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ADR SERVICES, INC.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2019 Issue

Mediating high-value personal-injury cases

WHEN EXCHANGING DEMANDS AND OFFERS, KEEP GOLDILOCKS IN MIND

There is no doubt that preparing for, and presenting, a personal-injury case to a jury requires a significant investment of time and resources, a degree of resolve towards a desired outcome despite the risks involved, and many hours of preparation and strategizing about the optimal way to "present" the case. This is done with the intent of easily, quickly and authentically creating a bond or a connection between the jury on the one hand, and your case/client on the other hand.

Trial attorneys work constantly to create effective ways to invite the jury to adopt a particular reaction, feeling, or frame of mind towards the case, whether it be empathy, sympathy, compassion, trust, reasonableness, justice, anger, disappointment, distrust, etc. This is especially true in high-value cases wherein past and future general damages, and oftentimes the parties' credibility, are anticipated to play a pivotal role in the jury's valuation.

Counsel ideally should use the same strategies and techniques at the mediation of a high-value case that they would otherwise use at trial so that a bond or a connection is easily, quickly and authentically created between the mediator and your case/client. Just as counsel wants the jury to "get it," in mediating high value cases involving potentially high general damages, counsel should also be prepared to provide the necessary information and tools so that the mediator "gets it" as well.

How big is a cloud?

Clouds can be described from afar as being big or small, dark or light, heavenly or ominous, etc. In describing a cloud, one can only rely on perceptions, personal and collective experiences, a vernacular or terms of art, all of which are wholly subjective. That is, the same cloud may appear as big to one person and small to another, or alternatively, a cloud may appear as dark or light to the same person depending on his/her perspective, mood, or point-of-view at any given time. Needless to say, no one can weigh a cloud, or otherwise objectively measure its dimensions or brightness with absolute accuracy. Any attempt to describe, measure or "value" the cloud will be, at best, an educated "guesstimate" based on many assumptions and with an inevitable degree of error.

Similarly, trying to accurately predict or calculate the value of a high-exposure case, including the jury's potential award of general damages, can present counsel with the same array of challenges and potential inaccuracies, making the entire exercise far from fruitful. That is, valuation of a case, and more specifically predicting the jury's valuation of general damages, is subject to the jury's different and oftentimes non-harmonious perceptions, interpretations, values, personalities and/or latent biases. Even after effective voir dire, a persuasive opening statement, compelling cross-examinations, and even an Oscar-worthy closing argument, accurately predicting what the jury will do in terms of valuation of damages is very difficult because it's still subject to the jury's subjective evaluation and interpretation of the evidence, the parties, the experts, etc.

If we accept the challenges associated with trying to accurately predict the verdict-value of a case or a jury's award of general damages, and to the extent that a mediation is often the last formal yet voluntary opportunity to monetize a case before trial, then the importance of *how* a high-value case is presented at a mediation should be a major strategic decision and consideration for counsel on both sides of the Bar.

The balance of this article will focus on factors to be considered in preparation for a mediation involving six-, seven- and eight-figure cases wherein general damages, both past and future, are a measurable portion of the potential value of the case.

Use demonstrative evidence

It is common to hear that "a picture is worth a thousand words," or that most people are "visual" in how they perceive, understand and process things that they have not observed firsthand. These concepts apply just as much to a mediator and the mediation process as they do to trial preparation. Unless it compromises your trial strategy, counsel should ideally have ready at the mediation any tool that will allow the mediator to quickly, yet fully, understand what the case is about, what happened, what the value drivers are, where the sticking points are, etc.

In addition to photographs and videos, you should present the mediator with: 1) a timeline of the operative facts; 2) a tabulation of the items of damages, and the amounts thereof, that you anticipate presenting to the jury; 3) a thorough analysis of similar cases, verdicts and settlements; 4) lifecare plans; 5) other visual aids such as accident reconstruction animations, "day in the life" videos, and/or surveillance footage; 6) having key witnesses and/or parties personally attend the mediation and available to the mediator; and 7) the findings of focus groups.

Mediation as a litmus test of case value

A mediation can be more than just a venue for exchanging arguments and positions, making demands and offers, and the inevitable posturing that often transpires. Depending on the track record that you have with your mediator, you can utilize the mediator and the mediation process to not only test the waters as to your valuation of the case, but also to vet the other side's presentment and analysis of the facts as well as their monetary valuation of the case. Just as the jury members are "human," i.e., they have a lifetime of experiences upon which they base their feelings, emotions, intuition, moral compass, etc., so is the mediator!

While counsel "roundtable" and focus-group their cases, and while their own experiences will guide them in navigating the core issues involved in a case including valuation, counsel should also take the mediator's "pulse" on key issues

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whether they be at the micro-level, e.g., will a piece of evidence be admitted and if so will it be persuasive, or at the macro-level, e.g., will the venue play a positive or adverse role in the outcome of the case. Doing so has no downside, other than possibly hearing something from the mediator that you don't like or agree with! The upside, however, is that you learn one more perspective about the case, which will make your analysis and evaluation of the case more well-rounded.

Storytelling and theme-building to "connect" the mediator

As already intimated herein, storytelling and theme-building can be just as useful a tool during a mediation of a high-value case as they can be during a trial in that they help connect the mediator with your client and your case. In the appropriate case, you should consider presenting a snippet of your opening statement and/or closing argument to the mediator. If doing so takes away from your trial strategy, then at the very least consider sharing with the mediator the theme or story that you anticipate presenting to the jury, e.g. misplaced trust or betrayal; being stuck between a rock and a hard place; the proverbial straw that broke the camel's back; being robbed of the prime of one's life or of one's golden years; doing one's best under the circumstances, etc. The story of your client or the story of what happened, and the theme within which said story is going to be presented can be a very impactful tool in the hands of the mediator as he/she works with the other side in evaluating the case. This is especially true in high-value general damages cases, as well as in matters wherein the story or theme in play has not been fully vetted during written discovery and/or during depositions.

Keep "Goldilocks" in mind

The term "Goldilocks Zone" is oftentimes used to describe a state wherein something is neither one extreme nor the opposite extreme, but rather some compromising state that is somewhere in the middle. While opening numbers, especially in high-value cases can be perceived as insulting or artificial whether inflated or deflated), at some stage during the mediation, "healthier" numbers are ultimately exchanged.

It would behoove counsel to consider the Goldilocks concept when exchanging demands, offers, or brackets, i.e., not too high, not too low, but just right! If done in the right way and at the right time, your Goldilocks demands or offers will be perceived as reasonable, especially when they do not envision a capitulation or one-sidedness. In doing so, you will not diminish the value of your case or otherwise leave money on the table.

In short, a demand or offer in a high-value case that is too high or too low, respectively, will only insult, cause parties to dig in their heels, and otherwise diminish your credibility during the negotiations with your adversary (with whom you may have future cases). Alternatively, demands and offers in the later rounds of negotiation that are neither *too* high nor *too* low will be better received, are more likely to generate generous counter offers and demands, and as a whole will significantly increase the likelihood of a settlement.

An inquiry that illuminates this issue: In choosing the amount of your next demand or offer, do you want opposing counsel to leave, or do you want to create momentum and give the impression (or hint) that a settlement is possible if *both* sides negotiate with Goldilocks-type numbers?

Resist the "I know what the case is worth" mindset during the mediation

While seasoned litigators and trial lawyers have heightened skills and intuition in reading "the tea leaves," it's fair to say that no one has a crystal ball as to whether their client will prevail, and if so, what that outcome will look like. Nevertheless, often- times during a mediation counsel will advocate *with certainty* about what they anticipate the jury will or will not do – oftentimes predicting that all known and contingent facts, evidence, testimony, etc., will likely resolve in their client's favor!

While there is nothing *per se* wrong with the foregoing approach, and while it is often a byproduct of confident and passionate advocacy, it nevertheless creates an opening for you to lose credibility with your adversary. In other words, the more you advocate that you *know with certainty* an outcome yet to be determined (such as how a jury will value a case), the greater the chance that your credibility will be questioned, especially if your predictions are artificially skewed in your favor. This is not to say that counsel should dilute or soften their positions; rather they should be cognizant that "credibility" has a fine line which neither side should cross, especially regarding their conflicting views about the jury's valuation of the case.

Similarly, at mediation counsel should resist the urge of valuing high-exposure cases based solely or predominantly on their *own* prior track record or based on some "mechanical" analysis. Instead, counsel should consider a hybrid approach that combines not only their predictions on the verdict amount, but also prior verdicts and settlements in similar cases (whether they be on cases handled by counsel or by other attorneys in other cases), as well as any other tool or piece of information, such as analysis of the venue, the jury pool and/or the judge.

Final thoughts

Successfully mediating high-value cases requires a *Midas* touch similar to the one used when presenting your case to a jury. The dialogue at the mediation of a high-value case should involve more than just a detailed review of medical records, or a recitation of deposition testimony, or jousting with case law and statutes. A more productive approach, in addition to the foregoing, is to focus the mediator's attention upon demonstrative evidence, tell the story or theme of the case, use reasonable offers and demand as a way to create negotiation momentum,

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and ultimately to use a negotiation approach that seeks an optimal outcome but that is flexible and open to the next best scenario if the ideal is not possible.

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