

Seven Tips to Successful Mediation:
Understanding the Defense Perspective

Most mediations are conducted because both sides want to resolve a dispute. This is the advantage of mediation over a mandatory settlement conference and it creates a different atmosphere, i.e., one that is usually less adversary in nature. Unfortunately, many plaintiffs' attorneys forget that a mediation is a golden opportunity to subtly exercise their advocacy skills to resolve the case. They forget that the focus should be on convincing the defense attorney and/or his adjuster to pay. In a mediation they are your jurors.

Following are some tips in dealing with the defense attorney and his adjuster in settling your case favorably.

1. Know Your Defense Attorney

Make sure that you know how the defense attorney feels about settlement. You have to speak with the defense attorney before the mediation about this. Most defense attorneys will let you know where they stand on settlement. They also will frequently give you their reasoning, e.g., the good impression your client makes, the poor impression created by the defendant they have inherited, etc. With a little questioning they often will indicate whether or not they have any problems with their adjuster or whether they like their adjuster. It also is good to know the level and experience of the adjuster and the defense attorney will tell you that. You need to know all of this to know who you will have to convince at the mediation.

If there are multiple parties, the attorney for the primary defendant may often be your best friend. He can help you work on the other attorneys and other adjusters to get the case resolved. This can be a win-win situation for the primary defense attorney because he can reduce his contribution to the settlement, costs and attorney's fees in getting the case resolved early. Do not be afraid to approach the defense about this type of strategy before the mediation because the attorney for the primary defendant may be more effective in resolving the case than the mediator.

2. Establish Rapport with the Adjuster

The adjuster realizes that he is the most important person at the mediation. People want to feel important and when they are happy and secure they usually feel better about what they are recommending. A mediation is not the place to ignore the adjuster or make him look stupid. I think it is wise to think of the adjuster as a juror who is biased against you but one who you can convert.

This process starts before the mediation with a good mediation statement. You have to attach to the statement the kind of evidence the adjuster needs for his file. For example, attach key excerpts of medical records, official reports, billing and photographs to your statement. Despite the bad reputation of insurance adjusters, most of them are human and a good photograph will have an impact on them. Do not forget to consider attaching reports of similar jury verdicts to get the adjuster thinking about the consequences of failing to resolve the case.

When you arrive at the mediation, make sure you introduce yourself and your client to the adjuster. Whenever you have the opportunity, chat with the adjuster to try to build up some rapport. Talk about anything but the case. I have had some fascinating discussions with adjusters about our respective children, skiing, baseball, etc. Talk about anything except politics and the law. If the adjuster likes you, he may be willing to go to bat for you.

If you are dealing with an adjuster who is hostile, let him "vent" during the hearing and let your clients know about this ahead of time. Of course, if the facts are misstated, you have to let the adjuster know that right away but it rarely does any good to get into a heated argument with an adjuster during a mediation. If the issue involves the law, argue that with the defense attorney and not the adjuster. If the adjuster is unreasonable, let him express his unreasonable views and then let the defense attorney and the mediator work on him. Oftentimes after the adjuster expresses his views and is told they are unreasonable, he is willing to bend. However, if the plaintiff's attorney openly challenges him in a hostile manner, he will dig in his heels and the mediation will be over.

3. Do Your Homework on the Insurance Coverage and Consent Issues:

More than one mediation has been derailed because the parties overlooked serious impediments to settlement. These include large self-insured retentions or deductibles, coverage problems, client consent problems, ignorance of the policy limits, uncertainty regarding the availability of excess coverage and unavailability of ultimate decisionmakers due to time zone differences. Do not assume that the defense attorney has done his "homework" on these issues. It is the plaintiff's attorney's job to ferret out these potential problems before the mediation.

The way to do this is with a good set of interrogatories and also a telephone call to the defense attorney. Ask him if any of these problems exists, e.g., "If we are able to have a meeting of the minds at the mediation, do you know of any special impediments to resolution?" This will be one of the first questions of a good mediator. If you overlook these issues it can be very expensive to

your client because you will waste money on a mediator and will lose the opportunity to settle your case early.

4. Does the Defendant Have What It Needs to Evaluate Your Case?

If mediation is too early it is ineffective because the defense does not have what it needs to justly compensate your client. If liability is disputed and it depends on eyewitness testimony, does the defense know what these witnesses have to say? You have the option of taking depositions or sharing witness statements but you have to do something before the hearing.

If the plaintiff's current medical condition is in issue, does the defendant need its own medical examination or will he be satisfied with the current medical records of your plaintiff? This is something you need to know or the mediation will go nowhere because the defense does not appreciate the value of your damages.

Wage loss is often a big stumbling block. I strongly urge plaintiffs' attorneys to be conservative about this and make sure you claim only what you can prove. Defense attorneys and adjusters are used to targeting an unreasonable wage loss as a way to discredit otherwise meritorious claims. For example, I usually claim the income tax privilege when defendants request income tax returns and W-2 forms but if that is what it takes to convince an adjuster of your client's earning history, consider bringing tax information to the mediation and showing it to the adjuster after you have an agreement that plaintiff is not waiving any privileges by doing so. Your clients must understand that in no event can they claim more than they have reported.

The bottom line is that you want to create an atmosphere that you have nothing to hide and you want to make sure that the defense has what it needs to settle the case. Every postponement of a mediation costs your client more money.

5. Select the Right Mediator:

Select a mediator that the defense respects because an adjuster will be more willing to listen to his advice. I often prefer a good defense attorney or a good judge who was a former defense attorney. They will have more credibility with an adjuster and the defense attorney can use that to convince the adjuster to modify an unreasonable position.

6. Overcoming Legal Roadblocks to Settlement:

If there is a legal issue that is holding up settlement, one way of approaching it is to invite confidential briefs on the issue. The mediator then can give an advisory opinion to the parties and neither side has to reveal its legal arguments. If you

have such an issue in your case it is crucial to select a mediator who has credibility. For example, a retired respected law and motion judge, a trial judge with considerable experience or an appellate justice may be the right people to consider as mediators.

7. Prepare Your Plaintiffs:

Your clients have to know what to expect. They will be active participants in the mediation. Assume they will be asked to express their views and explain their injuries and damages. You have to practice this with them just as you would for trial.

Prepare them for the expression of unfair views and misrepresentations of the facts. The last thing you want is to have your client get into an argument with the defense attorney or the adjuster. You do not want them to make faces or sneer at the other side while the other side is expressing its views.

A mediation is a unique opportunity for your clients to make a positive impression in a setting which is not obviously controlled by you. Once again, openness is the emphasis but the clients must be carefully prepared to know what you mean. It is not a time or place to confess to things that are not relevant, to get involved in second-guessing or to say things that will not be helpful to the defense. Your clients may want to "vent," too, and this may be very helpful in getting the case resolved because it lets the other side see how strong your clients feel and it lets your clients feel good about the process.

A mediation takes a lot of preparation. Do not just show up and leave it up to the mediator to settle the case. You have to understand and be sensitive to the defense perspective because if you do not convince the defense of the merits of your case, you will not resolve it.

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3/2/95