

C'mon, Does My Claims Person Really Have to Come Live to the Mediation?

-Christopher L. Heigele

As many of you who practice in the US District Court for the Western District of Missouri know, the Early Assessment Program (EAP) was one of the first court-ordered mediation programs in the nation. The stated goals of the EAP are to get the parties together and discuss settlement early on in the process, ideally, before the expense of extensive discovery and expert depositions. The EAP Administrator also follows the progress of the case if the initial EAP mediation meeting is unsuccessful, and offers additional opportunities to foster resolution. Other Federal Districts and many state courts are now entering blanket orders requiring mediation at some stage of all lawsuits.

In theory, mandatory mediation at early stages makes sense.

In practice, we all know that for various reasons, the notice letter of the early court-ordered EAP mediation, especially prior to extensive discovery and potentially the filing of summary judgment and/or *Daubert* motions, is sometimes not always met with excitement. That goes for counsel on both sides of the case. Before discovery, the plaintiff may have a loftier opinion of the merits of the claim and the defendant may have a loftier view of its defenses.

The EAP Order also has the ever popular requirement that a person with authority to settle must appear live at the mediation.

In theory, requiring the person with the holding the purse strings – oftentimes the claims handler from an insurance company -- makes sense. It is certainly frustrating for the EAP Administrator, to have an attorney show up for the mediation without authority, and have to attempt to negotiate by phone or email. In addition, requiring the claims handler to appear live confirms the seriousness of the goals of the EAP. Arguably, decisions can be made quickly and without consideration of the facts and negotiations presented at the EAP meeting, if the claims handler is available only by phone. Mediators are more effective speaking with someone face to face rather than from a comfortable distance over a phone line.

In practice, requiring the defendant's claims handler to appear live at the EAP may not always be cost effective, especially if that person must travel. The goal of the EAP to save the parties' expense is arguably not met if defendant's claims handler must book a flight, rent a hotel room and car. Plaintiff usually does not have this expense. We all have had our insurance adjuster say 'the more money I have to spend for expenses is the less I have to spend at mediation.' This is especially true when the case itself has realistically a low value.

Technology has slowly entered into the picture. For years, Courts – state and federal – have shifted to electronic filing and telephone conferences in the pursuit of cost effectiveness. Mediators (including perhaps the EAP Administrator) have begun to allow some parties and some insurance adjusters to appear at mediation by phone or video conferencing. Free video conferencing technology such as Skype and Apple’s FaceTime are easy to use, if planned in advance.

Our firm is always trying to bring value to our clients and their insurers. This includes exploring ways to use technology when allowed (and when we learn how to use it). I was recently involved in a civil rights case filed by a pro se plaintiff in the Western District. My client, a deputy sheriff at a mid-Missouri correctional facility, was served later in the case than other defendants. Initial disclosures from plaintiff as to the claim of damages indicated the case could be resolved for a nominal amount. Then the EAP order came (gasp) requiring the live appearance of those with authority to settle. My client’s insurance adjuster was located near Indianapolis. The airfare and hotel alone would likely eclipse the value of our portion of the likely settlement. Of course, my adjuster asked if there was any possible way to appear at the EAP by phone.

Knowing the chances were slight, I contacted the EAP Administrator and explained the economics of the case. I offered the next best thing to a live appearance, video conferencing via Skype for my claims handler in Indiana. That way the need to preserve the importance of the EAP process would be met. It took some coaxing, but the Administrator agreed to allow a video conference appearance, as long as I made advance preparations to ensure the technology worked. Well before the EAP, we set up the Skype account for our adjuster and made sure it and his cameral worked. One of our trusted paralegals went to the EAP office and made sure the Court’s internet connection was sound and tested a video conference from Indiana.

The EAP was successful (“the case was resolved to the satisfaction of parties”) and my Indiana adjuster participated via Skype without a hitch.

In the afterglow of our first EAP via Skype, I asked the Administrator if this could become a wave of the future for parties that have representatives or insurance adjusters that must travel. I was told that it is unlikely in the near future, but that I was free to make the request. The EAP is Court-ordered mediation and requests to vary the order requiring live appearances have to be submitted to the Court *en banc*. However, requests will be taken on a case by case basis, so it is advisable to be judicious in requesting variances. Complaints about repeated requests my “ruin it for everyone.” Requests for appearance by video conference may be most appropriate when the costs of live appearance outweigh the relative potential value of the case, such as requiring a representative or insurance adjuster to travel from out of the country, or as in our case, the actual potential value of the case is so slight making any travel cost prohibitive.

Also parties merely monitoring the case for various reasons may be allowed to participate via video conferencing.

Aside from this experience with video conference participation at the EAP with the Administrator, we are going to explore – when appropriate – requesting video conference participation at other mediations. It is certainly a cost effective way to provide service to our clients and insurers. I also suspect in the near future the economics will find its way into convincing the Court its EAP program might be more successful in allowing more video conferencing as well.