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ENGAGE MEDIATION

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Tips, tactics and timing for mediation

A FORMER PLAINTIFF'S ATTORNEY AND LONG-TIME MEDIATOR LOOKS AT WHY MEDIATION IS MOST OFTEN THE BEST PATH FORWARD

Over the past 50 years there has been a dramatic decrease in the number of civil cases proceeding to jury trials in both state and federal courts. The causes include the greatly expanded use of discovery and the escalating costs (and uncertainty) of litigation; a judicial attitude of overworked judges discouraging trial and granting motions for summary judgment; judgment on the pleadings or other dispositive motions; the increased use of contractual arbitration and mediation agreements.

The major factor however, in the reduction of jury trials, is the greatly increased voluntary use of mediation to resolve disputes. Many lawyers believe that the clients are better off concluding their case at mediation rather than proceeding to trial. Statistics referenced at the end of this article appear to bear them out. Although expressing my concern for the fundamental importance of trial by jury, the purpose of this commentary is to assist attorneys in securing the best possible results in mediation and recognizing that the obvious path is not always the best.

Preparation for mediation

Over time, attorneys have become far more sophisticated and competent in appearing for mediation. This is both a reflection of their experience and a recognition that in all likelihood their case will be resolved in a single meeting. This principle is so fundamental that knowledgeable attorneys have learned

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that preparation is the key to successful results at mediation.

Preparation begins with thoughtful decisions regarding: Timing of the session; who should attend; determining what should be included in the mediation brief and what should be held back for subsequent discussion with the mediator; consideration of whether the brief should be shared with the opponent; deciding how best to handle confidential information or potential impeachment; utilization of motions for summary judgment, bifurcation, or discovery issues that can aid as negotiating tools; references to other cases that can help set guidelines for evaluation; anticipation of any potential terms or collateral issues that should be included in a settlement agreement; ascertaining the size of the opening demand or offer and thoughtful analysis regarding how best to conduct the negotiations.

Timing the mediation session

While every case is different, there appears to be a recognition by most attorneys that early resolution can provide a significant benefit to their clients. There is a developing tendency to be cost-effective and mediate cases early, even seeking to resolve matters prior to the filing of a lawsuit.

One defendant that has to deal with frequent out-of-state personal-injury claimants has found a way to reduce costs significantly and still settle matters at early sessions. The approach is as follows: the defendant schedules a mediation, then sets the plaintiff's deposition for a day or two before the session and a defense medical exam either a day or two ahead of the session, or not infrequently, even setting it for the day following the scheduled mediation. When set in advance, an oral report aids the defense in evaluating the case for settlement and reduces the need for a written report. When scheduled to take place after the mediation, if the case settles, an arrangement exists with the doctor who generally charges only for a review of the medical records rather than the full cost of an independent medical exam. Moreover, if the case is resolved at the mediation, the defendant does not incur the cost of transcribing the deposition.

Parties in attendance

Customarily the plaintiff will attend the session and frequently, but not always, the decision maker for the defendant will attend the session. Careful plaintiff lawyers give thought as to who else, if anyone, should attend their session. Obviously, arrangements should be made to avoid bringing small children or uninvolved family members to the mediation, because they can provide a distraction. On the other hand, attendance of a spouse, respected family member, or elder statesman who makes a good appearance or can provide guidance or necessary approval might be helpful in resolving the matter. Sometimes factors such as age, health, distance, etc. might preclude the client or key participant from attending. In those instances, the attorney should take time to prepare in advance for how the matter will proceed.

This might require cell-phone availability; a conference call with the client; fax access; or visual reception or other arrangement to keep the client or decision maker available to finalize the matter. Where such arrangements are not available, securing adequate consent and authority from the client in advance of the mediation may be necessary to enable the parties to resolve the case.

Defendants generally bring the key decision maker such as the insurance-claims person, business executive or company representative to the session, or at least have that person available by phone or email, or otherwise. In substantial cases where additional authority may be required to resolve the matter, arrangements should be provided for access to the person(s) or committee who hold the purse strings.

Plaintiff's mediation brief

A first and fundamental rule to get the best results at the meeting is to provide compelling information to the mediator in advance of the hearing. As a matter of course, we would expect most plaintiffs' attorneys to provide a relatively comprehensive brief designed to "sell" the case to the mediator at the outset. It also provides an opportunity to anticipate the shortcomings or weaknesses of the case that the defendant will focus on and put them in the best possible light.

This would include appropriate evidence to support liability; the nature and extent of damages; and any collateral issues that bear on the evaluation of the case. Most such briefs would include an opening demand supported by the presentation of the evidence of injury and damages.

The most successful mediations feature well-prepared representatives on all sides who understand and carefully prepare for the process. Clients are informed in advance concerning the process and realize that the "demand" or the "offer" is merely an invitation to negotiate and does not necessarily represent the range of a realistic expectation. The attorney frequently has reviewed other jury verdicts or relevant information regarding potential recovery from a favorable verdict, analyzed the probability of success and the range of the risk of loss, and considered the costs of moving forward towards trial.

Sharing plaintiff's brief with the defendant

As a general rule, the plaintiff's attorney does not provide the defendant with a copy of the brief. This probably reflects the fact that the presentation shades the case in a way that is designed to influence the mediator but that the defendant could refute or minimize. Also, it is a way to avoid letting the defense know what it will have to deal with. However, in uncomplicated cases where both sides know the facts and the issues, it probably makes little difference or none at all.

Can there be a benefit to sharing the brief? In substantial cases where there has been a lot of discovery, the plaintiff's attorney might prefer to assemble a strong and convincing brief,

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supported by documentary evidence and argument to "sell" the opponent with support for a significant valuation. This might also be helpful in educating the defense to increase authorization in advance of the meeting.

Defendants' mediation brief

Defendants generally will have conferenced with key persons on their side; developed demonstrative evidence that factually supports their contentions regarding liability and/or damages; and are prepared to point out legal authorities that buttress defenses as well as weaknesses in the plaintiff's case; have considered motions to attack the pleadings or seeking dismissal; and have developed a negotiating strategy including support for their position or opening number.

Sharing defendant's brief with the plaintiff

Whether the defendant should share a mediation brief with the plaintiff requires a somewhat different analysis. If the case is straightforward there is little downside to providing a clear explanation of the defendant's position in advance of the hearing. It is done occasionally as a technique to lower the expectations of the plaintiff attorney and client. On the other hand, where the issues are more nuanced, or where there are impeaching items, or where the plaintiff may not be aware fully of applicable law or significant issues, a defendant almost invariably will prefer to save those important details for a confidential discussion with the mediator.

Summary judgment and other substantive motions as a negotiating tactic

Utilizing or threatening to file motions for summary judgment or other procedural or substantive motions may be an effective negotiating tactic. Studies of federal court cases indicate that summary judgments, judgment on the pleadings, and other motions before trial may result in dispositions of as many as 10 percent of the cases.

Introducing a calculated risk to the plaintiff that the case might be dismissed and never see the light of day can provide the defendant with leverage to settle at mediation for a reduced amount.

In an effort to strengthen their negotiations, defendants occasionally provide a portion or even the entire motion for summary judgment along with their mediation brief. While bulky, this provides the mediator with the opportunity to actually evaluate the likelihood that the matter will be disposed of on motion.

Motions to bifurcate as a negotiating tool

Does bifurcation or the threat that the defendant will move to bifurcate always impact plaintiff's negotiations adversely? Conventional wisdom is that in a personal-injury case or other matter where liability is tenuous, but damages are significant, a defendant should consider seeking to bifurcate liability to reduce sympathy for the plaintiff.

My experience as a trial attorney has convinced me that conventional wisdom might be wrong. In a "top heavy case," one in which the liability is marginal, but the claim of injury and damages are dramatic, sympathy might sway some jurors to vote for the plaintiff. However, there also is a contrary concern that jurors who are on the borderline of holding for the plaintiff but who are confronted with either voting for a huge verdict or nothing, may simply not be able to get over their initial reluctance.

In actual experience, where bifurcation was stipulated to jointly, the following two cases illustrate how the plaintiff benefited from bifurcation. In one matter involving a dispute concerning which motorist entered the intersection on the green light, the plaintiff prevailed on liability and a substantial settlement followed without the necessity of a trial on damages. In another, the plaintiff lost on liability and saved significant costs, and estimated six weeks' trial time and effort in presenting extensive medical evidence on damages. These examples demonstrate that the plaintiff has a strong counter argument in dealing with the defendant's threat to bifurcate liability.

Size of the opening demand/offer

There is an old saying in negotiations: "Never give them more than they demand." That is why plaintiffs are generally required to open the discussion with their number. Ultimately the plaintiff will need to provide a start to the process. Thought should go into it so as not to appear unreasonable but allow sufficient negotiating room to get to a realistic and favorable result.

Evaluation

In a recent article designated *Inside the Caucus: An Empirical Analysis of Mediation From Within* by Daniel and Lisa Klerman, 12 Journal of Empirical Legal Studies 686-715 (2015), the authors reviewed statistics from 400 cases that were presented for settlement over a period of time. Two significant conclusions got my attention. First, the settlement rate in Lisa Klerman's mediation practice was about 95 percent. The other significant observation was the fact that in her practice, involving primarily employment matters, they reported that in 25 percent of the cases, the defendant's opening offer was $5,000 and in 50 percent, the starting figure was $10,000, or less. In contrast, the plaintiff's opening demand was more than 50 times the defendant's opening figure. Despite this disparity, most of the cases settled, although generally much closer to the defendant's initial offer.

Dealing with unreasonable opening demands

Experienced defendants are not dissuaded by an unreasonable opening demand – nor should plaintiffs shy away from the process because the first offer is totally inadequate. Occasionally we have encountered a defendant who balked at appearing at a mediation where they regarded the opening demand in advance of proceedings as unreasonably high. Sometimes it is designed to "test" or attempt to

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intimidate a defendant; on other occasions it is something that the client has insisted upon; in still other instances it might have been a misevaluation of the case by either side and simply requires extensive discussions with the mediator for the attorneys ultimately to become realistic enough to resolve the case. (See Gage, *"Without prior demands, even the most impossible cases can settle."* In my article in the Los Angeles Daily Journal Form, p6, Feb. 27, 2009, I discuss the benefit of proceeding to mediation even in such cases.)

It is also true, that even greatly excessive demands or grossly understated offers do not prevent the parties from eventually reaching a successful settlement. Illustratively, a mediation took place in which the plaintiff's opening demand was one-hundred million dollars, despite the fact that the injured client was able to attend and participate in the session. Although it may have revealed inexperience on the part of the plaintiff attorney, the case nonetheless ultimately was resolved.

Dealing with unreasonable opening offers

The process works both ways. In another matter, the defendant made an opening offer of half a million dollars to one of our top trial lawyers. Although substantial, this well-known attorney shook hands with the mediator and retorted: "I am out of here!" As this gesture appeared primarily to be a negotiating tactic, he was "persuaded" to remain and the matter subsequently settled at that session.

Cases involving attorney fees provisions

Cases that involve a potential award of attorneys' fees to the prevailing party pose a special consideration. Accordingly, civil rights matters, whistleblower's claims pursuant to the Labor Code; ERISA matters; insurance bad faith fees; and contractual provisions between business parties all increase the pressure on one (or both) parties to resolve the matter. For an approach to successfully mediating cases involving the award of attorney's fees, see Gage: *The tail that wags the dog*, Advocate ADR Issue, Sept. 2013.

Mediators' techniques

Mediators like to plan ahead by reviewing the significant evidence from all parties. Thus, providing a comprehensive brief allows the mediator to conduct any independent research they deem necessary; develop key questions and potential areas of inquiry; consider possible alternative approaches and ascertain whether cooperative, competitive or collaborative negotiations will be most effective, and home in on creative solutions that might apply to resolve the matter, as well as developing a handle on valuation and potential ranges and areas of settlement that can serve as a guide to resolution.

However, not all information can or should be imparted in the initial brief. Additional insight can be disclosed in confidence as the case proceeds, or not at all.

Sharing previously undisclosed adverse facts with the mediator

Since there is no such thing as a perfect case, a lawyer often learns something adverse about his or her client or the case, either at the outset or later on when preparing for mediation that presumably is unknown to the other side. Of course, much of the time it ultimately will have to be disclosed during discovery and prior to trial. Determining how you should handle it at mediation depends upon the nature of the information, the stage of the proceedings, and your confidence in the mediator.

This could be such items as previously undisclosed prior or subsequent medical information that undermines the value of a personal-injury case. A divorce or business dispute might risk disclosure of previously unknown, but harmful evidence, regarding tax returns or records of loss of earnings in a business matter. A favorable witness or expert may have died, moved away, or otherwise no longer be available. Circumstances may have changed, and a party might have a need to reach an immediate settlement. Many other circumstances can arise that indicate the case is unlikely ever to proceed to trial. Depending upon the information, there may be a benefit to disclosing it to your mediator.

I firmly believe it is the absolute duty of mediators never to disclose matters imparted to us in confidence to the opposing party. However, with the understanding that the information will not be disclosed to the other side without subsequent permission, that discussion might assist the mediator in considering other approaches to the case that help the parties reach a settlement that otherwise appeared out of reach.

Techniques for getting the best mileage out of impeachment of the opponent's case

In some instances, the party in possession of potentially impeaching evidence never discloses it – satisfied to keep it for the eventuality of trial or because he or she is satisfied with the progress being made at mediation.

What kind of impeaching evidence can arise in connection with mediation? Illustrative examples abound, including pictures of the plaintiff participating in subsequent physical activities inconsistent with limitations alleged; inconsistent comments made online by a defendant accused of harassment; documentary evidence showing that the scene differs in a significant manner from the description testified to; impeaching evidence in a medical record or other document; harmful witness statements not previously disclosed; expert's reports providing significant contradictory information; understated or overstated accountings and damages, etc.

Sometimes a party will provide this information to the mediator in a confidential brief with the goal to undermine the valuation of the opponent's case at the outset. In other instances, the information is disclosed in confidence during

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negotiations seeking to secure a more favorable result at mediation.

Candor regarding impeachment evidence can cut more than one way

The following is an illustrative example of the effective utilization of impeaching evidence: A plaintiff was complaining of ongoing residual leg pain following injury and walked into the mediation session with an exaggerated limp. At the propitious timing during negotiations, the defendant showed the mediator a video of the plaintiff that had been posted online which demonstrated that the plaintiff could walk normally. Disclosure of that information to the mediator and subsequent discussions changed the dynamics and brought about a settlement.

In an example of candor benefiting the parties, little progress was being made during a mediation until the defendant disclosed to the mediator proof that the plaintiff's expert had relied upon an erroneously flawed measurement. That information demonstrated that the plaintiff's case basically was of very doubtful merit. Rather than try to withhold that information and spring it at trial, the mediator got permission to advise the plaintiff attorney who verified the accuracy of the fact, saved considerable embarrassment and further costs, and a very modest settlement followed.

The following example illustrates how disclosure of impeaching evidence to one, but not all parties, brought about a settlement. In that case, a plaintiff sued two parties, alleging that one or both had failed to maintain properly the accident site where the client fell and was severely injured. Little progress was being made until one of the defense attorneys asked to meet with the mediator in confidence. At that time, he produced a public record that included an order directing the co-defendant to correct the problem at the injury site 10 years previously! The mediator recommended sharing that information with the co-defendant, but not the plaintiff, and that disclosure in confidence resulted in an immediate settlement.

Reverse impeachment

The following is an illustrative example of a party hoisted on his own petard brought about via reverse impeachment. The benefit of disclosing impeaching evidence is not always recognized by the party in control of the information.

In one such matter the defendant decided to disclose a video that had been kept on premises and took pictures of the supposedly rather severely injured plaintiff. Indeed, the video showed the plaintiff sustained an impact on the job but immediately recovered and went back to work in a normal fashion. Deciding to show it to the mediator during the negotiations to undermine the value of the claim, the mediator suggested that as the plaintiff appeared honest and straightforward during the session that it be shown to the plaintiff for comment and explanation. The disclosure worked. The plaintiff's attorney was able to document that the incident depicted in the photo occurred somewhat earlier on the day her client was injured and was not the basis of the claim being pursued. Indeed, the fact that she went back to work promptly following that earlier incident buttressed her integrity. The defendant was unable to produce the video of the actual incident which took place somewhat later. This fact, and the disclosure of the earlier supposedly impeaching incident, actually saved the defendant from substantial embarrassment and damages at the time of a trial and resulted in settling the case.

Joint mediation discussions

Mediators have many tools to resolve cases: Questioning the parties in confidence; recommendations; suggested evaluations; bracketing (providing an upper and lower limit for further discussions); dealing with other than just monetary matters; etc. Despite such benefits, there appears to be a decline in sessions where the mediator guides the parties in face-to-face discussions. However, don't overlook the possibility that such sessions might provide the right tone and promote understanding to resolve an otherwise difficult matter. A more collaborative effort might be just the approach necessary to clarify and resolve differences and provide a breakthrough where the parties otherwise are stuck.

Listening and identifying with the parties

While most cases are about money, one should not forget that many also involve powerful emotions. Sometimes acknowledgement of the hurt and injured feelings via an apology has a therapeutic and revolutionary effect. Knowledgeable attorneys and claims adjusters are aware that in some cases their comments might allow a case to settle that otherwise would still remain an issue of anger and distress. In other cases, the mediator can assist the process because one or both parties just need to have someone listen and empathize with their feelings. Experienced mediators have many strategies that can overcome widely disparate initial negotiating positions laden with heavy emotional elements.

Potential trial dynamics

A mediator can be helpful particularly in evaluating the case beyond just the raw facts involved. After reading the mediation briefs, listening to the attorney's presentations, asking pertinent questions, discussing the case with each side, observing the parties during the mediation process, evaluating who is more credible and who is more likable, analyzing the potential trial dynamics and how the case and each side appears to sell, the mediator is in a unique position to evaluate the case and provide guidance to the parties to assist them to arrive at a successful negotiated settlement.

Illustratively, in one such case the plaintiff was such a dear, sweet elderly lady that the mediator urged the defendant to consider how well she would be received by the jury and to increase the offer substantially. With those remarks, the case finally settled. To demonstrate that it was the right decision, at the conclusion of the case, this lovely lady

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demurely inquired of the mediator if she had been the most difficult client he ever had to deal with!

Drafting the settlement agreement and release

It seems likely that in most cases, once the basic terms have been agreed upon, that drafting the closing papers is relatively straightforward; however, that is not always the case and a number of potential issues can arise.

Cases involving ultimate approval by a governing board or governmental entity; matters regarding the terms and timing of payment; enforcement provisions if there is a failure of compliance; confidentiality and publicity; resolution of liens; minor's or incompetent's court approval; possible structured settlements, re-employment and modifications or agreement not to seek return to work; pensions and back payment of salary issues; promotions; transfer of title; return of stock; the existence of other similar or related pending cases; etc. These matters are covered in a series of articles available on my web site: http:// www.engagemediation.com: "Drafting the Memorandum of Understanding"; "Preparation of the Settlement Agreement," and "The Settlement Release."

Confidentiality

As we have seen during the recent political battles, sometimes confidentiality is the whole purpose of the mediation settlement. Also, there are business and divorce disputes and cases involving professionals in which all parties might desire confidentiality. Likewise, there are somewhat more routine cases, such as relatively minor automobile accidents, in which the insurer or the attorneys may not care about disclosure.

However, not infrequently, once a case is resolved at mediation, further negotiations take place regarding the terms of the settlement release and payment. In many such matters defendants who have repetitive litigation almost invariably will insist upon confidentiality. Plaintiff lawyers who have secured a

substantial result look forward to publicizing the results. This is particularly true where other cases might follow. Defendants often want to "cover up" the matter and thus confidentiality can be a material matter to be addressed at mediation.

In an opinion piece in the February 2018 Advocate, former CAALA president Larry Booth called such agreements, "The despicable confidential settlement agreement" and highlighted the dilemma attorneys faced between the duty to the client and the obligation to the cause of civil justice. In products liability, sexual misconduct, insurance bad faith and a host of other cases, a defendant may be paying a substantial amount to hide the facts of the underlying wrongful conduct. However, with limited exceptions, such agreements are not prohibited.

Can the plaintiff ever benefit from confidentiality? Not all cases have such major public issues. One of the strongest arguments in favor of secretiveness is that it provides the plaintiff with an excuse not to share the outcome of the mediation with well-meaning friends and relatives, who generally will claim that the amount paid was not enough. More significantly, it provides a buffer to avoid lending money to hangers-on. Indeed, successful plaintiffs who recover substantial money are not infrequently prevailed upon and find it difficult not to give away or lend substantial amounts to those who accost them. Thus, a non-disclosure provision in the release documents can protect plaintiff's receipt of funds, as well.

Structured settlements and timed payments

Sometimes defendants can only make a deal by making payments over time. Their attorneys should have that information available as part of the mediation process.

Some years ago, it was fashionable to have a representative from an annuity company attend significant mediations to plan structured settlements that looked attractive to plaintiffs but saved money for defendants. Today, structured settlements have lost some of their cache due to prevailing low long-term interest rates. Moreover, investors were buying up annuities for substantially discounted upfront cash payments which undermined the effort to protect plaintiffs from losing the benefit of long-term structures. However, long-term payouts might still be a consideration along with protective trusts for persons who otherwise would not be able to manage their money.

Beware the lien

Medicare and other lien claimants' obligations can impact the settlement. Thus, the parties should have this information along with all other damages issues available at the time of mediation.

Trust your mediator

Keep in mind that an attentive mediator is constantly observing and evaluating the lawyers, parties and representatives, the potential trial dynamics, and thinking through the case so as to assist the parties in reaching a reasonable

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settlement. As an objective and neutral party, the mediator can provide useful guidance. Parties can benefit substantially from relying upon the background, experience and skills of the mediator to bring about a successful conclusion to their case.

Even when it appears that the parties have not been able to reach agreement, dedicated mediators still follow up in an effort to bring about a settlement. Techniques utilized might include subsequent oral discussions or written recommendations; or a second mediation session.

Circumstances may change and impact the parties. Further discovery; new evidence; additional rulings by the court on preliminary matters; changes in case law or statutes or party's economic status; client's rethinking of the economics and benefits of certainty and even the mere passage of time or cooling of emotions may result in reconsideration by one or both parties and bring about resolution.

When plaintiffs refuse to settle, it's most often the wrong decision

In his book, Beyond Right and Wrong, Randall Kiser sets forth a statistical analysis of cases that did not settle at mediation but proceeded to trial. According to his analysis, plaintiffs made decision errors in proceeding to trial rather than reaching a settlement in about 60 percent of the cases – that is, they recovered less than their last demand. The cost of this decision error is that the average difference between what the plaintiff received at trial and the amount that the plaintiff could have received by way of settlement is listed as $73,400.

By comparison, the defendant's decision error rate was only about 25 percent; thus, the defendants are much more likely to secure a result that is less than the last offer. However, that is not the whole story. The studies showed that when the defendant has misjudged the likely outcome, the average cost of the defendant's decision error was far greater, averaging $1,403,654.

This analysis certainly suggests that, most of the time, all parties benefit from a mediated result.

Sanford Gage is a former President of CAOC; former President of CAALA; Trial Lawyer of the Year (CAALA); co-author of the book: "Insurance Bad Faith" (Matthew Bender); was a founder of Advocate magazine; graduated from UCLA and UCLA School of Law; Law Review; Adjunct Professor Trial Practice – Pepperdine School of Law; member of ABOTA; wrote the Ethical Guidelines: "Code of Professionalism" for CAOC; participated in over 40 appellate cases; has authored more than 200 legal articles and has an extensive mediation practice.