Making Lemonade

Everyone has had this experience: You have done all the right things to set the stage for mediation. You sent all of the medical information, reports and bills to defense counsel 45 to 60 days in advance of the mediation. You sent a detailed demand letter at the same time, outlining the strong points of your case, and a demand. You followed up with a call to see if there was any more information he/she might need. You made sure your client did not have any new or different damages. You submitted a detailed brief containing all the same information 30 days in advance of the mediation. Your client has been primed for the process and is looking forward to getting the case resolved.

A few days before the mediation, you get the defense brief. It contains no surprises, but neither does it contain a response to your demand. One hour into the mediation, however, you get some bad news: the defense is not ready to discuss numbers anywhere close to your settlement evaluation. The explanation is (fill in the blank) (a) the case was reassigned to a new adjuster, who has not had time to get up to speed; (b) defense counsel dropped the ball and did not get your demand and mediation brief to the carrier in time; (c) the claims person dropped the ball and didn't get the information to the claims committee in time; (d) they need an IME in light of the size of the demand; (e) they have misguided optimism as to their chances of prevailing; (f) the dog ate the settlement authority; (g) all of the above. Regardless of the reason, the defense is not going to have enough money that day to settle the case.

The knee jerk reaction is to express righteous indignation over the waste of time and money, suggest that the defense pay for the entire mediation, and walk. These are perfectly understandable, endorphin producing responses. But there are better options, ones that take advantage of the mediation environment. So get into your inner yoga, breathe, and then start thinking of ways to take advantage of whatever guilt the defense may be feeling about showing up empty handed.

1. <u>Negotiate, however briefly</u> Though you know a settlement cannot be reached on that day, get as far as you can. This gives you an opportunity to send (another) message as to your view of the case, and to learn what the defense was willing to pay even though not fully prepared. If nothing else, that establishes the starting point for the next session or round of negotiations.

2. <u>Identify the Differences</u>

Using the mediator, attempt to drill down on the defense position, looking for those points that you can dispatch with evidence or case law. Were they miscalculating the medical bills? Were they discounting the income loss due to incomplete documentation? Were they disregarding a course of treatment or a procedure because there was no documentation establishing its necessity? Is there a factual misunderstanding that can be clarified? How many of those impediments can you remove? Each time you remove an impediment or answer an argument, you force the other side to reevaluate based on the new information.

There may be intangibles, such as the defense having a negative impression of the plaintiff as a witness. If you think the mediator might form a more favorable impression, spend the time to let that happen. That favorable impression will be conveyed to the defense.

It may turn out that the parties have wildly different predictions as to the amount of non-economic damages which may be awarded. Spend time persuading the mediator that at the end of the day, your arguments and evidence will be effective and support an award in the range you are suggesting. That empowers the mediator to take your case to the defense in an effective way, namely from the perspective of a neutral.

3. Set the Stage for Further Negotiations

This is a two part process. Part one is getting the defense to reevaluate or at least question its position, using the mediator for that purpose. Part two, and of equal importance, is giving the defense some notion as to where the case might be settled. It is not at all unusual for a claims person to ask, when responding to defense counsel's request for more authority, "Even if I authorize that amount, is there any realistic chance that it would settle for that?" In point of fact, authority that *will* settle a case is more likely to be granted than authority which *might* settle a case.

There are any number of ways to let the defense know where the case could settle. A good mediator will try to figure it out on his or her own, but having a candid discussion with the mediator eliminates the risk of the mediator guessing wrong. Have a clear understanding as to what the mediator will say to the other side, to insure that your negotiating position is maintained. Consider suggesting a bracket ("if they will go to 300 we will go to 450"). Even though the defense doesn't have 300, this at least lets them know that the case can settle somewhere in the 3's, while your demand remains north of 500K.

4. Finish with a Plan

After putting in the effort to set the stage for the next round of negotiations, try to get a commitment to return on a specific date. If the plan is to have the mediator follow up with phone calls, have an understanding as to the timeframe for that process. If the defense has unanswered questions or is missing needed information, try to agree on a game plan and a timetable for getting those answers and information. A joint session is often helpful at that point. Try to maintain whatever momentum has been established. Finish with a framework for resolution.

The Take-Away

Mediation is a process. Many cases do not result in settlement *at* mediation. But no mediation *needs* to be a wasted effort. There is always information to be gained and conveyed, and points to be made. Accomplish what can be accomplished before calling it a day. And, importantly, make sure your client understands that progress was in fact made, and that it was not a waste of his or her time.