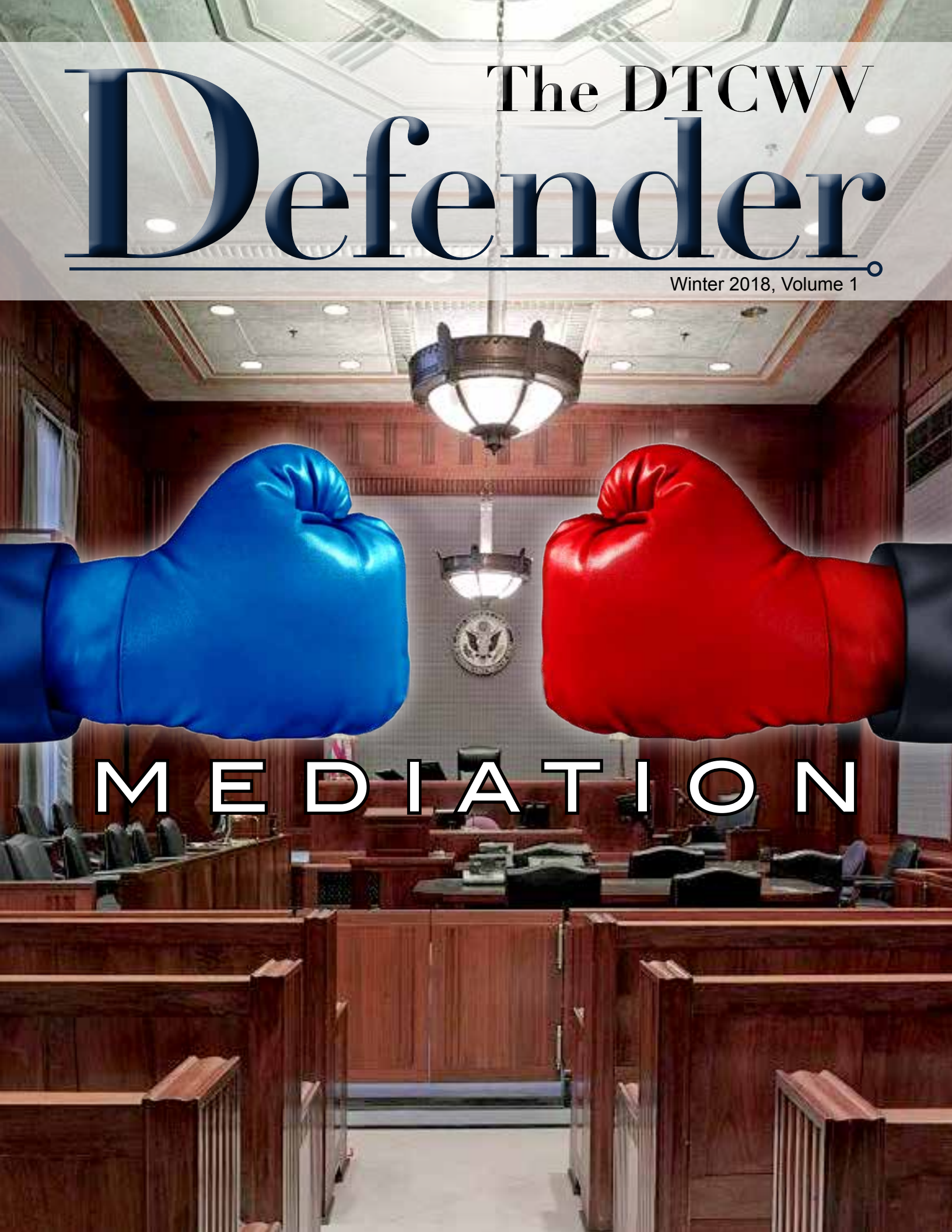
The DTCWV Defender

Winter 2018, Volume 1



Remaking Ourselves

Jill McIntyre, *Jackson Kelly PLLC*

Do you like our newsletter's new look? Peggy suggested it was time. Then we challenged members to come up with a **name** for the quarterly that Chuck Bailey is shepherding so beautifully. Congratulations, Deb Scudiere, on naming The Defender!

Are you following DTCWV on social media? I am proud to see our posts and tweets in my feeds, and I learn things I need to know without having to look them up on the website or receiving yet another email.

We see how quickly technology changes our lives, but is it changing very significantly the practice of law? The American Bar Association's Commission on the Future of Legal Services published in 2016 a *Report on the Future of Legal Services in the United States* (*see* http://abafuturesreport.com/#findings), and the ABA continues to publish on its Resource page articles, reports, and presentations on the future of the profession (*see* https://www.americanbar.org/groups/bar_services/resources/resourcepages/future.html), addressing issues like innovation, licensing, paraprofessionals, self-navigators, new categories of legal service providers, and unregulated legal service-provider entities.

> *As human beings, our greatness lies not so much in being able to remake the world . . . as in being able to remake ourselves.*
>
> --Mahatma Gandhi

When scanning the literature, we may be tempted to conclude that innovation in the practice relates mostly to reaching the poor or disenfranchised. Indeed, the ABA Commissions' 2016 findings focused primarily on unmet needs, technologies that improve access and service delivery, and public trust and confidence, which sound to me like mostly individual problems. Our clients are worried about proportionality, home cooking, and preserving issues for appeal.

But wait. What about LegalShield's small business menu, which includes Trial Defense Support (whatever that is)?

What about Baker Hostetler's 2016 hiring of ROSS, "the world's first artificially intelligent attorney," who can read and understand language, postulate hypotheses, research, generate responses (with references and citations to back up its conclusions), and learn from experience. What about those disruptors who are finding new ways to enter our jurisdiction and compete with us on rates, convenience, efficiency, and predictability? What about the "big data" that allows our clients to compare (fairly or not) our efficiency and effectiveness with that of law firms from throughout the country? What about our collecting the data necessary to effectively price flat fee work? Who would have thought just fifteen short years ago that technology would be presenting such challenges?

Are we paying attention?

Highlights

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The Ins and Outs of Mediation by the Professionals

Charles Bailey, *Bailey and Wyant, PLLC*

Mediation and alternative dispute resolution continue to replace civil trials. Statistics show that 97% of all civil cases are resolved without a jury trial. There are many scholarly articles on this subject, so there is nothing I can add to this development. Trial judges both -state and federal- lament the lack of jury trials but mediation is essentially mandatory in each judicial district in WV and the first failed mediation some times results in a mandatory second one.

Most of us are now preparing harder for mediation and trying to develop strategies to more effectively represent our clients at mediation. Therefore, we believed the membership would benefit by asking current and former members of Defense Trial Counsel of West Virginia who specialize in mediations to write articles that will better prepare us for it. (We could have reached out to many more, but we wrestle with space limitations.) What is amazing is that plaintiffs' counsel, despite the fact that many of the authors for this newsletter are or were members of DTCWV, request these persons to serve as mediators, which is indicative of the mediators' reputation and legal acumen.

We lead off with Donald O'Dell. Don really does not need much introduction, and it is important to note that he is a member of the National Academy of Distinguished Neutrals and has been selected by his peers as one of the top ten lawyers of West Virginia. He has mediated most of the high-profile cases in West Virginia. His topic is "Mediating the Multi-Party and High Dollar Case: 'Go Big or Go Home!'" Most of us have experienced the challenge and the accompanying anxiety associated with these types of mediations. Don provides excellent tips on how to prepare for the mediation, helping to meet the challenges presented in high-stakes cases.

Next is an article by Charlie Piccirillo, former President of DTCWV. Charlie is one of those attorneys to whom I turn for advice. His level-headed, common sense approach always resonates. Charlie gives us guidance on "The 'Excessive' Initial Settlement Demand and Mediation, Deal With it, Move Forward and Resolve Your Case." We asked Charlie to write about this because it is truly annoying to go into a mediation where the initial demand is so high that the client and claims professional (when there is insurance involved) are already angry about having to respond. Charlie gives us sage advice on the reasons for unreasonably high demands and how to competently deal with them.

We then reached out to Steve Dalesio. Steve is now a full-time mediator who has a strong litigation background in West Virginia and Pennsylvania. He gives us advice on a prickly issue that arises during mediation when neither side can see the light at the end of the tunnel for resolution. Steve prepared an article titled "Impasse: The Mediator's Biggest Challenge." He gives solid, concrete insight on how mediators try to break the impasse and how you can assist in breaking it. Those of us who are not mediators learn the common reasons for impasse and concrete strategies to move the ball forward. Steve has guided me and my clients successfully through this thorny brush.

We asked Monica Haddad to write "Preparing the Client and Insurance Professional for Mediation-Even the Experienced Ones." Monica is a member of the National Academy of Distinguished Neutrals and the Association of Attorney-Mediators and Mediation Counsel of Western Pennsylvania. She participated in many mediations when she litigated cases and brings this insight to the table. One of the challenges we face – at least those of us that do insurance defense – is getting the experienced insurance professional to focus on the mediation. It is also important that we prepare the client, as well. We need to advise the client and claims professional that, yes, the mediator will probably spend more time with the plaintiff. We need to remind and reinforce that the mediator is going to play "devil's advocate" and not be annoyed or offended by the mediator stating the other side's case.

Finally, we called upon the veteran litigator, mediator, and entrepreneur, Elliot Hicks. He took on the tough topic "Navigating the Emotional Roller Coaster of Employment Dispute Mediation." Anyone who does employment law knows how emotionally vested the plaintiff and employer is in these cases. It's not like looking at an x-ray and seeing clear evidence of a broken bone. You are looking at a far more muddled picture of motivation. What motivated the plaintiff to sue? What motivated the employer to take an adverse action against the employee? Complicated and emotionally charged issues of back pay, front pay, reinstatement, apologies, confidentiality, quid pro quo, hostile working environment, sexual harassment, and retaliation are all thrown into the soup of mediation of employment disputes.

Mediating the Multi-Party and High Dollar Case: "Go Big or Go Home!"

Donald B. O'Dell, *O'Dell Law | Mediation, PLLC*

Mediating the large, complex case presents unique challenges for the parties, counsel and the mediator. Success requires serious, advance preparation and realistic expectations on the part of all participants.

PREPARATION CHECKLIST

- ❑ Decide when to mediate
  - Timing is everything. View suggesting mediation as a sign of wisdom, not a sign of weakness.
  - Consciously look for the "window of opportunity" when mediation might be most successful. Then, be serious about scheduling.
  - Good mediators have busy schedules. Plan ahead to ensure that the most qualified individual will be in charge of your mediation.
  - In multi-party, high dollar cases, one mediation session is often not enough. Consider scheduling multiple days, to be utilized by all parties or groups of parties (e.g., defense group meets on Day 1 and plaintiff and defendants meet on Day 2).
- ❑ Determine an appropriate venue for mediation
  - Be proactive. Suggest holding the mediation at your offices, assuming you can comfortably accommodate a large crew.
  - If agreement cannot be reached, identify and propose a neutral location.
- ❑ Select a mediator
  - Consider the experience level and reputation of each candidate. Has the mediator handled other large, complex mediations? You don't want a rookie cutting his/her teeth on your client's case.
  - Should I choose a mediator with experience in my case-specific issues or an experienced, seasoned mediator?
  - Knowing my client, do I want a mediator who tends to follow the facilitative model or the evaluative model?
  - Exercise due diligence when selecting a mediator, especially in complex cases. The qualities and skills of your mediator can be crucial to the success or failure of the process. A good mediator must understand the dispute, the evidence, the law, the psychologies, and the intricacies of the mediation process. A good mediator should bring intelligence and integrity to the table.
- ❑ Prepare yourself
  - First, recognize and appreciate that you have a big, difficult case. Then, prepare and plan accordingly.
  - Prepare for mediation as you would for trial (my bet is that you have been in more mediations than trials during the last year . . . just a thought). Your goal is for mediation to be the final stage of your case. Better preparation equals better results.
  - Thoroughly review your file, including all documents.
  - Make copies of relevant portions of deposition testimony, discovery, records, and reports for the mediator to utilize at mediation.
  - Know the status of any pre-mediation negotiations, and develop a proposed strategy for negotiating at the mediation.
  - Determine those who must attend and those who should participate. Provide them with adequate notice. In addition to my client and key decision-makers, should I bring my experts? Consultants? Non-parties with an interest? In multiple plaintiff actions, should I insist on all plaintiffs being present or will the mediation be more productive in their absence? Above all, be sure to comply with the rules as well as the mediator's requirements.
  - Anticipate and address fundamental problems (e.g., insurance coverage issues) in advance.
  - Know the applicable mediation rules, as well as your mediator's procedures (e.g., joint session? opening statements? confidentiality of caucuses?).
  - Consider preparing a full settlement agreement and release to bring to the mediation in the event of a settlement. Chances are you will have fewer objections from counsel for plaintiff on mediation day, after a settlement has just been reached.
  - Bottom line: Your approach to mediation, planning, and preparation will often determine whether resolution is reached. If done correctly, you may be surprised to find that settling a large case is often easier than settling a small one.
- ❑ Prepare your client (and let your client help prepare you)
  - Fully explain the mediation process, including caucuses, sidebars with the mediator, and the possibility of finality.

- With your client's assistance, establish your goal and how you plan to achieve it.
- Jointly develop and agree upon a negotiation strategy.
- Encourage engagement, commitment, motivation, and optimism (at the same time introducing a healthy dose of realism). As counsel, strive to be a consensus-builder.
- Attempt to understand your client's needs as opposed to their wants.
- Present a realistic, objective case evaluation and have your client fully understand and appreciate the risks involved.
- For mediation to be effective, clients should be prepared well in advance, not on the elevator ride up to the proceeding.

❑ Prepare the mediator

- Prior to mediation, you have a valuable opportunity to educate the mediator and have the mediator become comfortable with your information, your client's positions, and your objectives. Make the most of this opportunity!
- Consider a conference or teleconference with the mediator. Remember, at mediation, you will have limited time with the mediator, due to the large number of parties.
- Spend quality time on your written submission. Keep it concise and crisp and submit it timely. Include important, key documents, photographs, and deposition transcript excerpts (not the entire transcript).
- Include a recitation of prior settlement discussions and propose a clear path for mediation negotiations. Identify for the mediator any potential stumbling blocks and offer suggestions for addressing and resolving them.
- Above all, be candid and transparent with the mediator. Seek to establish credibility for both you and your client.

❑ Prepare your opposing parties and counsel

- Even if not required by the mediator or mediation rules, consider exchanging written submissions with your adversary. Agree on the nature, extent, and timing of information to be exchanged. Often, these submissions provide more useful information and are more efficient than formal discovery. Pre-mediation exchange of submissions allows for unfiltered, direct, and potentially persuasive dissemination of your client's positions and arguments and can expedite actual negotiations at the mediation itself.
- Consider a conference or teleconference with opposing counsel. Your adversary may be more open and candid prior to and outside of the formal mediation process.

❑ Prepare your co-defendants

- Multi-party, complex cases (e.g., construction disputes involving the owner, contractor, sub-contractors, engineers, architects and other stakeholders) readily lend themselves to planning, organization, and communication within and among the defense group. Consider scheduling meetings to review the relationships between the various defendants, the interests and goals, and the issues on which certain defendants may be aligned. Ask whether there can be a "joint defense agreement" to negotiate as a team or whether each defendant will be left to negotiate individually with the plaintiff. If negotiating globally, what will that look like? How will this affect the format and flow of the process? Obviously, these discussions must take place well in advance of the mediation – trying to wing it the day of mediation is highly discouraged.

❑ When in doubt, PREPARE, PREPARE, PREPARE!

EXPECTATIONS

First, expect delay!

- Mediation of multi-party cases is a particularly slow and tedious process. You and your client will no doubt experience much downtime, so plan for it.
- Respect the tough job and logistical challenge that a mediator has in managing a gaggle of attorneys and clients, all located in separate conference rooms (and often on multiple floors of an office tower).

Expect fluidity

- Understand that mediation of large, complex cases is a fluid process. Alignment of the parties can change dramatically during the course of the session. For this reason, consider quickly cutting to the chase. The early bird may get the worm (the "worm" being a better deal than your co-defendants).
- To the extent possible, try to prevent the mediation from getting hijacked by a focus on individual issues unique to a particular party.

Expect success (but be prepared to deal with failure)

- Project optimism among your client's team. Venting in moderation may be tolerated; however, manage your team's emotions and remain focused on your client's goals and objectives. Remaining positive and proactive will serve you well. To the contrary, adopting a "this is a waste of time" mindset may well become a self-fulfilling prophesy.

- Consider sidebars. Parties and/or counsel having direct interface with one another may prove beneficial and potentially lead to resolution.
- In the absence of global negotiations, anticipate that the plaintiff will require that your negotiations be kept confidential. Also, should your client settle during the mediation, confidentiality of the settlement itself may be a mandatory term.
- If you settle, be sure to confirm the terms in writing and have all parties sign. Whether required (as in S.D.W.V.) or not, this is just good practice. After working this hard, why leave any room for miscommunication or misunderstanding?
- If you don't settle, don't despair. Follow-up sessions or telephone conferences are often necessary, especially in multi-party, big dollar cases. Time for the parties to reflect and process after an initial session is often helpful. Search for an opportunity to continue the dialogue. Remember, it is never too late to talk resolution.

Last, expect the unexpected!

In closing, I would note that I have had the privilege of mediating with many of you. Due to your preparations, efforts, and hard work, I have witnessed mediation in West Virginia evolve and improve dramatically over the years. Going forward, I would challenge all of us to strive to further improve and refine a valuable process that well serves the interests of parties, counsel, and our judicial system as a whole. In that connection, please share any suggestions, thoughts, or ideas that you may have.

2018 West Virginia Legislative Session

Danielle Waltz, *Jackson Kelly PLLC*

The sixty-day West Virginia Legislative session adjourned *sine die* on March 10, 2018. The session was dominated by a high-profile, statewide teachers' work stoppage, which resulted in a five percent pay raise for all state employees and a commitment to create a task force to address rising premiums for participants in the Public Employee's Insurance Agency ("PEIA"), as well as a possible restructuring of the insurance program. The 2018 legislative session concluded with both the House and Senate passing a balanced budget containing no new tax increases. This budget was signed by the Governor.

Not to be lost within the hecticness of the teachers' work stoppage are some key pieces of legislation that affect our members. Below is a summary of two important bills, one of which was signed by the Governor and the other which was vetoed.

House Bill 4013—**Clarifying Venue for Non-Residents**—provides that nonresidents may not bring actions in the courts of West Virginia unless all or a substantial part of the acts or omissions giving rise to the claim occurred in the West Virginia; provides an effective date; provides that nonresidents may file actions in the state courts if they cannot otherwise obtain jurisdiction in the state where the action arose, unless barred by the statute of limitations in the state the action arose; requires the filing of an affidavit; provides that the provisions do not apply to actions filed against West Virginia citizens, residents, corporations, or other corporate entities; provides that each plaintiff must establish venue; provides that persons may not intervene or join in a pending action as plaintiff unless they independently establish venue; and provides that courts shall dismiss claims without prejudice if venue is not proper as to a nonresident plaintiff. This Bill will be effective ninety days from passage or on June 8, 2018. The provisions of the bill by its language would apply to all civil actions filed on or after July 1, 2018.

House Bill 4392—**Relating to Medicaid Subrogation liens of the Department of Health and Human Resources**, a bill of major concern to some of our members, vetoed by the Governor on March 28, 2018.

Notably, with the assistance of a number of members of Defense Trial Counsel of West Virginia, significant headway was made on Senate Bill 341, creating an Intermediate Court of Appeals. This bill passed the full Senate with bi-partisan support and stalled in the House of Delegates due to concerns regarding funding the court. West Virginia is one of only nine states without an intermediate appellate court and is the state with the largest population without such a court. Relevant to the legislature's possible future consideration of the creation of such a court is Senate Joint Resolution 3, the Judicial Budget Oversight Amendment. Passage of this resolution allows an amendment to be placed on the ballot in November regarding some legislative control over the Supreme Court of Appeals of West Virginia's budget.

Finally, Senate Bill 57, relating to third-party litigation funding, passed the full Senate but was not considered by the House of Delegates. It is expected that this issue, along with the Intermediate Court of Appeals, will be revisited during the 2019 Legislative session.

The "Excessive" Initial Settlement Demand in Mediation, its Cause and Effect and How to Deal with It, Move Forward, and Resolve Your Case

Charles S. Piccirillo, *Shaffer & Shaffer PLLC*

Over the course of the past several years, we have observed a general increase in initial settlement demands and a significant increase in what the defense bar would characterize as "jaw-dropping" or "excessive" initial settlement demands. I can't begin to tell you how many times I've heard from defense counsel, their client representatives, or insurers, "We're wasting our time here, let's just end the mediation now," or some slight variation thereof, just as mediation is beginning as the result of one of these opening demands. As a mediator, I generally deal with that by simply stating the obvious, that no case ever gets settled without trying to engage in the process. I counsel that opening settlement demands are often made for many reasons and, generally, they bear little relation to the ultimate settlement. In this piece I am not necessarily discussing the case that by its nature, the facts, and the applicable law necessarily justifies a multi-million dollar demand. More to the point, I'm discussing what appears to be the case that indeed has settlement value and perhaps significant settlement value but not anything approaching the realm of the initial mediation settlement demand (i.e., the $150,000.00 case that starts with a six million dollar demand).

Why do some plaintiffs' counsel seem to always open with such a large opening demand? I think there are many reasons, but generally they want to start with some multiple of the actual value of the case for settlement purposes to leave plenty of room to bargain. As we all know, from their side, one can always go down but can almost never go up in the negotiation process. So part of the explanation is simply leaving plenty of room to bargain. Another important cause for such demands is that the plaintiff's counsel never wants his own client to believe that he started out asking for too little, as the plaintiff herself will almost always have a higher expectation of the settlement value of her case than her lawyer really does. That is human nature. Other less obvious reasons are: a) plaintiff's counsel may want to impress upon the defendants that this is a more serious case than defendants may believe; b) plaintiff's counsel may have the perception that a particular defense counsel or insurer always "low-ball," which must combated with a high demand; c) others appear to be doing it; or d) maybe the plaintiff and his counsel know something that the defense or the mediator do not. For whatever reason, however, these high dollar initial settlement demands occur, exist, and present challenges for the defense and, therefore, for the mediator.

In terms of dealing with this from the mediator's perspective, I generally try to ascertain whether I am missing something when confronted with such a demand, and I may very well speak with the plaintiff and plaintiff's counsel along those lines to try to learn if I've "missed the boat." If I have not, I usually try to dissuade them from starting quite so high. However, I virtually never refuse to convey an initial demand, even if I personally view it as excessive, because in my opinion, to do so risks the loss of trust necessary to effectively mediate a case. Rather, I'll pass it on and begin dealing with the predictable responses from the defendant and his counsel.

Rather than "pulling the plug" and ending the mediation, what will often occur is then a very low initial offer will be made, perhaps lower than what the defendant had originally intended to offer. Again, I will often try to discourage that but will relay it to the plaintiff, often with the message to both sides (or various sides in multi-party mediations) that at some point the parties have to move into the range of reality if we are going to have any chance of settling the case. I think the important point here is to try to convey to both sides that making the move into the realm of reality is not necessarily a sign of weakness and once one party or the other makes that move, I think it's incumbent on the mediator to convey to the other side that this "significant" move is made with the expectation that they will do the same. That may or may not occur on the next move, but ultimately, unless there is just an absolute difference of opinion as to the merits of the case or some aspect thereof, it's surprising how often the cases can be moved into at least a range which may lead to settlement.

My view of reacting to a demand you or your client view as excessive is essentially not to be thrown off your game and relinquish the opportunity to resolve a case that needs to be settled. As with many aspects of mediation, being able to achieve a settlement in mediation requires a bit of a different skill set than the adversarial approach we must take in the courtroom. Often I find litigation skills do not translate in to deal-making skills, which frankly serve the advocate and his client better in the mediation process. So to some degree I encourage you to park your advocate skills and bring your deal-making skills to mediation.

In summary, the best response I believe to the excessive initial settlement demand is to remain patient and keep your eye on what you believe the reasonable settlement value of the case is, but with an open mind to learning new aspects of either fact or law, which may influence your "reasonable range" evaluation for settlement. As a practitioner, you should take some comfort in the thought that while perhaps initial mediation settlement demands have gone up and even spiked somewhat in terms of what you view as "excessive,", in general, actual settlements have probably remained pretty constant and generally line up with traditional settlement values, adjusted, of course, for inflationary factors. My advice to those of you receiving demands that you view as "excessive" is to prepare well in advance, keep an open mind, remain patient, and trust your mediator and the mediation process.

Impasse: The Mediator's Biggest Challenge

Stephen J. Dalesio, *Dalesio-Law Mediation, LLC*

Without question, the mediator's biggest challenge is the impasse. *Merriam-Webster* defines impasse as "1. a: a predicament affording no obvious escape; b: deadlock; 2. an impassable road or way." It can be very frustrating when an entire day of seemingly-constructive negotiations ends without a resolution of the case. Many factors can play a role in the impasse, but the experienced mediator will usually be able to detect an impasse early in the mediation, usually by an unrealistic position taken by a party. Early detection of issues causing a potential impasse is important, but often the basis for the impasse is not something the mediator has any control over. For example, impasse can be the by-product of a sizeable lien, by the overly-zealous expectations of one of the participants, by high boardable damages, by a favorable ruling on pre-mediation motion, or by emotions that outweigh logic and common sense. It is important to inquire about the goals for a mediation to detect a possible impasse. Do the parties really want to settle the case at the mediation or are they simply going through the motions or complying with a mandatory order to mediate because what they really want is their day in court? The mediator must meet these challenges and still attempt to resolve the case in the face of less than favorable odds.

There are several ways to address an impasse. Not all of them work but many have proven successful track records.

1. Split the difference. Usually a day of negotiations that compresses the numbers ultimately boils down to one or two remaining moves. In this instance, the numbers will usually tell the mediator where the negotiations are going and suggesting a splitting of the difference is usually well received.
2. Quid pro quo. A "give and take" or "tit for tat." Basically, the parties agree to keep the negotiations going to avoid impasse because each side realizes the other side is giving in a little or making a bigger move and the opposing party reciprocates in like kind.
3. Conditional move. An example of a conditional move would be to require that a party agree to go a certain range before negotiations continue, such as requiring that the settlement demand be at or below policy limits or below immunity limits before an offer is made. If the conditional move is made, the chances of avoiding impasse are likely diminished.
4. Bracketing. This can be a very useful tool when the parties are very far apart. "I'll go to $$ if you go to $$$." The utility of the bracket is the midpoint that is communicated. Often, the parties are so far apart with their straight numbers that they have no idea where the settlement range is of the other side. A bracket helps to clarify that by setting forth a clearly-defined midpoint. After a few brackets, the midpoint becomes even more defined and usually then results in a return to straightforward numbers and eventual settlement. Bracketing can be particularly useful for high damage claims where the parties are several million dollars apart.
5. Mediator proposal or number. This is done where there is an impasse and the mediator makes a proposal to all parties, and each party is requested to accept or reject it, on the exact terms, with no modification or counteroffer, and it is made on a double-blind basis to all parties in separate communications. There are only two possible outcomes: settlement or continued impasse. Most mediators will choose a number that they believe has a chance of being accepted by both parties but a number that favors neither side. It can be an effective end game to avoid impasse.
6. New information. New information can be disseminated during the mediation that was not previously disclosed that can have an impact on the negotiations. Some parties choose to hold back information until they think the time is right for it to be disclosed. An example would be the existence of a surveillance video or a witness statement that was not disclosed in discovery. Another example might be a supplemental expert witness opinion or perhaps an expert that has gone south on a party. This eleventh hour disclosure of critical information often can result in breaking the impasse and resolving the case.
7. Expertise of participants. Those attending a mediation often are experienced litigators or insurance professionals. Their background, knowledge, and experience can be utilized to assist with an impasse. For example, a litigator who tries a lot of cases may have "been there and done that" with respect to an issue or position being taken that is not being accepted or endorsed. An experienced insurance professional can offer his or her knowledge as to settlement values or ranges of other similar cases that the participants might not be privy to.
8. Focus on the future. When there is an impasse, it is important to discuss the future. Now what happens? What's next? How much remaining discovery is needed and how much will it cost? When will the dispositive motions be filed and ruled upon? Even if you prevail at trial, will there be an appeal? How long will that take? If the case proceeds and is not resolved at the mediation, will the case get better? Worse? Stay the same?

9. Expand the pie. Pay the mediator's fee. Pick up costs. Pay the statutory 1% assessment (for current med mal cases).
10. Partial settlement. If the entire case cannot be resolved, attempt to settle with one or more of the parties. Focus on the parties who want to settle and not on the parties who throw up roadblocks. Partial settlements are always better than no settlement.
11. Apology. Not always the best route to take but can be an effective, useful, and powerful tool under the right circumstances. Often utilized in med mal cases.
12. Cooling off period. Sometimes, the parties just need time to cool off and let the dust settle. Significant progress is often made at the mediation but not always resolution. Parties often need time to address a medical lien or to take one or two remaining, critical depositions before resuming negotiations.
13. Bringing the lawyers together. This can be fraught with disaster or a useful tool. It depends on the personalities of the participants, and the mediator must make a judgment call. Often the lawyers can talk more openly and freely with each other outside the presence of their clients and significant progress can be made to close the gap and avoid impasse.
14. Lock the door. The mediator is in the position to keep the negotiations going, even in the face of negative or non-productive negotiations. Let the parties know that "going through the motions" will not be accepted or tolerated and that good faith efforts to resolve the case will be expected from both sides.
15. Adjourn. Sometimes fatigue, health, other commitments, travel plans, etc. really leave the mediator with no other choice than to adjourn the mediation. It is very important for the mediator to inquire about time limitations and travel plans when the mediation begins and try to work within those parameters. Adjourning to finalize lien information or to take dispositive depositions (as referenced above) is often necessary and can be useful to avoid eventual impasse.
16. Follow up. It is incumbent on the mediator to follow up with the parties on those cases that do not settle at the mediation. This is very important and often welcomed by counsel and demonstrates a commitment and dedication to close the gap and avoid impasse. Notifying the participants that you plan to follow up in a week or so while still at the mediation gives the parties optimism that the case can still resolve with your assistance.

These suggestions can be helpful to avoid impasse. The mediator usually has a certain strategy in mind to avoid impasse based on the nature of the case being mediated and his or her familiarity with the participants. Not attempting some type of strategy to avoid impasse is a missed opportunity to resolve the case.

Erik Legg, Mark Hayes, Jill Rice, and Peggy Schultz recently attended the DRI SLDO Regional Meeting in Savannah, GA. During this multi-region meeting other state civil defense associations came together to discuss successes, challenges, opportunities and other topics related to SLDOs and firms. Erik Legg, Vice President of the DTCWV, participated on a panel entitled "Planning for Succession – Grooming New Leaders and Young Lawyers." This DRI-sponsored seminar for SLDO's is held every year in a different location and with different regions.

Preparing the Client and Insurance Professional for Mediation – Even the Experienced Ones

Monica N. Haddad, *Monica Haddad Mediation*

Mediation training and education are not just for the mediator. Annual mediation training by attorneys and claims professionals will ensure that you and your clients have meaningful and successful mediation sessions. Despite having mediated more than 1,000 cases (a milestone hit just this year!), I continue to be educated, enlightened, and often surprised by what transpires in a mediation and its outcome. Attorneys and those who regularly participate in mediation should take advantage of the knowledge of experienced mediators to enhance negotiation skills and acquire techniques for overcoming impasse and avoiding pitfalls. This short article focuses on just one component to a successful (or at least meaningful) mediation: preparing the client.

"Before anything else, preparation is the key to success." (Alexander Graham Bell). In advance of the mediation, both you, as counsel, and the claims professional should carefully review your files, outline strengths and weaknesses, evaluate coverage, assess the risk of proceeding to trial, and evaluate both verdict and settlement ranges. Those findings should also be shared with the client who is attending the mediation session. It is not uncommon for a disagreement to arise between a client and an attorney and claims professional as to settlement value, especially where the client has not previously considered risk or expense in proceeding. And if a client will potentially be asked to contribute personal funds to a settlement, it will help to diminish any contention when the mediator poses the suggestion. Finally, although the claims professional will have an understanding of the mediation process, it is always worthwhile to assure that the client understands the process prior to learning about it from the mediator. Although the mediator should explain the process to your client, there are times when the mediator will erroneously assume your client understands the process given his education and position within a company. So, prior to mediation, **prepare your evaluation of the case and discuss it with both the client and the claims professional.**

"Patience is not the ability to wait but the ability to keep a good attitude while waiting." (Joyce Meyer). Almost as essential to a meaningful mediation session is assuring that your client and claims professional are prepared to be patient with the process. Although unpredictable which side of the "v" will need it, most often it is the plaintiff who needs significant time, conversation, hand holding, and re-evaluation with the mediator. Sometimes it is both counsel and the party who need that time, but as often, it is the plaintiff alone who requires significant time to comprehend the process, evaluate the case, and acknowledge that expectations may not be achievable. Unlike the defense, where usually everyone has had at least some experience with mediation, the plaintiff typically is at his first rodeo. It is essential for the defense to let the mediator have her time with the plaintiff to not only assist with an understanding of the case and its evaluation but to also develop a rapport and gain trust from an individual whom the mediator often has only met for the first time. So prior to mediation, **advise your client, and remind your claims professional, that patience with the process is key to a successful mediation.**

"An open mind is better than a clenched fist." (Matshona Dhliwayo). Although your claims professional will likely have participated in enough mediations to realize that the mediator will play the devil's advocate, your client on many occasions may be as much a novice to this process as the plaintiff and will put on the boxing gloves when the mediator presents the plaintiff's case. Gone are the days of routine joint sessions, and consequently, the mediator is left to assess how much about the process and the role of the mediator is to be explained in each room. Mediators will no doubt take the time to fully explain the process, including that we will be a devil's advocate to a plaintiff but may not do so in your room, incorrectly assuming that the corporate representative and the claims professional realize that the mediator will present the plaintiff's case and likely challenge the facts and/or theories of the defense. In addition to warning your client and claims professional about the mediator's likely devil's advocate routine, you should also remind them that the mediator is doing the same thing in the plaintiff's room – presenting your position and challenging plaintiff's claims. Finally, as new information is often discovered in mediation or known information is perceived differently due to the "conversation between the rooms," your client and claims handler should be advised to keep an open mind in regard to case evaluation and assessment of verdict and settlement ranges. So, in an effort to keep blood pressure in check, prior to mediation, **prepare your client and claims professional for the devil's advocate routine, and remind them to be open-minded about the facts and theories of the case and their evaluation of verdict and settlement ranges.**

Preparing your client and claims professional for mediation is the first step to ensuring your mediation session will be at least meaningful. Regular mediation training and education, however, will allow you to have *both* meaningful and successful mediation sessions, as you will enhance negotiation skills and acquire techniques to overcome impasse and avoid pitfalls. The West Virginia State Bar offers annual Advanced Mediation Trainings with different topics and presenters/trainers each year, focusing on mediation skills for both the mediator and the advocate. This year's training, **Negotiation Skills for Advocates and Mediators – An Interactive Process**, with national mediation trainer Rene Stemple Ellis, is on July 11, 2018. For further information see your WV Bar Blast or contact me at monicahaddad@comcast.net.

Reducing the Emotional Toll of the Employment Dispute Mediation

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When employees and employers turn to a mediator to help resolve their legal disputes, they not only bring evidence and arguments but also emotional reactions that are definitely not the same in everyone.

There are very few types of lawsuits that generate more emotion than those involving employment disputes. Our jobs are our identity. One of the first things you ask a person when you meet them is, "What you do [for a living]?" Our occupations define us in our society. Our jobs are how we define our contribution to the community in which we live. Though our jobs may be stressful, we get comfort that our jobs allow us to provide for our families and to give our children the platform and springboard they need in life.

The last thing the employer wants is a disrupted workplace. Disunity in the ranks of the employees is a cancer that grows steadily, if not addressed, and makes the business weaker.

Race and sex discrimination cases are particularly emotionally difficult for both sides. Our country continues to think of itself as a place where you can advance on merit, regardless of your skin color or sex. But there are wide gaps between the perceptions of sex discrimination between men and women and the perceptions of race and ethnic discrimination between minorities and the larger population. Emotions sometimes become overwhelming when discriminatory acts and language at work are compounded by the employer's refusal to believe that it actually happened. At the same time, nobody wants to be called a racist or accused of sexual harassment. The employer or coworkers who will be witnesses in the case will also bring fierce emotions to the table.

What can the lawyers, parties, and mediator do to deal with this flood of emotion at the mediation session?

Addressing the varied emotions that stand in the way of resolution often is a key to a successful mediation. The way a client will deal with employment mediation will be guided substantially by the approach the lawyer takes. So many times I have mediated cases where, instead of preparing their clients for the realistic ends that mediation can reach, lawyers simply hype up their client in order to show that they are the client's protector and sympathizer. If mediation is to succeed, counsel for the parties must do what they can to prepare clients for the modest goal of simply resolving the dispute and preparing for life thereafter. You do this by insisting on developing strategies and alternative strategies for settling the case.

What I have to do as the mediator is to listen to the parties to understand exactly what the root of the complaint and the defense are. So many times plaintiffs need to know that they have been heard and believed. Regardless of the need to express some empathy with the plaintiff, my job is not to take the emotion out of the case – I can't do that – but to guide the litigant's thoughts toward a realistic evaluation of how the evidence will come in to the jury and how a jury will accept the evidence. My thoughts on the issue aren't perfect, but I can provide another set of eyes that might view the case differently from the way they been told it will be perceived. Instead of talking about what happened, whether it happened, and how it affects the plaintiff, I need to talk about what evidence might make it through to the jury and what evidence won't. I need to ask them to think deeper about who might comprise their jury and whether that jury is going to be receptive to their claims or generous with an award.

For the defense I must do the same thing. Many situations that occur in the workplace are not deliberately discriminatory but might be the result of inadequate sensitivity or understanding. At trial, these actions have a spotlight shone on them, and they are repeated by the opposing counsel so often and with such disdain that they can be made to appear to be mean-spirited and oppressive. If I want to be good at my job, I am obligated to make sure that both sides have a sounding board that helps them understand how the case might appear before people who don't know them personally.

I can't be trusted to give an evaluation of the case until the parties come to trust me as a person and as an experienced lawyer. My early conversations with the parties have to be about showing that I am willing to listen to their side of the case and that I am worthy of their trust to give a fair evaluation of the case with unbiased eyes. It is only upon that foundation that I can begin to offer a helpful evaluation.

Time is the enemy in an emotional case. Time doesn't do anything but help the bitterness build within the parties. A person who claims a workplace injustice is certainly put at some distance from the supervisor and employer by the act of making the claim. They are probably shunned by their coworkers, who don't want to be associated with someone who is held in low esteem by the employer. This is why I fervently advocate the earliest possible mediation for employment cases.

Some years ago, a statistical study revealed that average potential litigation cost savings from use of early mediation in DuPont's employment litigation matters was $61,000 per case. Even when mediation does not immediately produce a settlement, it can give parties a better understanding of the case and the confidence to simplify the path toward trial, paring legal theories or damages claims. Another obvious benefit is that when parties retain control of the outcome through mediation, business relationships are more likely to be preserved or even improved. It is not uncommon for the fees and costs incurred during litigation to make settlement more difficult to resolve down the road.

Early resolution can also help parties avoid the hardening of positions that often occurs when litigating highly emotional matters such as employment litigation. It can also avoid public embarrassment or the discomfort that may come with litigation or other public proceedings. This is a benefit that appeals to both sides of the table.

I have mediated precious few employment cases where the employer could be persuaded to allow the plaintiff to come back to work. In a recent article in the American Bar Association magazine, an experienced plaintiffs' lawyer said that coming back to work with some compensation for the affront they have suffered is really all most of her clients really wanted. That is exceptionally hard to achieve after a year and half of litigation, with its intrusive discovery and hard-nosed depositions.

Even if the employer has no interest in taking the employee back, an early mediation with an experienced mediator can let the parties part in peace, with a well-defined agreement that includes matters of concern to both parties, such as good references and retention of certain benefits for the employee and nondisclosure and trade secret security for the employer.

To reduce the emotion of an employment dispute mediation, the time to mediate is as early as possible. There is no reason to complain about the lack of information in the case. Recognizing the audience for this publication, from the employer's side you already know the employee's work history, you have their employment file, and the witnesses are simply an intercom call away. Very limited discovery overseen by your mediator can get you any other information you truly need and in a very short time.

Don't waste any time. Employment dispute mediation should be suggested even before an answer is filed. With the talents of a good mediator, you will save time, you will save money, you will save anxiety, and both parties have the chance to maintain their reputations.

DTCWV SUMMER SOCIAL

Invite Your Summer Clerks and Show Up!

Charleston Member and Summer Clerk Social

Thursday, June 7, 2018
5:00 - 7:00 pm

Black Sheep Burrito & Brews
702 Quarrier Street
Charleston, WV

Morgantown Member and Summer Clerk Social

Thursday, June 14, 2018
5:30 - 7:30 pm

Hotel Morgan
125 High Street
Morgantown, WV