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MANDELL GISNET CENTER FOR CONFLICT MANAGEMENT

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The room where it happens

COMMENTARY BY A FORMER "IN HOUSE" DEFENSE COUNSEL

Mediation is a mystery. Have you ever noticed that no matter how much time is allotted, "the deal" is struck in the last15 minutes? There you are, waiting for the better part of the day, skipping lunch and munching on waiting room cookies, with your confused client, wondering whether you will be able to tell your kids that you will be able to go to Disneyland after all, or whether you will be putting together your trial notebook instead….then, click, boom! The mediator enters, fresh from that "room where it happens" and you're done. What just went down? Aaron Burr sings about the art of negotiation in the popular musical, *Hamilton*, when he describes the historic swap resulting in the location of our nation's capitol: "No one really knows how the game is played, the art of the trade, how the sausage gets made…" So, has your mediation experience been more "D.C. gridlock" than "Wall Street bull market?" Would it help to get a peek inside the sausage factory?

For over 30 years I was in "that room," holding the checkbook or, more times than not, with a client who was. I have had the privilege of working with some fine insurance adjusters over the years, and yes, (I know I may risk losing you here) they are people too. Insurance industry folks have a strong sense of fairness and moral obligation that is challenged by the litigation process and the pressure of making a wise financial decision. Most experience emotional dissonance, and the tension can be palpable. Until I was actually in that "hot seat," as the company representative in a bad-faith case, I did not understand how compelling and difficult that pressure could be. In that particular situation, with a judge standing over me red faced and frustrated, and the Plaintiff sobbing, well, frankly, I caved. The reality is, as the day wears on, negotiations escalate, the settlement range tightens, and so does that feeling in the stomach and throat. With just one word, "okay," it can all go away. It is so much easier to maintain resolve when parties are miles apart.

That experience informed my role as an adviser to the checkbook holder. It also helped make me a believer in mediation. I discovered what it was like to have a lawyer representing me who would not really give me advice and counsel. I was pretty much out to sea, and yes, when I got back to the home office, I had some explaining to do regarding my multiple six-figure decision, not to mention new panel counsel to hire. In the end, it was not the "no liability" case that it was purported to be – glad I found out sooner than later. As a result of experiences like this, I vowed that in my role as defense counsel, I would always take a stand, even if painful to do so. As they say in the musical, "If you stand for nothing, then what do you fall for?" My opinions have not always been popular. I have lost a few battles along the way, but have not lost any sleep, either. More than once, I have been accused of making a recommendation just so I could go to Disneyland instead of putting together my own trial notebook. That hurts! If conflict leads to growth, well, I've certainly grown.

Mediation provides an opportunity to test the evaluation. There is time to discuss the evidence, and to have that conversation with the adjuster where we try the Plaintiff's best arguments on for size and see how they feel. Sometimes the defense position isn't as comfortable as we once thought. It is so easy to be dazzled by our own brilliance back at the office. Mediation provides an opportunity to hold that opinion up to scrutiny. A good mediator will inspire this discussion.

If you are encountering the kind of defense lawyer I described above, otherwise known as the human log jam, why not avail yourself of the opportunity to appeal directly to the checkbook holder? Mediation could be the antidote. Alternatively, if defense counsel and client appear motivated to evaluate your case and settle, what have you got to lose by putting your cards on the table? Here are a few additional points to consider:

Never underestimate the importance of having your client meet the adjuster. Resist the urge to have your client appear by phone or stay home, a trend that seems to be on the rise. If you have a terrific client, go out on a limb and ask for a joint session or at least a "meet and greet." I know some mediators feel that this step is unnecessary, and I concur that it may not be advisable to start off the day with an adversarial "argument," but there are other ways to go about a meeting in a more controlled way before everyone gets backed into corners.

Deposition reports from defense counsel to insurance companies are fine as far as they go, but the information goes through the lawyer filter, and as I found out the hard way, there can be many factors at play, not the least of which is the lawyer's personal desire to get some trial experience or draw out the litigation process. Not all lawyers are terrific case evaluators, but seasoned commercial adjusters often are. There can be wide disagreement between counsel and carrier that you, of course, do not know about. Don't make assumptions about the carrier's point of view, based upon your exchanges with defense counsel. Most adjusters know there is no substitute for meeting the Plaintiff and assessing witness potential face to face. To that end, make sure that your client is prepared to impress, and, under the right circumstances, do let your client make a short statement or answer questions. My clients have generally responded positively to Plaintiffs who can discuss their challenges in a matter-of-fact way. Testimony that rings true, and is not overstated, makes a significant impression. It is not lost on an adjuster that a jury might feel the same way. If there is a scar involved, be prepared to show it. I have only seen this type of human interaction lead to more informed and generally higher settlements. Sometimes, it has made it a bit harder to say "no."

Whatever you do, as one highly regarded mediator recently put it to me, "don't bring a hand grenade to the picnic." Insurance people do not like risk. They do not like surprise. In fact, the truth is, given the way insurance companies evaluate and respond to risk, they cannot generally react immediately to new facts or opinions that you decide to raise

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for the first time at mediation. On a high-dollar case, there are many people who may need to weigh in on a significant evaluation change, maybe even a re-insurer. It cannot be done on the fly. You are virtually guaranteeing that you will need to meet a second time, which may be impossible to accomplish if a trial date is looming.

Timing is everything. If the discovery cut-off has come and gone, you may risk never knowing what the defense response would be, until you hear it from the witness stand. So, if you want to settle at mediation, don't roll out the high-dollar life care plan, the smoking gun, the surprise witness, the new expert opinion or the felony conviction at the mediation. I know it sounds sort of fun, but it is a bad idea. It will still be a surprise whenever you hand over the goods, but if you want to leverage settlement, do so with sufficient lead time so that the defense side can evaluate the new information, do a bit of discovery if needed, and change the evaluation if necessary. Instead, consider inviting counsel over to view that damaging video. If it's my case, I'll bring the popcorn.

I have seen a disturbing trend lately: lawyers on both sides who are using mediation as just another step in the discovery process. I am seeing a decline in meaningful first sessions, and it is now taking two or three. If you want to impress an insurance company representative, come prepared the first time. You will be viewed as a formidable adversary if you have real numbers on past and future losses. Back up your general damage claims, and have authoritative arguments on causation. Make sure you have a plan in place for handling liens. Consider having your expert available either in person or by phone. Preparation shows that you believe in your case, and mediation should involve more than tire kicking or just "feeling out" the other side. I come to try my case, you should, too. In the end, I come to listen, to evaluate, to recommend, and to do my best to make it happen back in that room. Click, boom!

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