

***The Resolutioin Advocate: Tips on Getting to the Goal Line in Civil
Litigation***

A LOOK BACK AT THE PROCESS OF DISPUTE RESOLUTION*

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I am privileged to do a column for the LCA, and have been asked to contribute quarterly. My focus will be on the negotiation and settlement of cases, which is a subject near and dear to my heart for many reasons.

I grew up in the Midwest the son of a lawyer who specialized in defending tort and insurance cases. My Dad, also Guy, also was General Counsel for one of the first regional insurance brokerage houses that handled claims for its insureds locally. It was innovative for a brokerage to have that authority, but it worked. My Dad ran that claims operation for several decades until his “retirement” in his late 70’s. He was an excellent negotiator and stressed the important of resolution before trial as usually the best solution. Oh, he knew some cases had to be tried but he subscribed to

*This if the first of a column to be published in the monthly publication of the Litigation Counsel of American Trial Lawyer Honorary.

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the line from the Kenny Rogers song, “You got to know when to hold ‘em, know when to fold ‘em,” a phrase that is occasionally heard from my colleagues when talking to a client about settlement.

When I started law practice in the mid 1960's the word “mediation” was not commonly used. I am not sure I heard the word more than a couple of times while in law school.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and negotiated “the file” directly with the plaintiff’s lawyer. Often the first real opportunity to negotiate a case was the “Mandatory Settlement Conference,” which later became part of the court rules, and which ordinarily was held quite close to trial. Other than direct negotiations, there was little involvement by the court in settlement talks before then. At that time there were no Case Management Conferences. Courts were ordinarily not very active in the case until a Pre-trial Conference was held, at which time the court might inquire about what settlement talks have taken place, and if the parties were interested in a judge, other than the trial judge, meeting with them to see if some settlement efforts could result in a resolution.

The federal courts were required to provide for ADR procedures in civil actions in the Alternative Dispute Resolution Act of 1988 (28 U.S.C. sec 651 et seq.). Prior to that in 1985, California provided for Mandatory Settlement Conferences in Rule 222, California Rules of Court.

The words “alternate dispute resolution” or “ADR” were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected or appointed to the bench and stayed to retirement. They did not leave these careers until that time. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification for mediators will soon be common, if not required. Standards have been set for mediators in the conduct of a mediation. (See, e.g., Cal. Rules Court 3.850 et seq.)² While it seems that there are more mediators than lawyers, the litigation process seems to demand this resource for

² Rule 3.850 states: “The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.”

dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

Also, lawyers are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning mechanism. That is good because it forces the parties to think about where they are going, what the results might be, and how much it will cost. That is, a “cost/benefit” analysis is part of the initial planning process and evaluation of the case.

One of the very important skills of a true trial lawyer or “litigator” is to know how to leverage a case to the point at which the parties are motivated to discuss settlement. I describe this point as a “plateau for resolution.” That is, it is a point where the parties have an opportunity to see what has occurred, evaluate the results for motions and discovery, and then look down the line at what will be done as the case progresses towards trial and a “forced resolution.” Does your client want to proceed? Does it know the risks? Is it aware of the significant costs involved? What is the potential settlement range versus the “net” that is likely to result if the case is tried?

Recognition of this plateau and then communicating with the client about the case – both past and future – is an essential ingredient of qualified trial counsel. It is our duty to explore the out of court resolution and advise

the client about the several alternatives for direct negotiation, mediation, or other alternatives to dispute resolution, such as non-binding arbitration, submission of the case to a neutral evaluator (or panel) to get a read on the merits and value, or even focus groups to gain information as to how a jury might perceive a case which can contribute to a client's willingness to negotiate or mediate the matter.

In future columns, I will give you my thoughts on various topics regarding negotiating and settling cases, including how to recognize the "plateaus," guidelines for improving your chances of resolution in direct negotiations and mediation, what you need to do to prepare your client and the mediator for the mediation day, and other topics designed to assist you in getting the best out of court results for your clients.

Good mediating.....