Kluwer Mediation Blog

The Evolution of Hunters and Gathers

Jeffrey Krivis (First Mediation Corporation) · Monday, August 1st, 2016

"Us and them. And after all we're only ordinary men.
Me and you. God only knows its not what we would choose to do.
With, without. And who'll deny that's what the fighting's all about." [Pink Floyd]

Historically our civilization has evolved primarily as successful hunters and gatherers. This evolution has been largely shaped by our environment, which gives us new resources and technology to continue our journey. But make no mistake about it, we are and will always be hunters and gathers. It is embedded in our DNA. In this role our instincts require us to do what prior generations did which is to take as much of the resources available that we can get at any given time because they might not be available in the future. This explains a lot about what has happened to cases that jump into early mediation without analyzing the readiness or actual value of a case. This piece will address those issues.

The current thinking is that a lawsuit gets filed and the court encourages the parties to jump into mediated negotiations, whether or not discovery has taken place or legal issues have been sorted out through law and motion. This is contrary to our hunter and gatherer instinct and has contributed to some awkwardness on the part of trial lawyers engaged in early settlement discussions. While early negotiation does work in some instances and has been embraced institutionally in the past, it has led to a lethargic approach by some litigators to settlement. By this I mean that some folks simply show up and hope that their adversary comprehends the real value of their case without a proper exchange of data critical to an evaluation. This lethargy is due to what some commentators have described as the failure to consider the "intermediate steps between filing a case and mediating" that are critical to a successful mediated negotiation.

The Conflict Continuum

It is helpful to consider a dispute as a continuum of conflict where on one end is the "dispute" and the other end is "resolution". In the middle are a number of signposts where the parties have real and substantive moments to reach closure.

On the right end of the continuum is a *jury trial*, which is the most effective and elegant approach developed by our judicial system. It has succeeded for centuries and is the cornerstone for everything else that flows from the system. The real challenge with the jury trial is that it is only available for less than 3% of all cases. That means the civil justice system had to create other methods to deal with the 97% of cases that are in need of resolution.

On the left end of the continuum is *self-help*. While it is not encouraged in the face of breaking the law, it is a common form of dispute resolution where parties take matters into their own hands. Early hunters and gatherers used this approach instinctively until it became illegal in most civilized countries. In the U.S. legal system we see it used in zero sum financial matters such as wage and hour class action cases where employers settle directly with their workforce (*Chindarah v. Pick Up Stix*, (2009)171 Cal App 4th 796) before the other side is aware of their action. It is also used in employment matters where offers of reemployment are offered, and in family matters particularly where children are involved.

In between the two ends of the continuum lie the bulk of processes that are primarily designed to get cases settled. Following "self help," the parties absolutely need these two intermediate steps *before* engaging in Mediation:

Intermediate Steps

a. Self Help – Explained above.

b. Communication – This is the part where lawyers are supposed to talk to the other side to gauge their desire for resolution. It might be a friendly exchange of data, a simple question about how their client feels about early resolution, or a firm "this case is going all the way." In any event, some type of communication is warranted before taking the bait and going to mediation where bad news is expensive.

c. Negotiation – More often than not I am told by parties to mediation that there is no demand to settle and they have no sense of where the other party is coming from. Instead of pre-qualifying the case in advance, they use their best instincts and knowledge of the other lawyer's leanings to surmise expectations. When they hear the first demand at the mediation that same hunter and gatherer instinct kicks in and they threaten to leave. We begin flailing to keep parties at the negotiation table. To say it is exhausting is an understatement.

d. Mediation – Trials are vetted way in advance because parties have exchanged substantial information about their case. The jury is now ready to hear the entire story and can make an informed decision on the outcome. Mediation, particularly early mediation, is often not vetted in this manner which is why it sometimes fails. That is not say that early mediation is not useful for settling cases. It's just that our hunter and gatherer instinct forces us to ask for value that might not be present, or have more optimism in our position than we should if our case was fully vetted. How to properly appraise a case for mediation is similar to how you might vet a case for trial, but you have compressed all the time and expense into smaller arena.

e. Jury Trial (or Arbitration) – Explained above.

Here is a simple checklist when vetting a case for mediation that can be considered as a starting point that I suspect will be supplemented for by your firm.

Intermediate Step Checklist

a. Insurance – No matter the type of case, knowing the identity of the insurer, their policy limits, the deductible, whether there is a reservation of rights and their position on coverage is a basic first step. This applies across the board and could include class actions, business disputes and routine tort cases. Gathering intelligence about the insurer and it's propensity to resolve cases early, who

they use as counsel, whether they will attend a settlement conference in person or handle via phone are all critical considerations.

b. Ability to pay – In the employment litigation arena, particularly wage and hour class actions, having a great case with large penalties is not enough to save the day. Understanding the nature of the employer and their business, and whether they can respond to "reasonable" settlement proposal is just as important.

c. Company on the market to be sold – How often do we read in the Business section of the newspaper that certain companies are merging or being bought by other companies. This information is readily available on the internet, particularly when dealing with public companies. This information creates a dynamic that is sometimes useful for settlement, depending on the timing of the negotiation.

d. Claims administrator needs to move files – Surprisingly, many lines of disputes involve insurers have plenty of funds in reserve but are literally backed up in their claims department with files. These files are waiting to be settled but we often don't know it. If a defense lawyer reaches out on a case, it might not be a bad idea to find out if the carrier is in a "run off" type business or simply needs to move files.

e. Mood of the marketplace – With the exchange of electronic information via listserv and other electronic bulletin boards, lawyers are able to gauge which lines of disputes are settling and the range of value. That being the case, consider where your case stands in the marketplace. It might be that your case is such a unique outlier that you would not want to negotiate early because the value will only come after certain damage depositions are taken. On the other hand, you might need to move the case quickly because of the many minefields it has such that you are more than willing to settle for market value or less.

f. Current state of legal defense – This is really a question of uncertainty in the law. In wage and hour class action litigation there are usually a number of areas where an employer simply can't rely on a clear rule or approach in paying wages. The uncertainty opens the door to settlement opportunities, particularly where the plaintiff is reasonable. It does not give rise to settlement opportunities for hunters and gathers who want to eat all the vegetables they find n the garden.

g. Opposing counsel – Reasonable counsel usually means reasonable clients. Follow the cues when counsel opens the door to discussions about the case. It is hardly a sign of weakness to want to discuss settlement.

h. Case facts – Some facts speak for themselves and others require a lot of explanation. Most cases fall into the latter category. If your case speaks for itself, offer up transparency in providing whatever information your opposition requires to fully evaluate the merits.

i. Information needed to evaluate – Put yourself in the shoes of your opponent. What would they need to advise their client about the case? Imagine they are drafting a formal report that goes through the strengths and weaknesses, and provides a financial quantification of your dispute. It would certainly be in your best interest to arm your adversary with whatever information might lead to a fair evaluation that opens the door to a reasonable negotiation. In other words, tee it up for the other side so that they can be your champion with their client.

j. Future cases with adversary – Are you a frequent flyer with this defendant or law firm? If so,

make sure they know that the case at hand is either an outlier or falls within the scope of what they are accustomed to getting from your firm. Failure to do so will result in an evaluation that is mediocre.

k. Symbols matter – The Confederate flag became a symbol of hate in our country. It stood in several government buildings in the south until people used "self help" to eliminate the symbol. Your confederate flag consists of nasty emails, defamatory statements about lawyers and their clients on electronic bulletin boards and so on. These symbols inevitably get into the hands of your adversary so be forewarned. Communicating in a respectful and principled manner in writing is the only way to properly vet a case for mediation.

Terms of Engagement

After considering the above checklist (which will no doubt be supplemented to adapt to your case), it's now time to negotiate the terms of engagement to mediate. Here are a few quick things to remember:

a. Scheduling – Mediators who understand how to close deals are in high demand, meaning that getting a last minute case onto their calendar is challenging. Consider reserving a couple of dates which select mediators a year in advance with an understanding that those dates will be returned to the mediator with ample notice if not used. Take advantage of the administrator for the mediator who usually knows how to herd cats;

b. Who will attend the mediation – When insurance is involved, particularly carriers from geographic distances outside your jurisdiction, do you need them at the table or will telephonic availability be acceptable? In a commercial setting, is the Chief Executive Officer attending or is s/he sending a subordinate? Discuss the pros and cons with your adversary and make it work for them.

c. Where will this mediation occur? – Generally speaking, a mediator is more effective in his or her neutral space. Conducting the session in a law office does work but doesn't utilize all the skills a mediator needs develop a proper settlement dynamic.

d. Costs – In most cases, the cost of a successful mediation shared by all parties is miniscule compared to the value obtained in settlement. Don't be penny wise and pound foolish. You get what you pay for, no matter the size of the dispute.

e. Pre-Mediation Conference – In any case that is sizable, schedule a short call with the mediator in advance of the mediation to highlight the areas that might be an impediment.

f. Agreements – Consider exchanging either a formal Settlement Agreement and Release or Memorandum of Understanding before the session. While there are some terms that are subject to negotiation and can be left out, at least the key terms can be handled without wasting precious time at the conclusion of the mediation.

Conclusion

We are hunters and gatherers. A form of entrapment is built into the civil justice system since it cannot handle our desire to eat all the cherries that are picked in the forest. As a result, we have asked mediators and others to assist in our efforts. Mediators are often misled and used as pawn

when they are put into a case where the parties haven't considered the intermediate steps outlined above. This has led to wasted resources and time, which is contrary to why mediation was placed into the system in the first place.

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