Mediation's Place in the Nuclear Verdict Era

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A myriad of variables are shaping the legal and trial landscape as we know it. Some of these issues are case law related and evolve over time, while other issues and influences on the way cases are litigated or settled are external forces and fluid in nature. Social media, inflation, and jurors' perception(s) of our legal system and the concept of what equates to justice, especially in the post-COVID world, are among those external forces. Their effect on our justice system has been discussed and debated for several years at this point. What remains after these external influences are filtered out is an uncertain legal landscape (an understatement) to be sure. We have seen a proliferation of "nuclear verdicts" and "nuclear settlements" (less used term) in the most recent of times, while still seeing defense verdicts in cases as well. One thing is for sure— the trial paradigm and the manner in which attorneys and their clients have planned and prognosticated jury trial outcomes, on both sides of the aisle, has been altered significantly. So, too, must the manner in which some of these cases are mediated, and the thought process behind those who mediate, and those who participate. This article explores the proposition that early mediation is an under-used vehicle that, if utilized more, and earlier in the litigation process, could help stabilize a volatile litigation environment, which would be a positive for both plaintiffs and defendants alike.

Still being an active trial attorney while mediating cases has given me a unique perspective into the rationale parties are now using to value cases. I have also come to terms, as many in their own litigation practices have, with the fact that there are cases that will need to be

tried in front of a jury for a variety of reasons such as: (1) the plaintiff(s) and the defendant(s) are too far apart, value-wise; (2) the plaintiff(s) and defendant(s) and their representative(s) want their day in court; and (3) the parties really have not discussed the prospect of settlement in any meaningful fashion. There are various other reasons as well, and none of those reasons are wrong. For the purposes of this article, we will focus on reason (3), above. The importance of a mediation cannot be underestimated where both parties are engaged, exchanging information and exchanging data, even if the case does not settle at the first mediation. Equally as important is the concept of at least initially having conversations about each parties' valuation of a case and the manner in which each side came to its respective conclusions on what the case is worth (or a range of what the case is worth). Many times, one or both sides of the case will not explore the concept of mediation until right before trial, after significant time and resources have been expended on both sides. Again, this may be inevitable, having been there like many of you have as well.

To the extent mediation can be explored, even during contentious discovery, it should. One could argue that exploring mediation, and the concept of a resolution process, while both parties are in the throws of depositions or some type of discovery-related motion practice, may seem like a bad idea, or a sign of vulnerability by the party initiating a mediation concept. But it actually may be the perfect time for a mediation. A mediation around the highest point of contention, but at an earlier time in the case, gives the parties a chance to breathe, reflect and come back together, without weapons drawn, so to speak. There needs to be mutual buy-in. Removing some of the external pressures that prevented the parties from opening up and having productive conversations at an early enough time in the case, where cost savings are real for both sides, and before expert costs start to soar exponentially, could produce surprisingly efficient results. Beyond the challenge of getting the parties past the contentious nature of a given case, how can the parties potentially close the gap between an anticipated nuclear verdict on the plaintiff's side versus the defense's position that such an anticipation is unreasonable? Should the parties simply ignore each other and not mediate at all? Or is there at least the possibility of still progressing towards a mediation despite all of the posturing?

An argument can certainly be made for ignoring everything and abandoning an early resolution process and proceeding straight to trial. It occurs all the time. But one could argue that at least starting a conversation about a case, and discussing the nuclear verdict concept and how it could possibly play into a given case, at an early juncture, could pay dividends for both sides in mediation. It is virtually impossible to place a consistent value on how much court-ordered settlement conferences can have on the potential settlement posture of a case. To be clear, many courts have taken proactive, aggressive measures to hold parties to case management deadlines and to facilitate settlement discussions to clear backlogs of cases. Some of the initiatives and efforts made by the judicial system across the commonwealth, many in the face of staff shortages and already jam-packed trial schedules to begin with, have been nothing short of remarkable. These herculean efforts by the judges and courts will need to continue, and be even more pronounced, as time goes on into 2024 and beyond. However, mediations should be a key piece of that overall settlement effort as well.

The notion of a nuclear verdict will not be dispelled. At least not any time soon. It could be an anomaly or the "new normal," but no one knows. It is not something that can be "managed" or "dealt with" once and for all, but it is something that can be discussed, vetted, accounted for, and folded into early, productive, settlement discussions through a mediation. The parties need to discuss it, preferably in person, with the assistance of both the mediator and their counsel. Without those early discussions, there is no hope for continued, additional discussions, and many times, it takes just that to resolve a case.

Face-to-face communication for constant, prolonged periods of time that a mediation can offer, can put the parties at a greater chance of resolution as compared to other alternatives. Mediations can also foster an environment where both parties and their clients can mutually create a pathway for their parties to discuss their case, the nuclear verdict phenomenon, and move their efforts towards productive resolution. A mediator call (or five) after an unsuccessful mediation to try and bridge a gap toward resolution is always useful to keep momentum going. Many cases would be better off with a mediation process in pocket, where all the concepts discussed in this article can be given the due attention they now command, and an exchange of information between the parties could at least

start in earnest, even if the initial mediation does not produce an ultimate resolution. Progress made is progress where it did not exist before.

Stuart T. O'Neal *is mediator with ADR Options, Inc. as well as an active trial attorney with Burns White handling all types of catastrophic injury cases. Recognizing how many of these "real time" trial and case themes have shown up in the courtroom for both sides has allowed O'Neal's mediations to occur in a collaborative fashion with all sides involved. O'Neal focuses his practice on all matters of professional liability (medical malpractice and nursing home matters included), motor vehicle accidents, sexual assault cases, construction matters, contractual matters and partnership and employment disputes. To schedule your matter for mediation/ arbitration with Attorney O'Neal contact ADR Options at 215-564-1775 or email contact@adroptions.com.*

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