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Managing Your Mediation Costs – Time and Money

By: Diane McGaha, Attorney Director &
Michele Sales, WAMS Panel Member

Many of the cases being mediated these days are referred into mediation as part of a court-ordered ADR scheduling requirement. While mediation by its very nature should be a “voluntary” process for the participants, there is little about court-mandated mediation that is voluntary, especially when it comes to the time and cost to attend. While most cases referred into mediation are resolved in a satisfactory way, too many disputes are being mediated with disappointing results for everyone. Determining whether a case is appropriate for mediation and how best to minimize the cost is the focus of this article.

First, don't be forced into mediation by a case scheduling order if the circumstances don't justify the expenditure of time and money. In situations where you or your opposing counsel will honestly admit that one of you is simply “checking the box”, schedule a judicial settlement conference or request a waiver of the ADR requirement. These situations might include that: 1) the claims adjuster has already offered the company's “bottom line” and says there is no more; 2) your client has a principle to uphold and, despite your best efforts, will not agree to compromise; 3) one party's view of liability is unrealistic and counsel recognizes and admits that it will not change.

Second, if mediation seems a viable option, consider whether the case warrants a half-day session or even

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less time. Some mediators require full-day commitments while others accept appointments on an hourly or half-day basis. The hourly rate charged by a mediator does not necessarily correlate with her skills or experience, as some mediators choose to bill at lower rates than others for any number of reasons. Ask about discounted rates for claims below \$100K or for cases involving non-profits or pro bono representation. Consider whether your case might get resolved with a mediator spending a couple of hours on the phone or in an office near you, instead of scheduling a full-day session in downtown Seattle.

The time commitment for mediation should not be underestimated, however. You can predispose mediation to failure by not allowing enough time for the process to work. If you have three claimants, each with a sizable claim and two insurance companies disputing liability, there may be insufficient time if the mediation is scheduled for four hours in a morning time slot. If the claimant has an especially emotional story to tell, as often happens in an employment or medical malpractice case, consider scheduling the mediation for a full day. The failure to schedule adequate time is a major reason why disputes are not resolved at mediation. Mediator follow-up and subsequent sessions only increase the time and expense of reaching a settlement.

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Mediator Focus: Monte Bersante

“A Man with Serious Rhythm”

By: Penny Gans, former WAMS Staffer

“No matter what you’re doing, always try to improve by being creative and bringing a different perspective to bear.”

This philosophy has defined Monte Bersante since his early days as a studio drummer and performer in several Seattle indie bands, including “Killee Candy”, through his medical training, legal career, community service as Board President of Tacoma’s Broadway Center for the Performing Arts, and as a new addition to the WAMS neutral panel.

Monte grew up in Spokane and was playing drums professionally by the age of 14. He was mentored by older musicians and has always enjoyed interacting with musicians of all ages. Monte still does studio work with indie bands in Seattle, using his two, complete 7-piece drum sets and extensive collection of cymbals and favorite snare drums (some more than 30 years old). When Monte’s parents finally convinced him to “get a real job”, he trained as a cardio pulmonary technician and worked on open heart and cath lab teams at Swedish and Harborview Hospitals. While working full time, he enrolled at Seattle U and earned his BA degree in History, then completed his JD at the University of Puget Sound. After interning with the Washington Attorney General’s Antitrust Division, Monte joined Davies Pearson in Tacoma, where he has been a partner since 1993. At Davies Pearson, he was part of the firm’s evolution from insurance defense to broader representation of personal injury, estate planning, employment, workmen’s compensation and business clients. Monte’s medical background has made him a “go-to” person for medical malpractice and serious injury claims in Pierce County.

When Monte joined Davies Pearson, WAMS mediator Larry Levy was the partner who introduced Monte to

mediation, then in its infancy. Representing clients in mediation increased Monte’s appreciation of the process of bringing multiple parties together to work through the challenging emotional dynamics. Monte credits his wife, Syd (President of St. Joseph Medical Center), for helping him learn to deal collaboratively with different personalities. As a plaintiff’s lawyer, Monte’s ability to work effectively and creatively with defense attorneys, adjusters and subrogated interests gave him confidence that he could succeed as a mediator.

Monte stresses the importance of creativity and patience in developing strategies for mediating different cases. Monte believes that the mediation process encourages participants to feel that what they say can impact their case. “This is your case”, he tells them. “Talk about what is important to you.” He frequently calls attorneys ahead of a mediation to learn about underlying issues that may not be apparent in their briefing. For instance, has the plaintiff been influenced by a friend or “sidewalk lawyer” who bragged about a huge settlement received (or heard about) for a similar case? Does a relative’s experience or opinion have a real bearing on this specific matter? Monte emphasizes how important it is for lawyers to evaluate their cases appropriately, prepare their clients for the sort of negotiation that happens in mediation and think creatively about settlement.

Monte’s creativity extends to the kitchen, as weekends are his time to prepare family meals. One of his favorite resources is *The Flavor Thesaurus*, a cookbook where a cook can choose one ingredient and find dozens of possible pairings with others. His enjoyment of good food is made possible by his daily weightlifting workouts, a legacy of a 2011 lifestyle change that enabled him to lose 85 pounds.

For Monte, one of the pleasures of being a mediator is working with and learning from the many excellent lawyers in the Puget Sound area. Monte’s wide-ranging interests and depth of experience have given him the knowledge and interpersonal skills that are essential in mediation. WAMS is delighted to welcome him to its panel.

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Third, when scheduling mediation, don't forget to consider the impact of pending motions for summary judgment, CR 35 exams, depositions or other important discovery activities. Scheduling a mediation to occur while a summary judgment motion is pending may be the best time to mediate a case since both sides still have risk. But the outcome of a summary judgment motion or medical exam could significantly impact the ability to settle the case, so leave enough time between that date and the mediation date to allow you to cancel the mediation without incurring a cancellation fee. Clients do not appreciate being charged for mediation services they don't receive, especially when the cancellation fee could have been avoided by counsel with better planning.

Fourth, alert everyone who might play a part in the settlement, such as lien holders (including Medicare and prior attorneys), to make sure they're available throughout the mediation. Don't schedule a mediation to start in the afternoon if the adjuster is on the East Coast. Make sure your client's flight home isn't booked for late afternoon, which could require her to head to the airport just as negotiations enter a critical stage. Determine whether a parent or spouse or CEO must be consulted if negotiations are not where you had hoped. If the right parties are not accessible when you need them, your mediation time and money will not be spent efficiently.

Fifth, remember that most mediators charge for their time to review voluminous materials submitted by counsel. Although WAMS mediators include "reasonable" review time in their flat rate structure, there is a limit to what will be reviewed without an hourly surcharge. Bring those deposition transcripts, photographs and medical records to the mediation for access if needed, but don't send them to the mediator unless you are willing to pay her review time. Email a case summary to the mediator (highlighting key discovery, if helpful) and take supporting records to the mediation. (On a side note, avoid using multiple formats to deliver information to the mediator: messenger, fax, mail or email – just not all four methods!)

Sixth, come ready to make the most of mediation. Prepare your client about what to expect so you can utilize the mediator's skills and experience productively. The day of mediation is not the best time to start educating your client about claim value, liability or other problems in her case. Clients should arrive for the mediation prepared to listen with an open mind to consider various aspects and risks of their case. Think of a scheduled mediation as a "today only opportunity" for you and your client to work with a mediator – not an indefinite, open-ended process that can drag on for months. When a mediation effort extends beyond the scheduled time, it will generally produce a higher mediation expense than what was originally quoted if the mediator bills for her excess time.

Finally, respect the mediator, the parties involved and the process. If you agree to participate in mediation, prepare appropriately and come to negotiate. The mediator expects to ask tough questions and work with you in the hope of crafting a settlement, but can only do so if you've spent the time to prepare yourself and your clients to use the process efficiently. Leave the posturing behind and you're much more likely to settle the case and save your clients some time and money in the process.

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intended to provide high-caliber mediation services in a two or three-hour format, at a rate that makes economic sense for disputes with demands below \$100k.

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...WAMS Buzzz

WAMS is pleased to announce that Melissa Fuller has joined the staff as House Counsel, taking on responsibility for a range of policy, business and legal issues. She brings years of law practice experience in insurance defense, employment and construction defect litigation, but is also a certified mediator and class action program administrator.

WAMS said goodbye to Senior Case Administrator Penny Gans this summer, as she retired after 9 years to pursue her passions for hiking and travel.



Margo Keller

"I want to thank WAMS and specifically Margo Keller for assisting in the recent mediation. She was at all times professional and considerate. Bottom line is she did a great job, got the matter settled and all parties leaving with a resolution which was in their best interests. Thank you."

~WAMS Client



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