Additional Benefits of ADR in Personal Injury Cases

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There are significant emotional shifts that take place from the time that litigation is initiated until the time that the litigation is resolved. The ADR process provides the parties with a greater opportunity to manage the ups and downs that accompany these emotional shifts as the litigation proceeds.

Mediation and arbitration should be a standard part of any litigators practice today, especially if that litigator is involved in personal injury litigation. There are a number of benefits to the alternative dispute resolution (ADR) practice. They include significant time and cost savings, prompt resolution of the disputed issue, the ability to select the decision maker and flexibility in setting the rules and the schedule for the matter in question. However, there are several other additional benefits to the ADR process that can be overlooked at times.

The first benefit to proceeding through ADR is the opportunity for the parties "to be heard." When COVID struck in 2021, trials were deferred and most ADR proceedings were conducted virtually. However, as the impact of COVID has dissipated, the majority of parties do not want their cases to be presented virtually but would prefer to have them presented "in person."

In discussing this with counsel, I have been told that their clients "want to be heard." To put it another way, although they have opted to proceed through ADR, their clients and attorneys still want to have their day in court. The ADR process will often be sufficient to satisfy that wish.

Another benefit of ADR is the ability to better manage the emotional highs and lows associated with the uncertainty of a trial. Litigation is an emotionally bruising process especially for those unfamiliar with it. Trial is particularly intense but the pre trial process itself can also be intense as it continually forces the parties to, in part, re-experience the events giving rise to the accident. A personal injury case proceeding through private ADR, generally, involves a serious or life altering injury. It's unavoidable that the tragedy that gives rise to the litigation will result in the parties to the litigation becoming emotionally involved in the process and outcome.

Obviously, settlement is less emotionally demanding than trial. An early settlement is less emotionally intense than a later settlement. Because a mediation can take place at any time, even before a complaint is filed, it can mitigate the emotional investment that the parties need to commit to the process.

There are significant emotional shifts that take place from the time that litigation is initiated until the time that the litigation is resolved. The ADR process provides the parties with a greater opportunity to manage the ups and downs that accompany these emotional shifts as the litigation proceeds. It does so because the parties have greater control over the process.

The parties get to select the mediator. The reality is that some mediators are better for certain kinds of cases than others. Mediators who have greater empathy for the parties in the litigation will probably be more effective in helping the parties resolve the matter. Independent mediators will have more time and probably more patience with the parties.

Under the best of circumstances, a trial judge will have limited time to devote to settlement conferences and more often those conferences will occur closer to trial. A private mediator will have greater flexibility in scheduling the mediation and determining how it is to be conducted. The parties also have greater ability to participate in the design of the mediation, i.e., who should be present for the mediation? What evidence can be utilized at the mediation? Should counsel give an opening address at the mediation?

Sometimes, the parties are better served at mediation if counsel do not give general openings about the merits of their cases as the opening may offend one of the parties or "lock in" the position of the parties. Sometimes at mediation the parties hardly speak to the mediator at all although discussions take place between counsel and the mediator. In other mediations the mediator spends a great deal of time speaking directly to the parties.

Additionally, some judges just aren't very effective in speaking to the parties. If counsel senses that their client is emotionally triggered by events during the mediation, the mediation can be interrupted. It can be delayed for a day or a week. This is much less likely to happen at a pretrial conference. Often while significant progress may be made at the initial mediation, the case may not settle and may require follow-up phone conferences or another in person or virtual conference. This is less likely to occur in a judicial proceeding.

I don't mean to suggest that judges aren't capable of bringing cases to closure through the pretrial process. In fact, many very good mediators are former judges. However, the informality of the mediation setting, while providing the parties with an opportunity to be heard, provides the mediator with a greater flexibility to talk with the parties than can be had during a judicial process. Some judges simply lack the personality or the interest to engage with the parties in a meaningful way. In a mediation you are picking the mediator that you think will engage well with your clients and the facts and legal principles applicable to the case.

Another benefit of mediation is that a mediator can be very helpful in educating or reorienting the parties. Competent counsel are sensitive to the emotional turmoil that parties suffer in litigation. Competent counsel will establish reasonable expectations for the parties. However, the fact that counsel is competent and the fact that counsel sets reasonable expectations does not mean that the parties hear what has been said, and even if they hear it, are prepared for whatever the outcome of the litigation may be.

Lawyers and their clients can lock in on a particular position. Mediation provides an opportune time for a "reset" or a "reassessment." The mediator is a disinterested third party and is in a position to refocus the parties and attorneys on the strengths and weaknesses of their case.

Additionally, there may have been significant changes in the case since it was first filed. Some parties may have been dismissed. Some parties may have settled. Counsel may need to focus on less culpable parties because of coverage issues or because the defendants who are most culpable may have less legal exposure because of the legal theories that must be pursued against them or because of the legal defenses available to them. This may make the case more difficult to try and may make the case more likely to result in an adverse outcome.

Competent counsel can explain all of this to their clients but the clients may struggle to understand it since for a significant period of time they have been focused on the "target" defendant and lack the legal, intellectual, or emotional nimbleness to change that focus. A mediator as a disinterested party can be very helpful in assisting a party in understanding why it is that likely a jury award will be favorable for a particular defendant.

A mediator's ability to interact with the parties may help to shape the expectations of the parties and prepare them for the outcome that is likely to result if the case is pursued through trial. An empathetic mediator may help to mitigate the emotional

turmoil that the parties are experiencing. The practical reality is that the emotional disappointment that a party may suffer as a result of an adverse verdict, to a large extent, is the result of the expectations that they have. A mediator can be very helpful in helping to reset those expectations.

Another benefit of mediation is that there are times when an attorney may have gotten it wrong. The attorney may even realize it but needs a mediator's assistance in persuading their clients to move from a position that had been earlier recommended by counsel. A mediator can be helpful in assisting counsel in getting clients to adjust their expectations. This is especially true in cases where there has been a change in the applicable law or where there have been additional facts or evidence discovered but where recommendations had already been made by counsel and a party is having difficulty accepting new recommendations or understanding the significance of the changes in the law that have occurred. Because the mediator is a disinterested party, they can be very helpful in getting the parties to understand the impact of those changes and in assisting the parties in not faulting their counsel for having made a prior recommendation that no longer is valid.

Arbitration also provides a number of benefits in the ADR setting. The formality of a jury trial requires openings, closings, the admission of certain exhibits, that certain testimony be presented and so on. Those openings, that testimony, and those exhibits can all trigger different degrees of emotion. At Arbitration the lawyers can decide how best to handle the potential "triggers." Because the fact finder(s) to whom evidence is being presented are experienced legal practitioners, how the evidence gets presented to them can be very different from how it must be presented at a formal trial. Oftentimes, there may be minors who will have to testify at a jury trial but whose testimony can be handled via Stipulation or deposition at an arbitration. The parties can even agree to control openings and closings so as to make them less emotionally triggering.

Additionally, while parties can agree that all appellate issues are waived at a jury trial, it is more common that such an agreement takes place in an Arbitration setting. If there is a right of appeal in a jury trial, more evidence will have to be presented; it will have to be presented in a formal setting, and agreements to stipulate as to certain evidence will be more difficult to reach.

Moreover, when a case is tried to a jury, the case generally proceeds linearly from jury selection to verdict. The fact that the case proceeds linearly may not give the parties adequate time to consider all of the evidence. It has always been my practice in arbitrating a case to wait a few days before communicating a verdict. I've done this to give the parties time to reflect on the case presentations and to discuss settlement if settlement is still an option. When a case proceeds directly from jury selection to verdict in only a few days the parties often don't have time to fully consider the impact of the evidence. I've sometimes had counsel in an arbitration ask "Can you wait to render a verdict for a few days as we are continuing to have settlement discussions?" While a Judge may hold a jury's verdict for a few minutes or even overnight if a case is close to settling, by and large, once a jury has reached a verdict that verdict can only be changed through a legal proceeding.

I am a believer in the jury system. However, over the years, I've learned that while the jury system gives the parties a chance at justice it doesn't always result in justice, especially justice as it would be perceived by one or more of the parties. Unfortunately, when that party is distraught or emotionally upset about the circumstances or injuries that they or a loved one have suffered a result that is undesirable at trial only deepens the hurt that they have suffered. In that sense, the losing party suffers doubly. The ADR process whether it be through mediation or arbitration can be helpful in mitigating that secondary suffering especially if the case settles or if the parties are better prepared for the outcome by virtue of an ADR proceeding.

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