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Why Can't I Be More Successful at Mediation?

I. Your Mediation Was Too Early or Too Late

Bad liability cases, unlike fine wines, do not age well. Cases of highly questionable liability may take inordinate amount of resources to prove the defendant "innocent." The first question one must ask about mediation of the case has to do with the timing of the mediation. It does not help to mediate before the necessary facts have been uncovered. Further, it may be too early to mediate if issues related to tenders of defense have not been resolved. However, there may be no reason to wait until you are at the damage witness or expert witness -stage of litigation before deciding to mediate.

II. You Chose the Wrong Mediator

The choice of mediator may be the most important decision you make. Does the mediator have substantive knowledge in the area of law involved in your case? Does the mediator have the necessary energy and mediation skills to help the parties settle their differences? The choice of mediator should not be entered into lightly. You need to ask your local counsel why he/she believes the suggested mediator is the best one for the job. Inquire of the mediator as to his/her track record of successful mediations.

III. Your Team Did Not Properly Prepare for Mediation

In preparing for mediation, your team should have a good grasp of the facts and the law applicable to the plaintiff's cause of action. Recognize that the mediator will be reading more than one mediation submission. The mediator will naturally jump to certain conclusions based upon the strength of the mediation submission and the accuracy of the law and facts contained therein. The mediation submission should recognize the warts in your case and explain in objective terms the accuracy of your damage calculations. In addition, you must be aware of any liens which may stand in the way of a complete settlement. Not knowing the amount of liens, and/or not having the lienholder at the mediation may be an impediment to settlement.

IV. Your Game Plan Was the Wrong One for This Mediation

In order to be successful at mediation, you need to be able to define a win. Most often a "win" is defined in monetary terms that have been well-thought out before the mediation begins. However, a "win" can also include obtaining information about your opponent or better understanding a crucial case fact. Should your co-defendants be involved in your mediation planning? There are usually common elements of which defendants can agree. Defendants should, at the very least, consult each other on their thoughts on the value of plaintiff's injury/damages and any comparative fault by the plaintiff or non-parties. There may be times when it makes sense to engage the co-defendants in pre-mediation discussions on how to divide liability among the defendants. All of these avenues should be explored before the mediation begins.

V. No One Made the Pre-Mediation Call

There is no rule against calling a mediator prior to the day of the mediation, introducing yourself and your client and asking the mediator if he/she has any questions concerning your mediation submission or any questions about any facts or law related to the lawsuit. This pre-mediation call allows you to obtain "first spin" on behalf of your client. Accuracy and fairness during the pre-mediation call is a must.

VI. You Brought the Wrong People to the Mediation

Does your client make a good appearance, or will your client's presence at the mediation hinder your ability to reach a compromise? Game planning for mediation includes who should be called as part of the mediation team. Does it make sense to have your client at the mediation or just the client's carrier? If the client is to be at the mediation, should it be the president or someone who has more knowledge of the relevant facts? Should an excess carrier attend the mediation or might that send the wrong signal if the mediation team believes the case should be settled at or near the limits of primary coverage?

VII. Your Mediation Got Off on the Wrong Foot

All mediations need not start off with an opening statement of counsel. Many times attorneys making an opening statement believe they must point out each weakness of the opponent's case may lead to that attorney's client not wanting to compromise and the opposing party and counsel becoming upset. Even if opening statements would be counter-productive, one of your team should start off the mediation by stating to opposing counsel and his client that you are at the mediation to seek a fair resolution and that you will use best efforts to reach a resolution. Most plaintiffs have never been at mediation and these simple statements by your side can help the mediator reach a fair resolution of the case.

As sure as night follows day, you know the mediator will ask you for your opening offer in order to start his efforts to reach compromise between the parties. Why stumble over an answer? Even if the plaintiff has not made a demand before the mediation, you should be prepared to make an opening offer based upon your assessment of the case. This does not mean that you can't adjust your opening offer at the mediation based upon the plaintiff's demand, but these scenarios should have been thought through before arriving at the mediation.

VIII. You Didn't Diffuse the Emotions

Lawsuits and mediations engender angst and uncertainty. For the plaintiff, mediation may relive the horror of a tragic accident. For the defendants, mediation may heighten a client's feelings of anger. Your job is to remove the emotional obstacles to resolving the case. This may require you to acknowledge the plight of the plaintiff even if you believe your defendant had little to do with the plaintiff's situation. Removing the emotional straightjacket to compromise, a resolution cannot be understated.

IX. You Didn't Show Necessary Mediation Skills

Experienced mediators know the usual road to settlement at mediation is not a swift one. Many times there are unforeseen issues which hold back litigants from allowing resolution. At mediation you must keep your mind open to creative solutions to negotiate a settlement. These solutions could be as simple as the defendant paying for the cost of mediation, or as complex as a party agreeing to buy unrelated product from the plaintiff in another business transaction. There is no one path to settlement. Before arriving at the mediation, consider all alternatives to resolving the differences between the parties. Use the mediator as your sounding board in working through possible resolution scenarios. A good mediator can size up your settlement scenario and help you shape it to fit what he/she hears when talking to your opposition.

X. You Weren't a Skillful Listener at Mediation

One advantage the defendants have at mediation is that the plaintiff normally defines their position before the defendant must react. This allows the defense to gauge the strength of the plaintiff's conviction and to look for clues in how to resolve the case. Further, the defendant and counsel need not always control the mediation. It is important to listen to the plaintiff and the mediator as to why the other side may be changing their position at the mediation. Also, if demands are being made in a joint session, look at the body language of opposing counsel's client. Does the plaintiff look uncomfortable? Again, these subtle clues can provide a wealth of information as to the real position of the plaintiff.

XI. You Didn't Know What the Mediator Was Thinking

A mediator has one goal at mediation and that is to obtain compromise from both parties. However, as the mediator works through this process, he is looking for the weak link. The weak link may be that party who does not show strength of conviction, and is the easiest one from which to obtain further concessions or money. Making sure you are not the weak link is why pre-mediation game planning is so important, especially in multi-party litigations. From the first part of the mediation you should convey confidence in your position and explain to the mediator the path for success for this mediation. The mediator will recognize your strength of position and move on to a weaker link.

XII. You Failed to Engender "Trust"

Arriving at a fair resolution at mediation is much more likely to occur if you have the trust of the mediator and he has your confidence. As noted earlier, this process begins with an insightful mediation submission and a pre-mediation call and continues throughout the mediation. If you trust your mediator, use his or her help when making offers of compromise. There is nothing wrong with bouncing multiple settlement scenarios off of a mediator to obtain input as to the correctness of a particular path towards settlement.

XIII. You Forgot to Play the Negotiation Game

When opposing counsel provides offers or demands which have little regard to the facts, law or amount of damages, you must demand reality testing. Many times your demand for reality testing relates to non-economic losses, or business interruption losses, which become stumbling blocks to negotiated settlement. You must demand objective criteria for these losses. Requiring plaintiffs to provide a completed jury verdict form is one way of finding the stumbling blocks to settlement. In regard to business interruption losses, plaintiffs in such cases should be able to document their losses with objective economic data. The mediator should welcome your request for using objective criteria in relation to demands and offers. Be prepared to have your team fill out a jury verdict form for comparison to the plaintiff's.

If you are close to settlement, there are various tools that allow you to bridge the gap. One of these tools is the "no offer" offer. This tool is best used in a private session between defense counsel and plaintiff's counsel. Defense counsel provides a bridging number between the two positions and agrees to seek this authority if plaintiff's attorney tells defense counsel that this number will settle the litigation. Defense counsel also informs plaintiff's counsel that this number is not an offer, but is a number to be accepted or rejected as a final move toward settlement. Defense counsel informs plaintiff's counsel during this private meeting that no offer is being made, but that a bridging number is being discussed. If no settlement can be made at this bridging number, the parties retreat to their previous settlement positions.

XIV. You Fumbled the Hard Question

There are a handful of times during mediation when the mediator and/or opposing counsel demands certain information from your mediation team. This mediation could be an explanation of your opening offer, a specific item of evidence which is being challenged, why you are making a change of position, or the answer to the question "what is your top dollar?" Being able to answer these questions decisively may mean the difference in being trusted by the mediator (and having your team be the "go to" party for the mediator when discussing settlement scenarios), or being just another "participant" at mediation. Being able to negotiate the handful of pointed questions during mediation many times means the difference to settling the case for the initial authority provided or having to provide additional authority and/or not settling the case at all during the mediation. Proper preparation and game plan for mediation are paramount in negotiating the strategic moments of the mediation. There is no substitute for hard work and planning in meeting your mediation goals.

XV. Bonus Session – You Forgot the Settlement Agreement

In many venues around the United States, your ability to enforce a settlement depends upon the strength of the settlement agreement. Having successfully negotiated a case during an extended mediation should not be thrown away by a failure to have all parties sign a settlement agreement while they are at the mediation. At the very least, the agreement should confirm the terms of settlement, confirm the money to be paid by each party, contain language on the payment of liens and note whether the settlement is subject to a confidentiality provision. This settlement agreement should be signed by all parties and their counsel.