Jury mediation: a new tool to resolve cases

By Richard Gabriel

Jasmin, a 14-year-old high school student went for a drive with two friends one winter night. On a mountain road, their car plunged off a 450-foot cliff and burst into flames. Her two friends miraculously escaped with minor injuries.

But Jasmin was badly burned over more than 50 percent of her body and lost most of her right hand. The experts estimated her injuries at nearly $10 million in past and anticipated medical care.

The state, feeling there was no liability on its part, made a low six-figure offer. With little movement in the first mediation, both parties were prepared to proceed to trial. But they realized the uncertainty, cost and heavy risk that comes with a jury trial, so they tried one last mediation. This one was different. It was a "jury mediation."

At that mediation, both sides gave short presentations, including witnesses, of their case to a group of recruited jurors who matched the jury pool in their venue. The jurors were directed to discuss how they saw the case, specifically focusing on liability issues, including how they would apportion fault. Both sides found the juror discussion revealing and instructive.

Plaintiff's counsel was surprised that the jurors' criticism of the driver overrode their sympathy for their injured client, resulting in a lower apportionment of fault than the plaintiff expected.

The defense was surprised that jurors were willing to give the state as much as 20 percent fault for an accident they saw as the sole responsibility of the driver.

As a result of their new appreciation of the risks they faced at trial, the parties decided to settle. More importantly, they settled at a value that both parties knew reflected a reasonable amount, given the facts and the likely judgment of jurors.

After the mediation, the mediator, Hon. Russell Bostrom, Ret. of Judicate West discussed the process.

"This was a difficult case as the substantial damages were clearly well into the seven figure range, but [there were] serious questions relating to liability," the mediator said. "The debrief of the 'jurors' educated the parties and counsel, … caused material changes in the parties' outlook and empowered [me as] the mediator to assist them in re-evaluating their positions."

The defense attorney in the case said, "The focus group mediation provided … first impressions of potential jurors that [were] both constructive and eye-opening. On a case that wasn't going to settle, the frank comments of our focus group brought about significant change in the posture of the parties, such that resolution was achievable."

The vast majority of cases settle before going to trial. Of all the concerns that cause parties to settle, the unpredictability of juries is one of the greatest. Most of the time, a mediation discussion about juries entails the parties contemplating what they think a jury will do with the case – an exercise in speculation because of idiosyncratic evidence, personalities of the witnesses and individual juror experiences and beliefs.

While jury uncertainty can create fear that results in settlement, it can also cause the parties to pay too much or accept too little. This information can cause us to settle cases that are better tried and try cases that are better settled.

How jury mediation works

In speaking to hundreds of attorneys, judges and mediators about their mediations and settlements over the past year, the question of settlement or taking a case to trial contains a fundamental risk analysis: how can a litigant obtain better information to either resolve a case or

let a jury check the boxes on a verdict form? To address these concerns, we have started conducting jury mediations.

Here's how it works. When it becomes obvious that the parties are stuck or further discussions will not resolve the case, the parties agree to conduct a mutual focus group or mock trial where the attorneys present short summaries of the case, show a few documents and maybe present some brief witness testimony.

An agreed-upon number of respondents are hired to match the characteristics of jurors the lawyers typically see in the venue where the case is to be tried. After a brief introduction, the attorneys for each side briefly present their case, including facts, exhibits, testimony and arguments.

The mediation jurors then "deliberate," discussing their impressions of the case among themselves, giving the parties a first look at juror perceptions. The mediator and a trial consultant then conduct a discussion with the jurors on their impressions of the strongest and weakest issues in the case, as well as any questions they have.

The mediation jurors are asked about their initial predisposition toward the legal questions in the case. Depending on the complexity of the issues or how much evidence the attorneys want to present, these discussions are typically conducted in a half-day or full day format.

The mediator and consultant then review the juror responses for any personal experiences, biases or confusion that may have affected how the jurors saw the case. This type of feedback is intended to give the parties insight into what evidence, testimony, misunderstandings and emotional reactions jurors might use to put together their picture of what happened, who was to blame and how much money to award.

The mediator and the consultant then meet with the parties to help them understand the pattern of juror responses in relation to how a jury in their venue would probably value the case at trial. Next, the parties review their respective cases to better understand which jury concerns they could easily address, which issues would be more problematic and how to ultimately refine their positions for either settlement negotiations or trial.

More importantly, the parties can have a meaningful conversation with their clients about the risks of trial in front of a jury. This will give them better information about how to discuss settlement in the ensuing mediation.

Key lessons

One of the most important aspects of a jury mediation is that it helps the mediator and the parties understand the dynamic process of how jurors listen to, respond to and decide cases. This goes beyond mere observation of what one or more jurors says in the focus group deliberations.

A mediator with a trained consultant should be able to look at the pattern of juror responses: what jurors do and don't say, their non-verbal reactions, the tone of their comments and how they put together the story of the case, as well as the jury's group dynamic. Finally, a trained consultant and mediator should carefully advise both parties on how those juror responses will play out in trial.

One of the benefits is that jury mediation is flexible, allowing the parties to do longer presentations, add jurors or even present information independently outside the presence of the other party if they are concerned with revealing confidential trial strategies.

Another major benefit is that both parties share the expense of jury research.

While jury mediation is not appropriate for all cases, a number of attorneys have said there are circumstances where they see a benefit to this type of ADR tool. For example, if multiple

plaintiffs or defendants cannot seem to agree on liability or damages issues, they might need feedback from “jurors” to break an impasse. Or in some cases individual personalities or positions may be so entrenched that they might have a hard time seeing how anyone would see the case differently.

After months, if not years, of immersion in the evidence and law of a case, jury mediation gives the parties a fresh, realistic view of what they will face in court. For the first time, attorneys can actually open up the doors to a deliberation and watch how a jury may decide their case without the risk of an actual verdict.

These focus groups put the jury’s voice in the mediation room, and take out the inaccurate speculation of how a jury will interpret case evidence. This third-party “reality check” can often help the parties let go of seemingly intractable positions and resolve the case. More importantly, it gives the parties much more accurate information about the potential risks and benefits of settling rather than taking a case to trial.

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