"Make mediation great again!"

Strategy comes with experience, but even without experience there are rules you can follow for better results

By John Drath

Sorry, I couldn't resist the title given the times in which we find ourselves. However, the fact is, mediation *is* great, particularly for those attorneys who know what they are doing and who, as a consequence, consistently achieve good results for their clients through the process. Curiously enough, the characteristics of those attorneys are also found in good mediators: Both groups are prepared, adaptable, and intuitive. They also tend to be creative. Just as no two cases are alike, neither are two mediations alike. The right approach in one may be the wrong approach in another. What strategy to employ in any given situation takes experience, yes, but even without extensive experience, careful preparation and analysis will lead to good decisions.

Preparing for mediation

When I was in practice as a defense attorney, I learned early on that plaintiff attorneys were my friends, if for no other reason than the fact that they were my *raison d'etre*. The reverse is also true, albeit for a different reason. The defense attorney is the conduit to the decision maker, the person(s) who will be calling the shots in negotiations. While most defense counsel do their best to accurately report to their principals, they are, like all of us, imperfect. A case assessment may not include all of the damages being claimed, may not address all of the legal theories, or may not include all of the arguments which may be made. This may prove embarrassing for defense counsel at trial, but long before that, it will prevent the decision maker from offering the money your client needs to settle the case. The good news is, you do not have to leave this to chance. You can take steps in advance of mediation to minimize the risk of an inadequately prepared defense. The following suggested timeline will serve as a helpful guide in this process.

• ***60 days before mediation:*** Review your correspondence and discovery to be sure that defense counsel has *documentation* for all economic damages being claimed. In a personal injury case, confirm that defense counsel has all relevant medical records and reports. Why 60 days in advance? Because defense counsel will have to submit a pre-mediation report (discussed, *infra*) well in advance of mediation, typically 30 days, so it is in your client's best interests that the report both include and address all of the claimed damages. If this means doing some of defense counsel's work, just think of it as part of your role as advocate for your client.

• ***45 days before mediation:*** Send a detailed letter to defense counsel outlining your case, including all theories of liability, and all damages. This is a letter that you expect to be forwarded to the decision maker, so pay some attention to the tone of your letter. Your client may be impressed by a tough, in-your-face, chest-pounding tome, but it will most likely have the opposite effect on the person who counts the most at this stage, the person with the checkbook. It is easy to be dismissive of claims representatives, but in many cases they will handle more cases in a year than you will handle in five. While this gives them valuable experience, it also can cause them to become somewhat jaded. At best, they are unmoved by bombastic demand letters, and at worst, will react negatively. There will be ample opportunity to send that letter if the carrier fails to negotiate in good faith at the mediation. Until that happens, a well-reasoned letter referencing admissible evidence will have greater effect.

This letter should ideally include a demand. In the words of one highly successful southern California attorney, Bruce Brusavich, the demand should be "high but credible." (Plaintiff, A primer for effective mediation, September, 2014) Putting a demand in this letter serves several purposes. First, it will, or may, influence defense counsel's evaluation. Second, it takes away any argument the carrier might have at the mediation that they were "surprised" or "shocked" by the demand, and unprepared to respond at a meaningful level. Third, it puts the ball in the defense's court and should allow the mediator to start discussing money quickly.

Why 45 days? The answer lies in the procedures followed by many insurers, and even self-insureds. Recall that defense counsel is required to submit a pre-mediation report, typically 30 days before the mediation. This report must address and assess both liability and damages. Also typically, the analysis takes the form of predicting what percentage of times the case will be won or lost, the range of comparative fault, if any, and the range of damages. The claims representative will then write up his or her own report, addressing those same issues, and that report is submitted to (1) set or modify the reserve; and (2) request authority for the mediation. Depending on the company and the size of the claim, the authority will be dispensed either by a supervisor or a claims committee. In either case, once that authority is established, it will typically not be increased before *or at* the mediation, even in the face of later submitted information or evidence. It may be increased *after* the mediation, after submitting a supplemental report, but rarely before and, even more rarely, during the mediation.

This pre-mediation letter, if properly written, will help defense counsel appreciate the evidence and arguments that will be advanced at trial. Even though there may be credible defenses and counter-arguments, stating your arguments plainly and persuasively will cause defense counsel to acknowledge and discuss them in the pre-mediation report.

• ***10 days before mediation:*** Prepare your mediation brief. Having prepared your 45-day letter for the benefit of the decision maker, the brief should focus on the mediator. While not the trier of fact, the mediator will be looking at the case with a jury in mind, so you should lay out the arguments and the evidence as you expect the jury to receive them. You want the mediator to be persuaded as to the merits of your case, so be persuasive. Keep in mind, though, that the mediator is likely to have extensive trial experience, either as a practitioner or judge, so to maintain credibility, avoid the temptation to included marginal claims or arguments that *could* be made but most likely will not be made at trial. To the same point, be surgical in your selection of exhibits. A conscientious mediator will try to read everything presented, but it is annoying to spend time on marginal or redundant material.

• ***1 to 5 days before mediation:*** If you are not contacted sooner, put in a call to the mediator a day or two before the mediation and provide any information that you consider important but which you did not want to put into the brief.

It may be personal information about your client, your insight into the defense position, or any number of matters. If you have not worked with the mediator before, this is a good opportunity to find out what format, if any, the mediator likes to follow. Joint sessions are no longer the norm, but sometimes there is a need for one, and this should be discussed. In most cases, you will want to have the first crack at the mediator, so make that request. Will you need a little help from the mediator in adjusting your client's expectations? This is the opportunity to bring that up.

• ***Any time before the mediation:*** Try to have an in-person conversation with defense counsel, and if that is not possible, then at least a phone call. It may seem old-fashioned in this world of emails and texts, but it can be quite disarming. After a deposition is a perfect opportunity (assuming the handling attorney actually attends – unfortunately not always the case), and of course should be outside the presence of the client.

Meet in your office and try to develop a rapport. Oftentimes this leads to a candid exchange of views on the case, and you can see if there is some interest in either negotiating directly or going to mediation. If the case is not quite ready for serious negotiations, try and reach some understanding as to what each side need to get ready, and what a reasonable timetable would be. As a rule, no bad things come from these discussions, and often wasteful discovery and needless posturing is avoided.

At the mediation

• ***Getting started:*** Having made the opening "high but credible" demand, the ball is now in the defense court. Even so, do not expect the defense to come back with an offer right away. There will probably be some back and forth on the positions before the first offer is made. However, before the negotiations get under way, you need to decide whether you want offers presented by the mediator in your client's presence. If your client is savvy and relatively sophisticated, then having offers conveyed in the client's presence should present no problem. However, with a less sophisticated client, or one given to especially emotional reactions, you might prefer to have the mediator just convey offers to you privately. That way you can control the message. Also, if you have a client that is particularly anxious to settle, that may not be something that you want the mediator to divine. Remember that mediators are always trying to "read the tea leaves" to determine where a case could settle. If your client is an open book, you may want to have the mediator reading you and not the client.

• ***Negotiate purposefully:*** Understand that negotiation is essentially communicating with numbers. Each move should convey a message, and the messages should be consistent in order to be credible. The pace of negotiations is usually dictated by the defense. Patience here is a virtue, as some defendants need to do the dance in small steps. Attempting to speed up the process too soon could convey the wrong message. Once a few moves have been made, parties start paying close attention to the midpoints, and these midpoints move with each offer and counter-offer. If you make a move that puts the midpoint below your desired settlement number, you will probably have difficulty getting the defense to that point.

• ***Working through the impasse:*** Negotiations often stall when one or both of the parties realize that their desired midpoint cannot be maintained. When this occurs, other methods can be invoked, either at the initiation of the mediator or the request of the parties.

• ***Bracketing:*** This is a way to convey larger moves without actually making them. One party says "if you offer X, we will go to Y." The midpoint between those two numbers is where that party wants to settle. The other party typically will reject that bracket and might respond with their own bracket, indicating a lower midpoint. The parties can continue proposing brackets, getting closer each time, without either party making a firm offer. They also can, and frequently do, return to straight negotiating, now that they have a better idea of where the other side is.

• ***Virtual negotiating:*** "If the other side offered X, how would you respond?" This can get the parties to move without disclosing the move to the other side. It is useful when one side is reluctant to make a move because they are convinced it would not move the needle and put them in a worse bargaining position. It is a ploy

used by mediators, but there is no reason you can't suggest it.

• ***Mediator's proposal:*** At some point the parties might consider asking for a mediator's proposal (discussed in greater detail in another article in this issue), but that is typically done as a last resort.

At some point you may want to meet alone with the mediator, and more candidly discuss where you need to be at the end of the day. Solicit his or her suggestion as to the best way to get there.

• ***Closing the deal:*** Once agreement on terms has been reached, do not leave the mediation without a binding written document. Hopefully the mediator has asked the defense to bring a draft release to the mediation, and it can be put in the final on the spot. Get agreement on Medicare set aside issues, lien releases, confidentiality, payment time.

The unsuccessful mediation

If it looks like settlement on the day of mediation will not be achieved, try to pinpoint the sticking point. It may be missing records, speculation as to what a witness will say, a pending motion for summary judgment, or any number of things which are question marks. Getting answers to some of those questions could cause one party to change evaluation. You should keep the lines of communication open, and have a joint game plan for clearing up these question marks. Try to set a timetable for completing the game plan, and to keep matters on track; consider scheduling a follow-up mediation on the spot. Often the mediator will be following up with the parties whether or not there is a new date, in an effort to keep discussions going. Today, more and more cases are being settled in follow-up phone calls or sessions.

Wrap up

Settling a case is nearly always in the best interests of a client. Obviously there are those cases that just have to be tried. There may be a genuine disagreement that is so fundamental to the exposure of the case that any compromise would be too deep of a concession. Or one side is simply misevaluating the case. But for the vast majority of cases, the goal is to settle that case for the best possible terms. Knowing that, preparation is paramount. You wouldn't go into trial unprepared, so why be any less prepared for resolving the other 98 percent of your cases? When your preparation has the effect of giving the defense the best opportunity to see the case the way you do, your chances of resolving the case at the right level are greatly improved.


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