Bloomberg BNA

ABA/BNA
Lawyers' Manual on Professional Conduct™

Mediating Legal Malpractice? Come Armed with Information, Panel Says

By Peter Weber

A well-balanced panel at the Fall National Legal Malpractice Conference presented the Master Class in Attorney Mal Mediations: Select Topics. Johannes Kingma moderated a panel consisting of mediator Ralph Levy, defense counsel Tami Goodlette and former defense counsel now plaintiff's counsel Michael Mihm. The result was a spirited discussion involving diverse points of view.

Kingma, a partner at Carlock Copeland in Atlanta, initially asked each presenter to discuss the pros and cons of an early mediation. Goodlette, a partner at Lewis Roca Rothgerber in Denver, said some benefits are being able to learn information and obtain documents early on, and the possibility of settlement within the retention or deductible amount. In Colorado, where Goodlette practices, a plaintiff can serve the complaint before filing. Doing so serves several purposes, including triggering coverage, involving the insurer early, on and communicating with assigned defense counsel.

Goodlette also believes early settlement discussions before the adversarial process begins can be helpful, since the enmity borne by litigation is somewhat removed early on. Goodlette's negatives are that parties sometimes lack the information and documents necessary to intelligently discuss the case before discovery is done.

Michael Mihm offered a plaintiff's perspective and agreed on the benefits of the Colorado rule that permits the serving of a complaint without filing it. Mihm, a partner at Ogborn Mihm LLP in Denver, said early settlement discussions are a good way to learn information about the case informally. Being on the plaintiff's side, Mihm wants to know if there are any bad facts or anything that destroys his case. This is valuable to learn early on since a case may cost half a million to a million dolars to try, and he and his client don't want to throw good money after bad.

Ralph Levy, a principal at mediation provider JAMS, focused initially on transaction costs, or what it cost the client to get the result. Levy thinks every lawyer should think about the point in time when he or she has enough knowledge to mediate effectively. He stressed that the economics of the case should be a huge driver in how to litigate the case. Early mediation could save hundreds of thousands in costs, which effectively adds to the client's recovery.

Mihm said he shows clients at mediation a breakdown of future costs to demonstrate that an early settlement is financially beneficial because of cost savings.

How long after mediation does settlement tend to occur, assuming there's no settlement during? Mihm stated he's seen cases settle within a couple weeks. Goodlette thinks one week is the best timeframe to settle after mediation. Levy estimated half his cases settle on the day of mediation. He's seen cases not settle at mediation where one or both sides has to do some ''homework,'' or gather information.

Opening Statements

Is it helpful to give an opening statement at mediation? Goodlette thinks it's not a good idea because attorneys are apt to open with a statement that contains argument and is inflammatory, ultimately having a negative effect from the outset. That's a good way to close down mediation at the outset, as opposed to delivering a calm presentation, she said.

On the other hand, she thinks an opening statement may be helpful for a client or insurer if the statement addresses evidence and facts and the attorney does less arguing. Advantages include seeing opposing counsel in action and seeing the other side's reaction or demeanor. Generally speaking, whether in opening statement or during the mediation, introducing new infor-

Peter Weber handles all aspects of civil litigation, with a particular emphasis in the area of professional liability defense. Mr. Weber's clients range from lawyers, directors and officers, insurance brokers, architects and design professionals to small businesses. In addition to representing professionals, Mr. Weber maintains an active practice in intellectual property matters and personal injury defense. Mr. Weber has participated in jury and bench trials and has appeared before various courts of appeal.

Additionally, Mr. Weber has been selected as a Northern California Super Lawyer every year since 2013.

 ISSN 0740-4050

mation, new facts or a new documents is a bad idea and not effective. Too much time would be spent at mediation assessing the impact, if any, of the new information. If the information is provided prior to the mediation, everyone has a chance to assess it properly.

Mihm agreed that opening statements should be about the facts, especially for an early mediation where both parties may not be familiar with all of the facts, good and bad. Levy said an opening statement may be useful in cases where a party feels a decision maker is not fully informed of the facts.

Mediation Privilege

The panel discussed mediation privilege in two jurisdictions, California and Georgia. The California Supreme Court in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), generally held that communications between a lawyer and a client in the course of mediation, writings prepared for mediation, and a mediator's account of a proceeding are confidential and absolutely inadmissible in a legal malpractice case.

Conversely, in Georgia, a mediator *can* testify as to the parties' competence in a mediation. Finally, the Uniform Mediation Act, not adopted by many states, protects a mediator but not an attorney from actions taken during a mediation. Goodlette observed that *Cassel*—which other jurisdictions may follow—raises the question whether an attorney is obligated to advise his/her client that he/she cannot be sued for malpractice arising out of conduct during a mediation.

Levy next talked about mediation statements. As a mediator, he likes to see several topics addressed in mediation statements, including:

1. historic settlement discussions;
2. counsel's takes on impediments to settlement;
3. needs and interests of the clients;
4. counsel's impressions of the adversaries approach in prior mediations;
5. insurer's tendencies; and
6. a theory of the case.

Levy advocated exchanging briefs, and said briefs that merely address the merits and not these intangibles are not helpful enough.

Mihm addressed some topics from a plaintiff's perspective. He would like to know:

- if there is a self-insured retention amount and how much;
- information about the law firm dynamics and governance (i.e., who is the decision maker);
- who bears the brunt of the financial impact, if any; and
- whether any law firm member's compensation is affected.

The goal is to understand as much as possible the dynamics on the other side.

Levy offered a piece of advice on mediation negotiation strategy. As a mediator, he does not want to know either party's ''bottom line'' as it might adversely affect his tactics. While some parties have a tendency to discuss their bottom line, he does not think it is helpful at the outset as it could interfere with the flow of the mediation and the necessary back-and-forth.

Final Thoughts

Mihm's takeaway was that you should respect your opponent, talk early, and make sure you provide any missing information. Similarly, Goodlette said it's important to share information before the mediation in order to educate and persuade.

Levy said insurance defense counsel should find out when the insurer last set a reserve for the matter and when this was reported in its financial statements. He thinks such information is valuable to understand the economics and the insurer's settlement authority. He cautioned against not being prepared in this regard prior to the mediation, as he does not like to embarrass defense counsel. He agreed with counsel that complete information is invaluable going into a mediation. Levy is a fan of decision trees, which help make sure the sides are fully informed before mediating.

MOPC ISSN 0740-4050