



2019 Annual Conference  
March 13 -15 2019  
Orlando, FL

## **Advanced Mediation Advocacy**

### **I. Pre-Mediation Preparation**

#### **Information Gathering**

Prior to the mediation, try to gather as much information as possible. This can be discovery that has been completed. You basically need to make sure you have enough information to make a reasoned evaluation and have covered issues such as liability, damages and any evidentiary issues.

#### **Understand Verdict and Settlement Issues Prior to Mediation**

If possible, research applicable reported settlements from the Jury Verdict Reporter that are from the same venue, same injury, and same age plaintiff. This allows the negotiations to proceed from a frame of reference.

#### **A great time to mediate a case is when there is a pending summary judgment motion.**

Both sides may be uncertain about the outcome and more willing to compromise at that time.

#### **Make sure the opposing side is bringing their client whenever possible**

Prior to mediation, make sure the opposing side is bringing their client. Mediators settle a lot of cases where the plaintiff or adjuster are not there, but it increases the success of mediation if they are there. Mediators find that when the actual plaintiff who is looking for a settlement attends the mediation, there is a much greater chance of reaching settlement than if just the attorney appears. Also, the presentation of the case with the actual client present is usually more persuasive. If possible, try to have the claims adjuster attend the mediation. It helps the adjuster determine whether or not the plaintiff would be favorably or unfavorably received by a jury in that venue. If the adjuster cannot attend, please make sure they are available by video conference or cell

phone. Having all decision makers present decreases conference time and increases likelihood of settlement.

**Always have an idea prior to the mediation of what each side is demanding or offering.**

Mediators have experiences where there have been no prior negotiations, meaning the plaintiff has not made a formal demand and the defendant has not made any offer. Although they can still work with the parties to get the case settled, they find it better when the parties have had prior negotiations. Engage in some negotiations prior to mediating. If possible, always try to get a demand and offer before the mediation. This way you know the parameters (the last formal demand and last formal offer) before you walk into the mediation.

### **Mediation Statement**

Send the mediator a brief Mediation Statement prior to the conference. The mediators appreciate when an attorney sends them a summary of their case. It allows them to get a basic understanding of the case and saves time at the mediation conference. A Mediation Statement helps the mediator settle the case.

## **II. Mediation Conference**

**Come to the table with a range of possible settlements, not an exact number.**

You cannot expect to just settle the case for what has already been offered or demanded. You can never expect to settle a case for what you want. Mediation is a fluid process. There must be flexibility during a mediation in order for it to be successful. A good settlement is when both sides have compromised.

**The venue of the case makes a difference.**

You cannot expect to settle a case in Nassau County for the same amount as you would in the Bronx or Brooklyn. In addition, the ethnic background of the plaintiff may also make a difference based on venue. The venue makes a difference and you should adjust your offer accordingly.

**During the mediation do not get into arguments with your opponent**

Never make any personal attacks on your adversary, because of the damage that can do. Mediators have had experiences where attorneys have insisted on arguing their case in front of the other party thinking that would help. That it rarely helps. You can't keep

trying your case at every round of the mediation. In fact, the mediator usually spends the next hour trying to calm the parties down in order to reach an agreement.

**Always make offers and demands so that you have room to move.**

Most cases will settle if the parties are reasonable and continue to move during the negotiation. As a party to the negotiation, focus on what you can do to make progress toward settlement and not merely react reflexively or negatively to a movement that your opponent has made. If a party does not move to your liking, you can always shorten your increments rather than stop moving altogether. Movement breeds movement. When each side sees movement by the other side, they are more interested and apt to continue with a difficult mediation. Each small move generates progress and helps the possibility of settlement.

**Be honest with your mediator.**

He or she is there to settle the case. Tell the mediator your honest range of settlement and he or she will try to help you get there. If you are honest with the mediator, he or she will have a better idea of where the case can possibly settle and hopefully will settle for an amount that will make you look good to your clients.

**Have patience for the mediation process**

It is really a process that works. During negotiations, the parties should make movements to encourage the other side to move and create a real chance to settle the case. During the mediation, it never helps to react to another side's proposal with anger, frustration or resignation. The idea is to keep the negotiation going. Most successful mediations occur when the parties hang in there and don't give up on the process.

**No backward negotiating**

Never go backward during mediation. This will almost always result in a failed mediation. Prior to mediating, you should memorialize the last demand as well as the last offer.

**Structured settlements help**

A structured settlement can often help settle a case because the annuity that the insurance company purchases with the settlement proceeds pays the plaintiff over time and this could be a solution for a plaintiff who is worried about continuing medical care or future medical costs. Structured settlements can also be very effective when they are tailored to the needs of the plaintiff laid out in the life care plan provided.

### **Consider litigation costs**

Litigation takes time and costs money. The parties should always consider the cost of litigation. It also takes time and energy to prepare for and conclude a trial, and it usually disrupts one's normal life and opportunity to concentrate on productive activities.

### **It is never a good idea to give your adversary your walk away number**

Even if you have a great relationship with the opposing party. Otherwise, it will be converted to a formal offer or demand.

### **Make your biggest moves early and smaller moves later**

It's important to make a good opening offer at the mediation. It will build trust with your adversary and set a positive tone for the mediation. Your first move should be the biggest and then each subsequent move progressively smaller.

### **Do not make ultimatums**

It may seem efficient to cut to the chase, but much theory suggests that you have to leave the other party some room to come back and feel they also have had an opportunity to negotiate. Good negotiation often involves a number of moves before people are satisfied that they have done their best.

### **Never put a time limit on a mediation**

Each case must be given the appropriate amount of time necessary to reach a settlement. The process should not be rushed.

### **Momentum in mediation**

It's important to gain momentum in the mediation process. Therefore, lawyers should not take too much time (hours) between offers and demands.

### **Each side shares equally in mediation fees**

It most productive when each side shares equally in the cost of the mediation. Otherwise, the party not paying has no incentive to negotiate fairly. Instead, they will just be there to establish a floor for further negotiations.

### **III. Post Mediation**

#### **Settlement Agreement**

If a case settles at mediation, it is important to finalize a settlement agreement with the mediator. Most mediators have a standard agreement and then it can be modified based on the dispute or any additional details.

#### **Follow up calls by the mediator**

If a case does not settle at the mediation, a good mediator is going to make follow up calls with the parties to try and obtain a settlement and maintain momentum. They may also suggest a second mediation conference if it looks like it will be productive.