



The Role That Steals the Show

By B. Rose Miller and John Horn

“Through the centuries, men of law have been persistently concerned with the resolution of disputes... in ways that enable society to achieve its goals with a minimum of force and maximum of reason.”

Archibald Cox

“The mediation by the serpent was necessary. Evil can seduce man, but cannot become man.”

Franz Kafka

Choosing a Mediator within Pre-suit ADR Constraints

The time has come to give credit where credit is due. This article salutes the role of the mediator, who is vital to the success of any pre-suit, alternative dispute-resolution (ADR) program. Pre-suit ADR has vaulted

onto the landscape in recent years as an increasingly important tool to control legal costs for in-house law departments, third-party administrators, insurers, and even outside defense counsel.

Previously, we presented the nuts and bolts of The Home Depot’s pre-suit ADR program, piloted in 2007, which the company rolled out in 2008 nationwide. “The Home Depot Hammers Down Lawsuits Using Pre-Suit ADR,” DRI Annual Meeting, October 2008. At that time we discussed the logistics of setting up the program, from finding sponsors within the company to choosing the right partners outside the organization to make it work. Our predictions about the success of the program were in fact realized. It achieved a settlement rate for pre-suit ADR claims exceeding 70 percent, contributed to a 30 percent reduction in new general liability lawsuits filed against the company in 2008, and helped it achieve savings in litigation costs and

expenses in the millions of dollars. At the time of this writing, The Home Depot continues to refine its pre-suit ADR model to further improve efficiencies in light of this challenging economy.

The Home Depot’s model relied primarily on in-house resources, but some retailers now are trying pre-suit ADR models that utilize outside counsel in lieu of or to supplement internal resources. This may become even more pronounced with the development of retainer agreements designed to provide a level of predictability and control over expenses. However, shuffling the players and tweaking the processes does not change a mediator’s fundamental role in ensuring successful results through pre-suit ADR. If early settlement is your objective, experienced litigators on both sides of the aisle will tell you that choosing the right neutral is one of the most important aspects of getting there. Even recalcitrant opponents have been lured



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into a negotiation session by the prospect of spending a few productive hours working with a talented mediator.

But what do you do when the mediator sought by everyone in town is not available? Or what do you do if the “ADR star” is available, but her or his budget-blowing hourly rate is problematic? Whether you are a participant in a pre-suit ADR pro-

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gram or just looking to settle a given case, this article will offer some strategies for choosing an effective mediator within the constraints of a pre-suit ADR program. We queried some of the best mediators that we have come across who participated in The Home Depot’s pre-suit ADR program during the past two years about why and how it works. Many of these mediators have handled pre-suit ADR matters for a wide array of other clients. Their collective insight highlights some of the unique challenges and opportunities this form of ADR practice can present.

Common Constraints

In a perfect world, we would be able to utilize our preferred mediator, regardless of price, location, or availability. Unfortunately, that world rarely exists, and instead, we are forced to operate within a particular set of circumstances. The myriad of constraints we faced in selecting mediators for The Home Depot were not necessarily unique to this program. Some of the constraints we faced included:

- *Cost:* The Home Depot chose to subsidize costs of the program to entice greater participation, so rates were an important factor. In most cases, we had to negotiate a reduced rate with a mediator beforehand to keep costs within the guidelines of the program.

- *Locale:* Invitations to the program were grouped geographically. Accordingly, we needed to retain local mediators for each location. Many times, securing access to facilities also became a component of this process.
- *Availability:* Under the program, the dates and locations were chosen well before the mediator. Naturally, the mediator had to reserve time based on projected claims that we might have to schedule for the program.
- *Style:* To maximize the effectiveness of the program, multiple mediations were scheduled for a given day. This led to a series of stylistic requirements on the part of the neutral, such as the ability to work quickly, multitask, and digest most, if not all, of the subject matter for the first time on the day of each session.
- *Conflicts:* Just as a good mediator may help persuade parties to participate, choosing the wrong mediator can have the opposite effect. Even though mediation is a purely consensual process, we had to be very careful in choosing mediators who did not appear partial.

Choosing the Mediator

All of the mediators utilized under The Home Depot’s program were retained subject to the constraints listed above. Through no small effort, we developed a talented and effective panel. Some mediators may have compromised their rates a bit to fit into our structure, but most related that they gained significant exposure to plaintiffs’ attorneys, defense lawyers, and industry business clients alike by virtue of their growing reputations and that of the program. This, in turn, helped them to expand their practice. As you will see, their stories highlight some of the characteristics we thought were important when we selected them for their roles.

You Choose

Under The Home Depot’s program, the claimants’ counsel usually did not have the opportunity to choose the mediator. The rationale was that they benefited from the company’s agreement to subsidize, as well as its ability to negotiate, competitive rates, due to the nationwide scope of the program. The reality was that if we had let the claimants’ counsel participate in every media-

tor selection, we would never have added a case to the calendar, so this was part of the deal. Although a handful of claimants were put off and chose not to participate, we were able to schedule far more claims than would have been otherwise possible by establishing this term, due to its efficiency. As a compromise, when a claimant’s counsel did insist on a given mediator, we sometimes agreed but required a different fee structure, and the mediator was approved by The Home Depot only after a complete vetting.

Take away: Take the upper hand in the mediator-selection process to the fullest extent possible.

Go Local

Few professions are more influenced by local custom and culture than the practice of law. From state to state, and even city to city, lawyers act differently and have a different approach to settlement. Approaches to case valuation are especially regional. For these reasons, it is always to your advantage to retain a local mediator. In the first place, plaintiffs’ counsel are always wary of settlement overtures by defendants, especially when it becomes part of a “program.” More importantly, having access to local knowledge and the ability to communicate in the language of the local culture is invaluable to the defense.

For instance, we had a particularly difficult claim in Georgia in which the parties had become entrenched in their opposing positions—the claimant and her counsel had completely “dug in.” As The Home Depot’s headquarters is in Atlanta, our inclination was to use a previously tested mediator from the metropolitan area who would make a two-hour trip for the case, but the claimant refused to participate under those terms. Once we contracted with a local mediator, however, the claimant agreed to come to the table. The neutral was an older gentleman, and despite his differing ethnicity from the claimant’s, he was a long-time resident of the community where the case would be tried, which resonated with the claimant. When the negotiation reached an impasse, he pulled the claimant’s counsel aside and was able to move counsel and claimant to settle due to his deep insight into the proclivities of juries and the court in that jurisdiction.

Take away: A local mediator helps even the playing field for non-local defendants.

Know the Client

Doug Beattie, a top mediator in Tampa, Florida, and surrounding areas related this story:

As an experienced mediator, I always am sensitive to the dynamics of what makes a plaintiff compromise and settle his or her personal injury case. So often, they look for a tangible concession, many times something in addition to money, from the defendant. They also talk of 'principle' and most seem intent on getting the last word because, after all, they have been injured as the result of the defendant's negligence." In other words, how the offers from the defendant are packaged and what, if any, final gestures of compromise are offered by the defendant play a very important role in whether a case settles.

In many of The Home Depot mediations I have conducted, the dynamic of 'product loyalty' has played a very important part in getting the cases settled. These people love their Home Depot store, continued to shop there after the incident in question, and clearly do not have the same attitude towards The Home Depot that I see in plaintiffs against other large, corporate defendants. It has seemed to me, as the independent having access to them in private caucus, that these individuals came into the mediation process already looking for a win-win resolution. Yes, they had expectations as to what their injuries might be worth and they wanted 'fair' compensation, but they also wanted to be reasonable in their dealings with The Home Depot, because they liked the company and wanted to continue their relationship with it. Of special note is the extremely favorable reaction I got from these individuals when, to bridge a final gap in the negotiations, The Home Depot offered gift cards in lieu of additional cash. It seemed they saw this as the additional concession they were looking for and were excited that the store they continued to patronize was signaling that their continued business was desired. Every conference that I have mediated in which The Home Depot has offered gift cards has settled.

I have become aware, through my years as a mediator, of the importance of the 'package' and how a party's settlement position is communicated to effectuate negotiations. Mediation is about more than just money or making the claim go away; it can also be a business-development tool. A consumer that walks away with a gift card as a result of a settlement has not only agreed to drop the dispute, but also has agreed to do business with you again in the future.

Take away: The mediator is your "face" to the other side and is responsible for carrying your message. It is important to choose a mediator who can help you to effectively package, then sell your offer.

Know the Claimant

Retired district court judge Michael Alonge of New York mediates frequently on Long Island and Manhattan. He talked of a particular case that required him to connect with the claimants:

One of my more memorable Home Depot mediations involved an entire first-generation Greek family from Brooklyn. The father, who said he was injured when some lumber fell on him, was there with his two sons, daughter, and three grandchildren. He was in his 70s, a widower, and was obviously and sincerely loved by his protective family.

His lawyer did a good job of presenting the case, and after the usual outrageous and unrealistic demands from the plaintiff, The Home Depot patiently presented the realistic value of the alleged injuries, given the comparative negligence of the father.

The family, however, was adamant. Their lawyer was put in the uncomfortable position of trying to persuade his client and the rest of the family that, just perhaps, it made more sense for all concerned to settle at a fair figure rather than go through several years of costly litigation.

Finally, after a bit more than two hours of back and forth, demand and offer, doors slammed and banging fists, the case was at an impasse. The daughter, a school teacher, made an emotional plea, explaining how this injury had changed Papa, especially after the recent death of her mother.

The eldest son, a big, burly bear of a man who owned his own construction company, followed with an outraged, table-pounding denunciation of The Home Depot for not offering enough compensation to his father, "Papa has worked hard all his life to provide for us," he said angrily. "He deserves to be paid for his injuries."

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At this point, I asked that both The Home Depot's representative and the family's lawyer leave the room with me. In the hallway, it was made clear that this was the final offer. The lawyer shrugged helplessly. "They're not going to take it," he said.

I asked if he would let me talk to the family. He readily agreed and the lawyers stayed outside.

I went back to the conference room, presented the offer and received a stony-faced response. I turned to Papa and in my best Brooklyn inflection said, "You know, if you were my uncle I would tell you to take the offer. It is fair, and I would really like you to leave here today with money rather than wait years hoping for something better. Who knows what the future may bring?"

The old man nodded. Turning to the son, I said, "And if you were my cousin, I would tell you to tell your father to settle the case today. It is really in his interests. It may not be everything that you want, but Home Depot is even offering a gift card in addition to the money. It is a reasonable settlement, and I know you are a reasonable man."

There was a brief pause and then the son asked Papa what he wanted to do.



Papa said, "OK, I will take it." The other family members nodded in agreement.

A few minutes later, while the papers were being prepared, the son came to me and asked for my card. "I don't want to give it to you," I said.

Surprised, he asked "Why?"

"Because I don't want you to know where I live," I said.

Even if lawsuit filing

is inevitable, a mediator can help you to reach agreements to accomplish discreet amounts of formal discovery on an accelerated timetable.

We both smiled, then laughed and shook hands."

Take away: Choose a mediator with the ability and inclination to reach out to the claimants on their own level.

Know the Drivers behind the Negotiations Process

Tom Craig, an experienced mediator in Los Angeles, told this story about how his understanding of what really goes on behind the scenes can influence settlement negotiations to help resolve a claim:

Maybe one of my favorite Home Depot mediation stories involves a slip and fall case involving an elderly woman who would have been loved by a local jury. Liability was a question, but if a jury bought all the allegations and injuries, a verdict could have hit six figures. Her counsel told me after a couple rounds of negotiations his bottom line for settlement was a certain figure. Knowing that was not going to happen and that the defendant was at about half that figure, max, I shot both parties a mediator's proposal at just above that same number. The claimant's counsel left the room, going to another vacant room. I

was in the hall awaiting their response already having received the defendant's in the affirmative. One of the claimant's attorneys stepped out of the room and was speaking on his cell phone to the partner in charge saying, "yeah, we [*the lawyers*] get x. Yeah, we get x." Case settled. So much for protecting the client's interests.

A good mediator will know who is running the show in any given mediation. Mr. Craig was able to accurately discern how much the claimant's counsel had "put into" the case and how much they needed to "get out of" the case to settle. When the parties reached impasse, he was able to use that knowledge to come up with a figure that would settle the case. And, of course since the pre-suit investment in the process was significantly below what it would be after expert fees and deposition costs accrued, this number appeared palatable.

Take away: Choose a mediator savvy in negotiations strategy who understands the underlying interests and positions of ALL the participants.

Show Some Creativity

Full-time mediator David Harwi in Philadelphia offered this bit of advice:

I view my role in The Home Depot mediation program as that of a facilitator. I don't want to be or appear partial to The Home Depot. I am very candid in my opening statement about my relationship with the mediation program. I tell all involved that I am not and will not be an adjudicator. The parties and counsel always know more about the case than I do, and I have not tested the credibility of any evidence. I am there to facilitate an open and frank discussion of the matter.

However, that does not preclude me from participating in brain-storming activities with parties and counsel when all are stuck. In one instance everyone involved wanted to conclude settlement during the mediation but the extent of the claimant's injuries was unclear. Those injuries could only be assessed with a current MRI, the cost of which was approximately \$1,500. The parties were not terribly far apart but neither side wanted to move. I suggested that the parties split the cost of the MRI,

which would be performed by a doctor acceptable to both sides. The result would determine the outcome of the negotiations. Both sides thought about this at the table and came to an acceptable number for settlement without the MRI.

The flexibility and informality of the mediation process allows for creative solutions unavailable in other venues. You cannot resolve every case through straight-line, distributive bargaining. Accordingly, a mediator's creative approach not only to solutions, but also to communications, can lead to distinct increases in settlement percentages. Whereas retired judges are usually best equipped for evaluative bargaining sessions than lawyer-mediators, lawyer-mediators have a greater, but not absolute, tendency to take a more creative approach in mediation than the judges.

Take away: Retain mediators who have flexible approaches to mediation and will engage creatively in the process whenever possible.

What Other Skills Are Necessary?

The state of Florida is very active when it comes to ADR. Among other factors, the longer statute of limitations—four years for personal injuries—senior status of many claimants, and crowded, slow-moving court dockets have encouraged members of both the plaintiffs' and defense bar to resolve disputes early when possible. This is not always easy when the parties don't speak the same language. The Miami area is ethnically diverse, with a particularly high percentage of Hispanic claimants. Some claimants do not speak English and their attorneys speak little or no Spanish, making meaningful negotiations through traditional adjusting methods difficult, at best. It is hard to evaluate a claim when even the attorney-advocate for a claimant does not have a grasp of the relevant facts.

Markel Arrizabalaga of K & A Mediation in Miami is a talented mediator. Mr. Arrizabalaga is of Spanish-Basque descent, speaks fluent English and Spanish, and utilizes his skills not only to help everyone involved in pre-suit negotiations understand the facts, sometimes for the first time, but to also secure the trust of often wary claimants in the mediation process. On one notable occasion, an elderly claim-

ant, her husband, and niece appeared at K & A's offices with their attorney. The claimants appeared ill at ease until Mr. Arrizabalaga began his opening in Spanish. You could hear a pin drop as all eyes focused on him, the family resting on every word. Smiles and nods abounded and the claimant began to speak excitedly in rapid Spanish, describing the occurrence, as Mr. Arrizabalaga interpreted for the advocates the relevant events from the claimant's perspective. It was not long before misconceptions about the facts were clarified. The claimant, feeling as if she had her day in court, left satisfied with a settlement that included a gift card to her "favorite store," embracing Mr. Arrizabalaga as she exited.

Take away: *Do not overlook the importance of specific skills, particularly skills that enhance communication, or knowledge to successful negotiations.*

Know When to Hold 'Em and When to Fold 'Em

Critics of pre-suit ADR say that you can't resolve disputes without formal discovery because too much is unknown about the claim. "If you settle under these circumstances you will over pay," is something that we hear a lot. Well, maybe, or maybe not.

Atlanta-based mediator Michael Fisher, who has mediated several claims for The Home Depot, opined: "A key and often overlooked benefit of pre-suit ADR is in taking a claim that is at a dead-end in traditional, over-the-phone negotiations and putting it in an environment where the parties can meet and clarify the key disputed facts." He recalled a pre-suit ADR session for The Home Depot in which a claimant surprised everyone at the mediation with the revelation that she had taken pictures with a cell phone, presumably showing the condition of the premises where the subject injury had occurred. The existence of the

photos had not previously been disclosed, although the claim had been pending for nearly two years. As Mr. Fisher recounted, "The really interesting thing was that the claimant had not even told her own attorney about the photos before ADR." The mediation was tabled with the understanding that the photographs would be provided to the defense, along with executed releases for pre-accident medical records, and a second mediation scheduled before the statute of limitations terminated.

What local juries might think of witnesses, particularly the claimant, is critical in determining case value, and a good mediator can assist both parties with this projection. For the defense, especially with retailers, employee witnesses may have been terminated or may disappear before trial. Physical evidence may also walk away. "With these kinds of risks," said Mr. Fisher, "it may be better to resolve a claim now if you meet the claimant and find their story credible, even if it has not been fully tested."

Geoffrey White of New England-based Legal Options, Inc., recounted his experience with pre-suit ADR where the parties were not able to settle the claims before suit, but still significantly advanced the matter toward a possible later resolution. "I always tell the parties involved in pre-suit mediations that one of the objectives of the process is an adequate exchange of information. Sometimes, final resolution of disputes cannot occur in this setting because critical information has not yet been provided by one of the parties or is unavailable to counsel without additional discovery. When confronted with these situations, the neutral-mediator must resist their natural tendency to try to settle the case and shift their guidance to assisting counsel in mapping out a strategy and plan for informational exchange. The skilled mediator will propose a formal suspension of the process with a specific timetable for discovery and

a second session of mediation, either before or sometimes after the lawsuit is filed."

Even if lawsuit filing is inevitable, a mediator can help you to reach agreements to accomplish discreet amounts of formal discovery on an accelerated timetable: releases for medical records can be obtained, key medical or fact witnesses identified for depositions, IMEs suggested. These steps can help companies save money on legal fees for discovery. And, when conducted under a retainer relationship, this can mean big cost savings for law firms assigned to defend these matters in suit.

Take away: *Pre-suit ADR does not have to settle the claim to make progress toward the dispute's conclusion.*

Conclusion

An old adage says, "You can't pick your family, but you can pick your friends." For defense counsel, the analogous adage is: "You can't pick your clients or your cases, but you can choose how to resolve them." Tautologically, if your cases are your "family members," then mediators are your "friends."

Despite the superficial similarities from case to case, it is the subtleties below the surface that make every case unique in some way. A mediator stands as your champion, a second in the battle on behalf of your client. Once the negotiation process begins, you must rely on the mediator to serve as your observer, communicator, and commentator. In pre-suit ADR, a mediator's ability to adapt to the unknown and take advantage of opportunities that he or she in fact can help create, may allow parties to resolve their disputes quicker than they ever expected possible through traditional negotiations. Choosing the right mediator is good for your client's business—and as an attorney-advocate navigating the new playing field of law firm economics, it may be better business for you and your law firm than you expected as well. 