



Using a focus group when your case gets locked up

Listen and learn from the mock jury panel's deliberation

This article is for you if:

- Your client has catastrophic injuries resulting from a product defect or negligent act;
- Liability and causation are heavily in dispute;
- You have gone through a failed mediation where the demand is substantial and the offer modest;
- All sides express a willingness to settle before case costs become too extreme, but agree that another conventional mediation session would be a waste of time.



Krivis

BY JEFFREY KRIVIS

Cases get locked up and become difficult to settle for many reasons. Often the defendants cannot agree on a fair apportionment between each other, or the liability in the case is considered wafer thin. The parties are stuck like a hamster on a running wheel, unable to move forward but exerting plenty of energy in the process. One approach that has worked is a focus group or panel mediation. Here's how it works:

The mediator convenes a full day process in which the trial lawyers present abbreviated versions of their case to a small panel of average people who look a lot like a representative jury. The presentations would include short opening statements, perhaps some testimony from key witnesses or at minimum summaries of what the witnesses would say, key documents and final arguments.

The panel then deliberates in a room where the trial lawyers and mediator will be able to view their discussions. The mediator then conducts a facilitated discussion with the panel members concerning their impressions of the strengths and weaknesses of the case, as well as their biases toward the parties and evidence. The trial lawyers will generally observe this part of the process along with their decision makers. The mediator then proceeds to conduct a traditional caucus-based mediation based on the feedback of the jurors.

The value in this approach is that the parties no longer have to speculate as to the unpredictability of the jury. They get to hear and see in real time what the impressions are of people with similar characteristics as the jurors in their venue hearing the facts for

the first time. This helps the parties understand how jurors might filter information about their case and come up with outcomes based on the information presented. The mediator, sometimes with the assistance of a trial consultant, will help the parties understand how the juror responses might impact the actual trial. This reality check allows the mediator to maintain a sense of impartiality because the evaluation of the case has come from third parties with no skin in the game.

The beauty in this process is that the parties can design flexibility into the presentations. For example, if corporate decision makers, such as high level claims personnel, are having trouble with an apportionment of liability issue, the parties can segregate a specific amount of time to address that issue in a principled and businesslike format. The corporate decision makers will then benefit directly from instant feedback. If the feedback causes the decision makers to shift positions but for some reason they don't have appropriate authority to do so, the mediator can organize the case in such a way to allow the decision makers to regroup at a later day after they have run the new information up the flagpole. Alternatively, the mediator can make specific apportionment recommendations after further discussions with the parties along with a specific time frame in which final decisions on settlement are reached.

Also, if parties are concerned about revealing trial strategies to the other side, the process can be designed in such a way as to allow the parties to present case information outside the presence of the other party. In other words, the mediator can help design a process that is so nimble it removes the usual internal constraints that prevent decision makers from pulling the trigger on a deal.

The most optimum use of this approach is for the mediator to initiate final negotiated resolution immediately after the parties have reviewed the panel deliberations. Obviously the information is fresh in everyone's minds and the key issues in dispute can be hit head-on by the mediator.

While there are many other ways to handle these type of intractable cases, the focus group or panel mediation allows the parties one way to avoid the heavy cost and risk associated with a trial while giving the parties their proverbial day in court.

Jeffrey Krivis has mediated complex dispute issues in Northern and Southern California for 20 years. He teaches at Pepperdine Law School/Straus Institute for Dispute Resolution and has been named one of the Top Neutrals in the state by the Daily Journal. Visit his Web site: www.firstmediation.com