation. When the plaintiff, as anticipated, did make a high demand ($600,000) and very low concessions, the mediator indicated he found the recorded awards were much lower than the demanded amount.

The third implication is for plaintiffs and defendants. They must consider that the outcome of the mediation is very dependent upon them and their behavior. Therefore, they should not turn the case over to the mediator, hoping that he or she will perform some legal alchemy. Rather they should arrive at the mediation knowing their own position as well as their opponent's. The parties should be ready to negotiate and expect the mediator to press them whenever they make low concessions or indicate high goals.

Pressed or not, the plaintiffs and defendants need to assist the mediator in the case. One modus operandi is to explain the complex cases. For example, if the case involves a dispute over the validity of a drug test, one of the disputants should take the time to explain to the mediator the steps in a drug test procedure and indicate how the procedure is vulnerable to compromises.

Also in complex cases (e.g., failure to adequately insure against the value decline of a derivative) the disputants should make offers on multiple issues rather than taking issues one at a time. The former approach allows the mediator to construct a package in which one side concedes heavily on some items which it views as low value but are of high value to the opponent. This allows the mediator to ask the opponent to reciprocate and concede significantly on items that it views as low value but are of high value to the other side.

If the plaintiffs and defendants insist on negotiating the issues one at a time - rather than in packages - the mediator will too often be forced to call for a "numbers only" exchange between the parties, rather than constructing win-win packages.

The final implication is for scholars as well as practitioners. In the last decade there have been approximately 80 articles that advise mediators on the tactics and strategies they should employ. They are told to control emotions, obtain apologies, overcome perceptual errors, facilitate, define the problem, evaluate, not evaluate, not believe attorneys, be neutral, be fair, improvise, manage risks, focus on central elements, etc. Most of these prescriptions and proscriptions should not be proffered, because they assume the mediators control the mediation process. As noted previously, our evidence, as well as that from other studies indicate mediators do not have substantial control over the process. Rather, it seems that the case type and the plaintiffs' behavior are the more influential factors.

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We asked three experienced trial consultants to respond to Wall & Chan-Serafin's article on Civil Case Mediation. Melissa Gomez, Jeri Kagel and Paul Scoptur offer their thoughts on the following pages.

Melissa Gomez responds to Wall & Chan-Serafin

A jury consultant and owner of MMG Jury Consulting, LLC, Dr. Melissa Gomez focuses her Philadelphia-based practice on the psychology of learning, behavior and decision-making. She has more than a decade of expertise in research design and methodology, as well as in behavioral and communication skills training.

Wall and Chan-Serafin have found empirical support for one of our intuitive perceptions. Specifically, in the jury consulting profession, I and my colleagues spend a good deal of time making sure litigators understand the impact of preconception and experience on decision-making. A juror who is entrenched in a certain perspective (e.g., companies are evil entities that put profits over people) is not going to be convinced out of that belief in a two week product liability trial. We can't change minds set in concrete. So, if jurors are people whose core beliefs are all but impossible to change, why should we expect any different from the folks involved in the litigation. Are they not people too?

Carl Sagan once said, "Where we have strong emotions, we are liable to fool ourselves." This cannot be any truer than in litigation. I have seen clients so entrenched in their position at trial that no one-- not even a mediator-- could sway them from seeing the case any differently. Actually, I find that when mediators employ aggressive techniques with one side or another, the party to which the aggressive technique is directed may assume that the mediator (or arbitrator, or judge) is biased, and will therefore stop listening.

It also makes intuitive sense that small cases settle more than large ones. Especially when dealing with cases of an individual versus a company (it appears that most of the cases this study reviewed fall into this category considering the list of litigation types provided), companies are likely to have insurance policies that will happily pay a small injury claim rather than move forward with the cost of litigation (which can actually end up costing more). On the other hand, large cases often involve insurance policy limits and potential excess carriers. If a plaintiff is unwilling to settle within the limits of an insurance policy, the case is more likely to go forward. No mediator can persuade her way around that.

The truth is, there are many different levels of negotiation within litigation. It is not unusual that attorneys themselves are at the whim of unreasonable clients who absolutely refuse to budge. In these instances, the mediation won't do a thing. If the client won't listen to his attorney, he likely won't listen to the mediator either. In my experience, sometimes the best strategy is to mock try a case before the mediation occurs. I like to call it "the reality check." Even if clients won't listen to their attorneys, mediators or jury consultants, sometimes they will listen to mock jurors.

Mediations can only be successful when each side has a real sense of its risks. While a mediator can try to put these risks into perspective for the parties, it is not surprising that her one voice is likely not going to be enough to make someone "see the light." It just doesn't happen that way.

I think the authors summed it up well, citing author Brazil (2007). Specifically, mediators should understand that they are "hosting a negotiation process," not controlling it.

Jeri Kagel responds to: Civil Case Mediations: Observations and Conclusions

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Mediation is a process designed to help litigants resolve disputes themselves rather than have their "fate" determined by a judge or jury. This article attempts to uncover whether, and if so, how, certain behaviors exhibited by the parties and the mediator affect the outcome. What is more likely to lead to success or failure? What are the implications for attorneys and their clients?

Although their research was done on a very small scale, the authors found that their predictions were mostly correct: mediation is often successful, mediators use aggressive tactics more often with plaintiffs and more often when a party makes low concessions. The article left me with many questions: The authors do not define the behavioral terms they observe during their research: For example, who determines "low concession"? "Aggressive tactics"? Are these behaviors and others evaluated from the perspective of the mediator, the litigant or is some other measure used? When behaviors are described we are not told when, during the mediation, they occurred - the beginning, middle, end? Does it make a difference? Finally, we are not made aware of other factors concerning these mediations - were the mediations all court ordered, voluntary, or some kind of mix? Many questions about the study go unanswered.

The authors also conclude that a mediation's success has little to do with the techniques used by mediators, but instead is based on the type of case being mediated and the "plaintiff's behavior". They found that the techniques used by mediators had little impact , saying "the outcome... is independent of the mediator's behavior." Yet they go on the suggest that litigants, during mediation, should "assist the mediator." Toward what end? If the mediator doesn't affect the outcome, are the authors suggesting that, with litigant's help, mediators will be able to affect the outcome? The article is not clear.

If we take the authors' conclusions at face value, then we are where we began: Mediation is a process where *litigants (themselves) can resolve their dispute*! In my experience, a mediation's success often starts with the intent of each party. When the parties enter the process with the desire to settle - regardless of why they want to settle - they are, in my experience, more willing to make concessions, more likely to be flexible and more often know that the true "value" of their case is not just based their individual wishful thinking.

The article suggests that the power, during mediation, is with the parties, not the mediator. As trial consultants, we help parties learn the most effective ways to "tell their story" to the jury. We do this by helping develop case themes likely to resonant with jurors, by creating powerful visual aids, and by teaching communication tools and techniques to enhance opening statement and trial testimony. Attorneys and litigants will feel empowered and can maximize their efforts toward a successful outcome by being prepared to present their case in many of the same ways at mediation. Although the audience is different, effective cogent, cohesive and convincing presentations at mediation can "assist the mediator" and illustrate for the opposite side what they are likely to encounter at trial.

The article says that plaintiffs make more concessions during mediation than defendants, but does not offer any reason for that observation. One reason may be that because plaintiffs often make the initial demand or offer to settle, they, in some ways, have more room to move than defendants. Through their silence, defendants effectively begin settlement negotiations at zero. Plaintiffs can

start as high as they want, and, in that way, may be more likely to move and may have more room to move than defendants. To know the most legitimate concessions to make, if one wants to have a successful resolution at mediation, it is important to ascertain, before going to mediation, the value of your case. We can help that determination in two different ways: We can assist with verdict research and we can design and implement focus groups or mock trials that center less on trial strategies and more on issues relevant to damages. It is our job as trial consultants to learn how to convey the importance of these "pre-mediation" events to our clients and to make sure that they are cost effective.

The authors conclude that because they interpreted their research to mean that mediators have little impact on the parties' behavior, we should think of mediators as "hosting" the mediation process. In my experience, I have seen a number of mediators from a variety of backgrounds who approach mediation with a range of techniques and skills. I have been unable to see any clear correlation between background and skill level; nor have I been able to discern whether it was a particular technique or any one mediator's ability to use that technique that made a difference in how the parties responded. I also believe that how a party's attorney interacts with a mediator and conveys the mediator's position may also affect how a party responds.

It may be, as concluded by this article, that a mediator is "only" hosting the mediation. In life there are good and bad hosts. A good host prepares for the event, welcomes guests, creates a congenial atmosphere, etc. In much the same way, I experience a good mediator, even if without the power to affect resolution, as one who prepares beforehand by either talking with or reading materials our clients send in, helps keep people involved in the process through their own facilitation skills, and provides opportunities likely to encourage continued discussion Our job is to prepare our clients for the "good" or "bad" host, just as we help prepare them to walk into the courtroom.

Paul Scoptur responds to: Civil Case Mediations: Observations and Conclusions

Paul J. Scoptur (www.paulscoptur.com) is a trial consultant and trial lawyer with Aiken & Scoptur S.C. in Milwaukee Wisconsin. He wishes he could still dunk a basketball.

Yogi Bera also said, "It's not over 'til it's over". In my experience, many mediations are over before they even begin. The authors have four predictions. The first is that mediation is generally successful. The second is that mediators want the parties to be realistic. The third is that plaintiffs generally make more concessions than defendants. The fourth is that mediators are more assertive and aggressive when the mediation starts to go south.

The four predictions are all interrelated. My experience, as a lawyer and as a consultant, is that the success of a mediation has little to do with the mediator. Mediation is driven by what has been done up to the point of mediation. Discovery, depositions, the relative likeability of the plaintiff and the defendant, these are all the factors that are plugged into the mediation process. What pluses and minuses have come out of discovery? Is the plaintiff likeable? Is the defendant a bad actor? These are the factors that drive mediation, not the mediator.

The defense comes to mediation with a certain authority. They have a plus or minus 10 percent, 20 percent, but their authority is based on what the claims committee or adjuster has given them based on the information available. The success of mediation is not dependent on the skill of the mediator. The success of the mediation is dependent on the realistic expectations of both parties. In my view, the defense generally has the upper hand at mediation.

I have worked with many mediators who come from a past life of being a defense lawyer or a judge. Very few plaintiffs' lawyers are accepted by the defense as a mediator. The problem that I have faced so many times is that even though the mediator agrees with my position, even though the mediator has a "connection", the mediator is unable to move the adjuster and/or the defense lawyer. To me, that is the crucial test for a mediator. Can a mediator move the "rubber band man", the adjuster, the one who can put the rubber band on the file and close it?

In my experience, a mediation results in a settlement under one of three circumstances:

1.It is a case the plaintiff must settle under any circumstances. In fact, I had one just a few weeks ago. The plaintiff was a serial "faller", had two prior slip and falls, and this was the third time that a fall had "ruined her life." This case had to settle for the last best offer. It did.

2.The case is a train wreck for the defense. There is a good plaintiff, good liability, good damages, the perfect storm. Although I have found that even with this type of case, success is 50/50 at best. The defense is banking on a plaintiff lawyer who doesn't want to do the additional work, who wants to put the "rubber band" on his file and accept a settlement for lesser value. I recently had a case settle shortly before trial. At mediation, the offer was $1.5 million. We did the additional work, did the additional discovery and ultimately settled the case for $2 million. The facts did not change in the interim. The mediator couldn't move them to $2 million at mediation. All that changed was that we were closer to trial.

3.The plaintiff is willing to accept less than the case is worth. The plaintiff may be just too sick and tired of the litigation process to continue. It may be that his lawyer convinces him the settlement offer is good, whether true or not (yes, I am cynical at times.) There are lawyers in firms that have to meet their numbers. This often results in a lower settlement for the client, to their detriment.

CONCLUSION

When I first started practicing law in the "good old days", plaintiff lawyers and defense lawyers picked up the phone and negotiated one-on-one. There were no mediators involved in the process. It seemed to work just fine. Mediation has become a cottage industry for defense lawyers and retired judges, a cottage industry that is flourishing in number. However, I concur with the investigators when they conclude that the mediator's behavior most often had no effect upon the ultimate agreement. I also concur that plaintiffs and defendants must consider that the outcome of the mediation is very dependent upon them and their behavior. Judge Wayne Brazil hit it right on the head when he said that, "They should understand that they are hosting a negotiation process." "Would you like some coffee, a soda?" Sometimes mediators will offer their opinions, but more often mediators will simply shuttle back and forth between the rooms where the parties are. Ultimately, authority levels are set both by the plaintiff and the defendant well before the mediation process.

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On civility, racial slurs, graphic pictures & anthropomorphism

Recent days have been filled with news about (very public) rude and/or disrespectful behavior from athletes, celebrities, and politicians. Pundits and pollsters are telling us what it means about our society and about the deepening political divisions in our country. Media outlets are covering the frenzy intently and 'civility' is being talked about as a behavior sorely lacking in our society today. It does make us stop and think about how each of us is responsible for our own behavior and for treating each other with respect.

Our goal with *The Jury Expert* is not only to help you increase your trial skills but also to offer information that helps you pause and ponder from time to time. This issue features diverse and provocative pieces that we hope will make you stop and think about hate crimes, racial slurs, graphic injury photographs, and assault weapons as self-defense tools.

In addition, we have terrific pieces on the contribution of the mediator to the negotiation process; how to identify leaders in the jury pool; the benefits of humanizing complex evidence through anthropomorphism in technical presentations; considering the need for alternative cause strategies in product liability litigation; and a primer of sorts, disguised as our September 2009 Favorite Thing.

Read us cover to cover (or web page to web page)! Tell your friends and colleagues about us. Help *The Jury Expert* travel to offices in venues where we've never been before. And, as always, if you have topics you'd like addressed in upcoming issues, let me know.

--- *Rita R. Handrich, Ph.D.*

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