The Use of Mediation for Construction Accidents

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The percentage of plaintiffs' verdicts in Philadelphia Common Pleas Courts has decreased dramatically in 2015. It is most noticeable in construction cases. Construction cases are complex, costly and tough to win in jury trials. They usually involve multiple defendants in different disciplines and require expert testimony that is difficult to communicate to a jury. Multiple defendants may result in multiple defense experts. Additionally, because of the exposure involved, a trial will be against a top-notch defense counsel. The advantages of mediation are that you get to play a role in selecting the fact finder instead of a chance selection. It certainly is preferable to be able to select the date for the hearing rather than being subject to the dreaded phone call. Your dealings with a mediator regarding the issues of both liability and medical expenses are usually better if he or she is an experienced litigator, who is likely to be more reasonable than an autocratic judge. Most of you have suffered the anguish of trying to get an out-of-town expert into court on short notice, let alone the exorbitant cost of a live appearance instead of a well-crafted report that is readily absorbed by any mediator worth their salt. You can select a mediator with significant experience in trying construction cases whereas the average Court of Common Pleas judge may not have that specific knowledge. While it is true that representing a significantly injured plaintiff, may result in a very generous damage award by a jury; for the most part you will get a more reasonable result from a skilled mediator.

Among other pitfalls of a jury trial is explaining to a lay jury a case that may involve understanding plans, blueprints, work rules, statutes, safety regulations and

construction contracts. It is often difficult to keep juries interested in listening to complex medical testimony. How do you keep a jury interested in a trial that lasts more than two weeks? Whereas a mediation rarely lasts longer than one day. A jury deliberation can take several days in contrast to getting a mediation result the same day.

Many lawyers are more comfortable in a mediation setting. They are far more capable of presenting their case to a mediator than to a judge, a jury and a public audience. An important participant in a mediation is the representative of the workers' compensation carrier. This party is seldom involved in the jury trial. Pre-hearing motions can probably be disposed of by a conference call prior to the mediation rather than with a meeting before a judge with a crowded docket.

The amount of time spent in a mediation is far less than a jury trial. There isn't time spent in voir dire, side bar, chambers conferences, recesses for the jury, interruptions to the trial judge for other matters, etc. The difference in time, consumed by live testimony of experts versus the time spent by the mediator reading the report prior to the hearing, is enormous. The mediator can read and compare reports in the same time frame rather than trying to compare one's testimony with another's given days before.

One cannot say enough about the well-reasoned opinion of a mediator contrasted to the possible outrageous opinion of a radical juror. It is not easy for lay jurors to understand the distinctions between general contractors, subcontractors, statutory employers and the other terminology involved in construction cases. Educating the jury is a lengthy and uncertain process.

I cannot emphasize enough how important it is to select an appropriate mediator. Not only one who is an experienced neutral but one who has actual experience in handling and trying construction cases. The mediator should not only understand the law involved, but also be able to differentiate between the nuances of subcontractors and statutory employers. You should hire a mediator who can interpret a construction or labor contract as well as a workers' compensation agreement. A good mediator is also a good psychologist who knows how to handle plaintiffs lawyers and their clients as well as defense lawyers and claims representatives. He or she is aware of when to play hard ball and when to use a soft sell, how to get angry litigants speaking civilly to each other and how and when to get the parties into negotiations. It is most difficult to get angry people to negotiate. It is also important to have the mediator ingratiate himself to all parties and their attorneys. A skilled mediator is able to convince everyone of his knowledge and expertise without offending. The first thing a mediator must do is to get everyone speaking civilly to each other. Money discussions should wait until the appropriate time. Construction cases can involve personal injury, construction and insurance contracts, labor contracts, blueprints, design and labor management relationships; and you want someone who is familiar with all facets.

How does a mediator arrive at the negotiating point, where the parties and their attorneys have confidence in him? Of course there are many tricks to the trade and you can be certain that some mediators are more skilled than others. One of the problems of negotiating construction cases is that you usually have multiple defense counsel who do not want to show their hand too soon and are adopting a small pay or no pay stance. In many cases, one defense counsel will not discuss money with the other defense counsel(s), except for counsel who might present exposure to their client. What I try to do is to engage groups of defendants, small and large, into separate meetings. I try to get groups of different personalities involved in discussions. It is most necessary in construction to have claims representatives with authority in attendance, so that I, as a mediator can look them in the eye and try to convince them of my settlement proposals. A tactic that works successfully is to get all defendants to agree on a global settlement with the plaintiff, as well as a method of funding such a settlement and an agreement to select an arbitrator to hold a binding hearing thereafter to set the proportionate contributions. It is always easier for insurance carriers to negotiate percentages of a known lump sum than with an unknown figure. The known is always easier to deal with than the unknown. It is also easier to come up with the global figure when the participants don't know how much of it they will have to pay. You also want to have a mediator who has personally negotiated construction cases with insurance representatives.

As a mediator, I always want to speak personally to the plaintiffs as well as claims representatives. I always want to talk to defense lawyers without their claims representatives so they don't have to put on a show of bravado. There is much more to mediation than "cutting the baby." It takes a skillful mediator to navigate the waters of construction litigation, medical malpractice, patent litigation and insurance coverage, and you want to make sure you have the right person.

I find that parties, their attorneys and representatives are much more comfortable and relaxed sitting in a comfortable chair with snacks and drinks than in a stark courtroom in the shadow of a stern judge (no offense intended).

Relaxed people are better suited to negotiation. •

Ronald Sherr has conducted more than 800 mediations and arbitrations through ADR Options since 2003. He specializes in complex cases in all facets of construction, as well as medical malpractice, products liability, personal injury and other areas of civil law.