



Ten steps in mediating your case

MEDIATION IS NOT A ONE-SHOT EVENT LIKE A LOTTERY OR A SLOT MACHINE;
IT'S A PROCESS, JUST LIKE A TRIAL

Mediation is the most misunderstood tool in our plaintiff litigation practice. I have now been mediating cases for over thirty years. I have probably mediated over twenty-five hundred cases. As I read the listservs every day, I am surprised and troubled about how many practitioners really do not understand the process and how to make it work for them.

It seems that a lot of attorneys go into mediation as a one-shot event that they liken to the lottery or a slot machine. They do not understand that mediation is a process just like trial. One needs to devote extensive effort and skill into making the process meaningful and successful. So many times, I hear people asking what mediator out there will get them the most money, as though some mediators can just deliver dollars no matter the nature or progress of the case.

So, I thought I would share some of the tips that I have developed over the years. I can say that we probably settle 90% of our cases either at the mediation or at a mediator's proposal shortly thereafter. These tips should help the more novice practitioner navigate the process to a more successful result.

1. When should you mediate your case?

You get a new case in the office and shortly after you notify the defendant, some lawyer calls you and tells you that you should stay everything and go to mediation. This is fairly common now and so many lawyers are disappointed when they jump at this inquiry and put out substantial money only to get a nuisance value offer at the end of the day.

Basically, the mediation call comes at certain stages:

- Immediately after notice of the claim;
- after the lawsuit is filed;
- after discovery;

- after summary judgment and on the courthouse steps.

The first two stages should be treated with great suspicion. Many lawyers think that this early stage is based on the fear of the defendant. In reality, many factors may come into play, such as insurance companies putting pressure on defense counsel to limit fees; feelings that defense can intimidate your client by scaring them if they don't take the low-ball offer, etc.

There are really only three times that one should mediate at such an early stage of the claim.

First, you have a case with substantial smoking-gun evidence that can't be refuted, with a high-profile defendant and a noteworthy claim that will result in massive publicity. In those instances, you should mediate because that would be clearly in the best interest of your client. But you should set some parameters. You should make a written demand and demand a written response. You should pick your mediator or at least provide a panel to pick from. And you require the defendant to pay the majority of the fee.

Second, you have a small case with a client who you do not feel will be able to hold up in the litigation process or a plaintiff who is erratic and the type who could abandon the case during the litigation. In that instance you will want to get out with the best deal you can get, so you should just set it up and go for it.

Third, you have a defense counsel with whom you have litigated many times and who you can trust. This will not happen with beginning lawyers but after doing this for as long I have, I do have a handful of defense lawyers who will call me up, take me to lunch and then have an honest discussion about our relative positions. We then go to mediation and resolve the matter.

Other than those three instances, you need to litigate your case aggressively and not suggest mediation at the outset. If the defense approaches you about mediation, pick a date some months out. You might limit discovery such as one day for the plaintiff and one day for PMQ or other relevant witnesses. You will want to have your written discovery answered, especially to determine the nature of potential insurance coverage. I cannot stress enough that *you cannot keep pestering defense about mediation*. That will send a message to counsel that you are desperate to settle and will probably result in disappointment at the defense settlement value. With the current attitude of the trial courts, you will be able to use the court to push mediation rather than you risking it.

Also, I cannot stress enough that you have to be willing to try your case. If the defense gets the idea that you will not try your case, it will depress the value of your case. Trust me, the defense talks about us and if you are labeled with a fear of trying a case, it will be death to any negotiation. You have to try a case at least every couple of years. Of course, some lawyers are constantly in trial, and those are the ones who get the largest settlements. But even if you only try your losers and lose a lot of your cases, you will have credibility in the other room.

2. How do you set up your mediation?

Now that you are ready to set up your mediation, you have to pick your mediator and set it up. The first tip you should understand, if the defense has been the one pushing the mediation, it is important to document it. Earlier in my career,

I regularly went to a mediation pushed by defense only to have the mediator walk in with a ridiculous offer,

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saying that they are only there because I begged them to come. Then the mediator spends the first hour arguing over whose idea it was to be there in the first place. This happens for a couple of reasons. First, it may just be a disreputable game-playing defense lawyer. Second, it may be a lawyer who fears the case and is getting his reluctant defendant or adjuster to the mediation in hopes that the mediator will bear the bad news. He certainly doesn't want to admit that in front of his client. He has probably told his client that it was the plaintiff begging for mediation.

The only way to circumvent this ploy is to confirm the terms of the mediation in an email. Lay out that you are going to mediation because the defense was pushing it. That way when you are faced with this tactic, you can pull out the email and give it to the mediator and short-circuit that argument in a matter of minutes.

Next, you will have to pick a mediator. I am going to deal with mediator choices in the next section but I strongly recommend you try to let the defendant pick the mediator. We do this first to prevent the obstructive lawyer who just keeps rejecting whoever we suggest. Second, you do want the defense lawyer's input in most instances. I usually suggest that the defense give me a list of potential mediators from which to choose. If the defense counsel is being sincere, you should find a couple of names off his list that would have been on your list. At the same time, his or her list will tell you volumes of where the defense is coming from. If you get a list of total defense hacks, you know that you are going to have problems getting real value on your case.

The next consideration is who is paying for the mediation. As I said at the outset, there are times when you want to really push to have defense pay the whole fee. Other than that instance, we generally agree to pay for half of the mediation fee. From the outset we are trying to project strength in our case and our ability. I feel that begging the defendant to pay most of the fee on every

case is counterproductive. Having said that, the guys who are constantly in trial are known to make the defense pay, and because of their trial ability, they can do so without showing weakness. But if you are a newer lawyer, trying to require the defense to pay will project some desperation. Of course, there are exceptions to every rule. There are a few defense lawyers who will never offer fair value and who use the process to attempt to intimidate you and your client or use the mediation for a billing event.

(I am not going to name names in this article, but you should use your listservs to learn about the practices of your opponents and mediators. I think it is malpractice not to vet both before mediation). With those attorneys, you should demand that they pay.

As far as timing for the mediation, the farther out you can schedule the mediation, the better it will be for retaining one of the best mediators. While there are some newer mediators who are turning out to be rock stars that are available on short notice, the most seasoned successful mediators are booked out for months.

3. Who should you pick to mediate your case?

Now that you are going to set up a mediation, who are you going to use? The first thing you should do if you are going to mediate cases is to develop a short list of "go to" mediators. We have a list of about 30 mediators we will consider using, but in reality, we mediate most of our cases with about 10 mediators. Why is that? Mediation is a process. You want to be able to trust your mediator. You want to know how they think, and you want them to know how you think. You want their candid assessment of your case as well as of the attorney and defendant in the other room. We do not expect the mediator to breach confidences, but there is a lot the mediator can tell you about the atmosphere in the other room and who the decision maker appears to be. You need that information if you are going to assess the potential for value and whether settlement is possible. Also,

the mediator can share his or her prior experiences with you in the other room to get a better response from them.

There are mediators who are very adversarial and are thought to be highly successful mediators. I personally don't need a mediator to berate me about the facts of my case. I know the strengths and weaknesses, so I want it to be a comfortable process for me and my client. However, while I generally do not have client-control problems, in the event I do, I want the mediator to be willing to step up and firmly deal with my client. In that instance, I don't want a screaming, offensive mediator getting in my client's face.

If you don't have experience with many mediators, how do you develop the knowledge you need to pick a quality mediator? Use your listserv. Once you get responses, call the attorneys up and have a conversation with the listserv responder. Don't base your decision on a one-word comment. And be especially careful about the anecdotal information. Using a mediator is a very personal experience with a myriad of personalities. Sometimes a mediator's personality may not mesh with everyone's. There are a few very highly regarded mediators that I just do not work well with. I don't use them. If I do comment on them on the listserv, I will candidly tell people that.

Some listserv posters, however, have personal conflicts over a failed mediation and they may skew their responses. So, what I am telling you is make sure to get a whole picture before deciding on who to accept. Finally, never go to a mediator just because he or she got someone a lot of money recently. That may not be your case; there are a million reasons why a case settles and more than likely you will not learn all of those reasons in a listserv post.

4. What style of mediator should you use?

There are various styles of mediators with many different talents. There are many out there that just carry numbers.

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I would stay away from that type of mediator. They offer no input and just go back and forth until there is a lockup. Those mediators will sometimes do a proposal that is simply based on the midpoint, which rarely settles the case and just leaves bad feelings.

If you have insurance coverage in your case, you should pick a mediator who relates to insurance people and so will be able to talk to them in their language and understand the hierarchical impediments they may have. In that instance, the mediator may be able to cut into that hierarchy without causing hurt feelings and get to the decision maker.

If you have a case that certainly has trial potential, you should look for a mediator with strong trial experience. I especially like to use someone who was a defense trial lawyer or a very experienced judge. That mediator will have real credibility in the other room as to how the trial will play out.

Should you use a retired judge? That is a tough question. Judges who had a heavy trial calendar in complex litigation can be very helpful. However, newer judge mediators may have trouble making the transition. They are used to very short settlement conferences where they can issue orders and make demands on the parties. They will candidly tell you that they can get very frustrated by the process and give up early.

At the same time, some judges have tremendous clarity and reputations for getting cases settled. You may not spend a lot of time with those types of mediators, but you will get the deal done quickly.

5. How should you prepare for mediation?

Okay, now that you are going to mediation, how should you prepare? First, you have to decide whether you are going to give a demand before the mediation. This is probably one of the most controversial issues in mediation. I strongly believe that a demand should be made and briefs should be shared.

First, why give a demand? Many lawyers are afraid to put out an opening

demand. They are fearful that the defense may pull out of mediation. That is a reasonable fear. There are some defense attorneys who solicit a demand before they agree to mediation. And some of them will use that to refuse to mediate ostensibly because your demand is too high. Then you give a lower demand and they do the same thing; it just continually drives you down. All you can do is to stick with your original demand. What we do is to make a realistic demand that we believe we can achieve. We give it to the defense and tell them we are only doing so in return for an offer from them. In this scenario you will have to stand on your demand if you get rebuffed. We tell them we are not ever going to lower our demand in the absence of their offer.

Make a demand

Why do we almost always give a demand? Remember the defense has no idea what you are thinking on the value of your case. If you are silent on the value of your case, you are inviting two things: First, you are putting that responsibility in the hands of the defense attorney to advise his client. If he puts a value in excess of your eventual demand, he looks like a fool to his client and will not be relied upon during the negotiation. If he comes in with a much lower number out of your range, you know he is going to stick with that. What are the odds that he is going to tell his client that he seriously undervalued the case? Zero. Instead he will be an obstacle to the process and will do everything he can to scuttle the settlement. If the mediator gets beyond him and gets the client to overrule him, you now have an enemy on the next case.

Second, and probably more common is that with an unknown number on the table, the decision makers will engage in the nefarious "round table." How many of us have gotten to a mediation to find that some obscure non-identified group has had a meeting and put a number on a case. Think of the psychology of that process. Who in a round table group is going to go out on a limb and suggest a much higher number? No, what you have

is a group trying to see how low each can go. This is especially true when liability is complex and murky.

Therefore, we like to come in strong. We like to share our briefs with detailed information and with a demand that will be supported by the case. We expect that when we go to mediation, we know our case and have set a minimum value that we will take. Most of the defense lawyers we deal with understand that. They know we are invested in the case and not just hoping for a quick settlement. They can show their clients that we are experienced and will not be bluffed into a lower number. With a demand in brief a week in advance there is at least some time on the defense side to consult and evaluate your position.

6. Should you agree to a joint session?

You now arrive at the mediation and it is about to begin. The first decision your mediator may ask you to make is whether to agree to a joint session. There was a time when mediators regularly demanded that all parties sit in a room and go over the facts of the case. In fact, one well-known mediator would require that the parties talk to each other as to how they felt about the events. Let me be clear. I never allow this scenario to occur.

Thankfully, most mediators no longer push this process. But if one does, you have to hold your ground and refuse. Your client more than likely has been abused and humiliated in the workplace. The client does not need that process to continue in the mediation. You must make your client feel safe and protected in the process. That is not the way to do it.

Having said that, there may be instances where the defense counsel has never met your client. Unless your client makes a terrible appearance, it is fine to have a simple meet and greet where the mediator expresses how everyone is there to work together towards resolution. But even in that instance, get your client's buy-in before you agree.

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7. Should your client be in every decision on settlement negotiations?

I never engage my client in the negotiation process. I usually get some understanding before the process begins from the client as to a range that the client is willing to accept. As long as I don't get below that range, there is absolutely no reason to involve the client in the process. Usually you will open with a large demand, which is much higher than the value of the case. And you will probably drop faster than the defense moves up. That creates a very disturbing and stressful time for a sensitive client. You will probably get from them that they are losing money on every move. Or they will not understand why we are moving down faster than they are coming up.

Most clients are not sophisticated negotiators (if they are, you are probably in a lot of trouble). Don't involve them in the process and make sure the mediator is not coming in and giving you numbers. Make the mediator understand that numbers should only be shared with you. Tell the client before the mediation that you may have private conversations with the mediator and that it is not meant to hide the ball or double deal on them.

There are some counsel who put their client in a separate room and keep them in isolation for the entire day. I do not like that strategy. You want your client to feel like they are part of the process. A lot of clients are dubious of this process and may think this is a setup between the lawyers in advance to get the client to take a low number. If you have your client involved, that usually is not an issue.

8. What about different strategies in demands and offers?

In some instances, negotiations will break down early and parties take intractable positions. Maybe both sides don't trust each other. Maybe the defense counsel is afraid to disclose their position. In that instance, the mediator may suggest bracketing. That device means

that you agree to go to a specific number if the defense rises to a certain number. In that way you are not giving up your negotiating position unless you get the appropriate response. Just understand that the bracket has a midpoint. And even though everyone will proclaim that the midpoint shouldn't be relied upon, everyone looks at that midpoint.

In some instances, the mediator will get one of the parties to make a substantial move in return for a suggested response. That, of course, is voluntary and this process should never be used unless you have a strong and trusting relationship with the mediator.

Finally, a mediator may use the mediator's proposal. Good mediators will use the information from the day and come up with a proposal that they think will settle the case. It should not be based on what one of the parties will say. Some mediators ask the defense if they will consider a proposal at a certain number. That is a terrible way to do it. When they do that, the defense now controls the proposal number and keeps driving that number down. If the mediator tells you he or she is going to make a proposal, find out how they are going to arrive at that number. Don't do it if they are going to get a number defense will authorize.

9. You now have an agreement, but the truth is in the details

After a long, fought-out day, you have a deal. Suddenly out of nowhere the defense tells you that they have to make payments over ten years and they are going to treat 100% as wages and issue a W-2 and they are demanding confidentiality of all terms, etc.

Most mediators will tell you that you should not address these issues up front. I disagree in most instances. First, you should try to get the defense counsel to send you their proposed settlement agreement before the mediation. A large number of mediators do now push the defense to get the agreement to plaintiff's counsel in advance. At least in those instances, you will raise those issues up front if they share the agreement.

On the tax issues, there are a number of repeat-player defendants that have taxation policies that are onerous. You should know that in advance, so again, using the listserv can help you understand those policies. In some instances, you will have some defense attorney come up with an outrageous policy and tell you that the company will not bend. You may be able to show him that they have deviated from that policy in the past.

With respect to the claim of poverty, you need to address that as early as possible. Where you have defense counsel tell you that in advance, you must demand all of their financials in advance. When they refuse to give them to me, I tell counsel I will not consider their financial condition in my negotiation and we might as well cancel if they are going to assert it. You should also do your own research in advance. There are many online resources you can use to evaluate the financial viability of defendants, and you must use them.

Other issues that come up are confidentiality and no-rehire clauses. These are basically unlawful in most cases and you should refuse to allow them in the settlement agreement. At the very least, confidentiality should be mutual.

10. What if your case doesn't settle?

Your mediation locks up and doesn't settle. What do you do next? The first thing you should not do is immediately call the defense lawyer and start negotiating. You should get your mediator to follow up to see if the matter can settle. Many times, the mediator will suggest certain acts take place and then revisit the case. All of the mediators I use are willing to engage in this follow up. There are a few that won't, and I suggest you not use them. The only time you will want to deal directly with opposing counsel is if you suspect that the mediator has not been truthful with you.

This brings me to the one thing you should never do in a mediation. Do not take a stance with the mediator that you do not intend to stand by. If you tell your

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mediator all day long that you will not take a certain number, do not call defense counsel right after the mediation and take that number. The mediator's stock in trade is his or her credibility. If they go in the defense room and repeatedly tell them you will not consider the range they are proposing and then after the mediation, you accept it, your mediator looks either like a fool or looks like he is not truly neutral. That will make him or her ineffective in any further mediations

with that defense counsel, and like us, defense lawyers talk, and if word gets out, that mediator will be damaged goods.

Conclusion

Keep in mind that your mediator is the one person who is hearing what is going on in both rooms. Respect his skills and intuition as to what is doable. If that is not satisfactory, then there is nothing wrong with walking out the door. A mediator's job is to settle cases, and most

will try to keep you there. But when they tell you to walk, respect their opinion and don't take it personally.

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