

Negligence Law Section

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“You Say You Want a Resolution?”

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Less than 2% of civil lawsuits in Michigan proceed to trial, according to a recent study that I just made up but is probably not too far off. And since the days of settling cases over a beer and a handshake don't appear to be coming back, all those cases that don't go the distance to trial have to be resolved somehow.

Enter: alternative dispute resolution. Specifically, case evaluation and facilitation. These events often represent the first chance for the parties to begin making real headway toward settlement. And while there's no shortage of successful approaches and strategies for having meaningful alternative dispute resolution, below are some tips that may help you cross that resolution finish line.

- Special panels for special cases

For many cases, attending case evaluation with a panel selected by the ADR clerk makes practical and logistical sense. But not all cases are right for this format. MCR 2.404(C)(3) allows parties to stipulate to the appointment of a panel of evaluators that the parties have chosen.

Your case may involve uncommon legal issues. Or it may be pending in a jurisdiction where there aren't many attorneys who practice the area of law controlling your case. Appointing a special panel of evaluators who are well-versed in a specific area of law ensures that the legal issues of your case are properly considered and understood before an award is rendered.

- Facilitation is your friend

Not all cases are well suited for case evaluation. There are a number of reasons why you may be better served submitting your case to facilitation in advance (or in lieu) of case evaluation. Whether it's the number of parties involved, the number of claims asserted, complicated legal issues, or any number of other factors, facilitation offers many advantages over case evaluation.

For one, facilitators are able to focus on your case and spend more time reviewing the summaries and exhibits. They're also able to address numerous claims made by multiple parties. Legal

issues such as liability, indemnity, etc., that bear on parties' responsibilities for damages are often better served being addressed by a knowledgeable facilitator.

Facilitation before case evaluation also allows the parties to approach the settlement table with clean slates. An unreasonable case evaluation award is difficult to undo and can impede meaningful settlement negotiations. Attending facilitation before any figures have been awarded provides a great opportunity for parties to approach settlement negotiations with open minds.

- Grab the panel's attention

In many venues, case evaluation hearings are scheduled all day. This means evaluators may be tasked with reading anywhere from 30 – 50 summaries to prepare for a full day of hearings.

Your summary may be one of the last in their tall stack of reading. So make the most of your introductory section to not only let the evaluators know exactly what your case is about, but also to distinguish your case from the rest. Add in unique facts or issues that aren't common to the other cases the panel will be sorting through.

It's not always easy to make your case "pop" and you certainly don't create the facts. But when there's something that distinguishes your case from others, the panel is more likely to recall your case when the time comes for your hearing. And like any reading material, the more interesting you can make your summary, the more likely the reader is going to retain the information.

Bonus tip: photographs, diagrams, charts, and excerpts from records/transcripts in the body of your summary can be particularly persuasive (just don't make the mistake of using too many and turning your summary into a scrapbook).

- Have a method to your madness

There's no SCAO-approved form or hard and fast rules about how your summary has to be laid out. You have an opportunity to tell your story and present your case in the manner of your choosing. Much like the rest of your practice, figure out what works best for you and your client and fine tune that approach with each summary you write.

That may mean making separate sections addressing each of the claims at issue. Or it might mean taking a chronological approach and walking the panel through the timeline of the events giving rise to the case. Whatever your approach, keep working at your craft to make your summaries clear, concise, and informative.

- Giving ground isn't giving up

In motion practice, we must acknowledge case law that's adverse to our position. It's then our job as lawyers to distinguish that case law from the facts of our case and advocate for why our client should still prevail.

Apply this duty to your case evaluation summary. Ignoring facts that are damaging to your case won't make them go away (and you can be sure your opposing counsel will be talking about them). So acknowledge adverse facts, evidence, or issues and then advocate why your client should still prevail in spite of them.

Not only will this gain you credibility as to the other arguments you have to make, but it will force you to see the case from another perspective and acknowledge the weak areas of your case.

- Just the facts, please

Participate in enough case evaluations and you'll come across the argumentative, inflammatory summary that accuses your client of everything short of committing treason. Attacking other parties and their claims doesn't strengthen your position or put your client in a better light.

Case evaluation isn't the time for your opening statement about the grave injustice the opposing party has committed. That doesn't mean you shouldn't infuse some passion into your summary where it's warranted. But make sure your summary focuses on the facts and issues that the panel is being asked to evaluate.

- Be heard at the hearing

Depending on the venue you're in and the number of other cases being evaluated the day of your hearing, you may only get 5 – 10 minutes to present your arguments. The temptation at hearings is often to simply regurgitate what your summary sets forth.

But assuming the panel has read your summary, merely parroting its contents back to them is a lost opportunity. Take the facts and evidence laid out in your summary and explain to the panel why they're impactful. This is also a great opportunity to sharpen your oral advocacy skills, so take advantage of it by going beyond the written words of your summary.

And while you're waiting for your turn to present, pay attention to the panelists' reactions to what the other attorneys are saying. You can often see which arguments the panel is interested in and which facts they find important. When it's your turn, be sure to touch on aspects of the case that seemed to resonate with the panel.

- Respond but don't dwell

Another temptation at hearings is to spend the limited time you have rebutting and attacking the statements other parties made during their presentation. You need to address conflicting evidence or statements that you don't believe are supported by the facts and evidence of the case.

But if your time to present runs out and you've done nothing but respond to another attorney's statements, you really haven't "advanced the ball" for your position. Briefly address the other party's arguments and statements, and then move on to the arguments that support your client's position.

- In conclusion...

Like everything we do in this profession, better results come with more experience. The more case evaluation hearings and facilitations you attend, the more you will find the style that works best for you.

Keep an open mind to alternative strategies and take note of other attorneys' effective tactics. Take note of approaches that worked well for you as well as those that didn't. And remember, as exciting as trials can be, sometimes the best case is a settled case.

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