

Post-Trial Mediation

Why would a plaintiff who just won a huge 7-figure verdict want to mediate post trial? After all, she won big, and even after attorney's fees, the net amount is life-changing money.

Sometimes, less really is more. Less – meaning a modest victory -- is one that a defendant is going to be more likely to accept and pay. More – the big win – is one that a defendant will fight to eliminate.

The fight comes in the form of post-trial Motions for New Trial, Motions for Remittitur, and threats of appeals. The cost to file briefs is relatively nominal compared to the judgment. Post-trial briefing prevents the defendant from having to pay the judgment and delays the day of reckoning. If a Motion for New Trial is successful, the next time around there will be a different jury. The entire win could disappear next time around.

If there are appeals, the reality is that the delay could go on for years. And, the verdict could be overturned.

Collection of a large verdict can also be an issue: The fight can come in the form of a threat of filing bankruptcy.

WHY MEDIATE THE WIN?

Because the “Win” Could Turn into a Loss.

You fought the good fight, and you won. But hanging onto that victory is a different question. You are only done if the defendant is willing to accept the judgment and pay it. If not, even though you may have waited years to get to trial, it's possible that two, three even five years later you will still be waiting. In other words, in a huge case, the “win” can be just a step in the process.

For the plaintiff's lawyer who worked the case on a contingency

basis, settlement allows that lawyer to be paid for his or her hard work. The motion for new trial and or the appeal means that any payment is further delayed, potentially for years, and may not ever come if the verdict is overturned.

Of course, the challenge to post-trial settlement discussions is that the plaintiff with the big verdict has been validated. Parties and counsel are no longer talking about what might happen – it's happened, a jury of 8 or more people believed in the plaintiff, and that is a hard thing to give up. It will likely be difficult to persuade the prevailing party that a new jury would come to a different conclusion.

The mediator can help point out the reality that a “win” at trial is based not only on how the witnesses presented, but also on how the evidence came in or was precluded, and what legal arguments were precluded, and what jury instructions were given.

Whereas pre-trial mediations discussions are focused on the facts, and whether they will likely support the claims asserted, post-trial mediation discussions are focused on the legal issues – more specifically, legal errors made in the course of the trial. This is an entirely different focus.

Consider these arguments, which were only some of those made in a recent case I mediated, asserted in a Motion for Judgment as a Matter of Law or Alternative Motion for New Trial:

- The evidence supported only one reasonable conclusion and the jury's verdict was contrary to it;
- The verdict was against the clear weight of the evidence;
- The Court committed “plain error” in failing to strike a juror;

- The Court committed “plain error” in failing to give a jury instruction;
- The damages were excessive and should be remitted;
- The damages were duplicative;
- The damages were punitive, and punitive damages were not allowed in this case;
- The plaintiff should not have been allowed to assert a “private right of action” based on one of her statutory claims;
- Counsel made unfairly prejudicial statements in closing argument.

In addition to the above, defense counsel was prepared to attack the reasonableness of plaintiff's counsel's attorney's fees and willing to take a different legal issue to the Court of Appeals as there was a recognized split of authority on that issue.

The trial lawyers have done their best. Post-trial, it is up to the judge, and the appellate lawyer, who may not be the same as the trial lawyer. It's a whole new ball game.

Certainty Brings Peace and Allows you to get Off the Roller-Coaster.

A trial is an emotionally draining and time-consuming process. It takes a while for the adrenaline from the victory to subside. Once it does, though, if that success is at serious risk of being lost, there is value in the certainty of payment and in getting paid sooner rather than later. The plaintiff and her counsel will always have the positive feelings that come from going all the way through the process and coming out with a win, even if that win is compromised in the end.



Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Arizona's Finest Lawyers in Alternative Dispute Resolution, and is the author of the book, “Mediation Success: Get It Out, Get It Over, Get Back to Business.” For more information, visit www.insightmediation.com or call Amy at (480) 248-3366.