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Alexander Polsky

Let's settle this PI case!

When it comes to personal injury mediation, there are no "rules" but there are mistakes

A well-regarded plaintiff personal injury attorney asked me why he was having trouble settling cases at mediation. Although my experience in mediation is that the cases are settling, discussions with others suggest there are challenges afoot.

Prepare the other side!

Interest-based negotiation is a useful tool to achieve or maximize your client's objectives in a mediated settlement conference. The techniques employed to successfully resolve personal-injury matters are an art. It is not a science. There are no rules, but there are mistakes.

It may appear obvious, but the core of a personal-injury claim is an injured party. That party does not stand alone: loved ones and family members are generally intimately involved. The more severe the nature of the injury, or in a death case, the more significant the human factors weigh on the mediation process.

What does this mean for the practitioner?

The defense lawyer

The lawyer is juggling a basket of cases as well as the needs and interests of multiple clients, coupled with the policies of multiple insurers or corporate representatives. It is all too easy to categorize the case: "This is a leg off case," "This is a high comparative case," etc. This categorization is a byproduct of an unemotional case analysis process necessary to separate the lawyer or corporate counsel from the painful nature of the case. The case, as a case, involves a human tragedy. The settlement process may represent the only opportunity the injured party or family will have, short of trial, to communicate their sense of loss. All too often they are pushed aside while the lawyers negotiate.

The defense lawyer has the ability to address these issues without doing damage to the settlement interests of the client or insurer. Start with the brief. The settlement conference brief could be written in a sensitive manner, targeted toward the claimant as well as the lawyer. It is not a sign of weakness to acknowledge pain and suffering. It is not a sign of callous disregard to express opinions as to what a jury may do with issues like comparative negligence, speculative damages or the obligation to mitigate loss – if these concepts are written with a specific effort to reach out to the client. The sensitive and informative brief need not be full of case citations for mediation. The mediator and the other lawyer know the law. But the brief should be written and submitted early – preferably a week before the settlement event and not later than the Thursday before the week of the mediation. This ensures at least that the lawyer and client will have the opportunity to read it. It also ensures the mediator will have the opportunity to read it and perhaps make some pre-mediation calls.

The point is, if the defense treats the claimant with dignity, while pointing out the relevant issues in the case, significant movement toward settlement can be achieved.

When setting the mediation, the defense attorney should clearly indicate whether additional information is needed in order to evaluate the case. It is also helpful to confirm the persons who will be attending, and whether briefs will be exchanged (which I recommend). Surprise is never good.

The plaintiff's lawyer

This person must deal with a client who likely has real economic needs; is burdened by the factual issues of the case; and has an affirmative obligation to impress upon the defense the human factors issues, economic losses and, significantly, the risks attendant to a trial.

All too many briefs are hastily put together, submitted late, and are simply one-sided. The worst thing of all is when plaintiff counsel writes the brief for the mediator rather than for the decision-maker on the other side.

The plaintiff's brief is an opportunity to reach out to the decision-maker and demonstrate your commitment to your client and the case. You do this by: acknowledging the risks of the case; demonstrating how these risks may be overcome; linking a short dose of information via discovery documents attached to the brief; sharing snippets of your expert's analysis; and, where appropriate, providing an early submission of a day-in-the-life video or overview.

See Polsky, Next Page

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What top professionals say

Glen Barger, Partner of Chapman Glucksman, et al, and Incoming President of the Association of Southern California Defense Counsel puts it this way:

> Clearly there are strategic reasons for keeping some of your cards hidden, even up to trial, but if plaintiffs truly believe in their case, including the settlement value, and want to resolve the matter, they should provide the legitimate medical report, a bid from a licensed contractor or impeachment evidence, depending on the case, at the time of settlement discussions. This is especially important the bigger the matter and when an insurance carrier, corporation, governmental entity or some other decision-making authority is involved because there are specific procedures in place and oftentimes round-table discussions which must occur at high levels before settlement authority will be granted. Quite simply, files must be documented to support any settlement amount.

I cannot over-emphasize the importance of a well-written professional brief. The plaintiff's brief, if submitted early, represents the only time that you will have an opportunity to communicate directly to the decision-maker in an unfiltered manner. Send defense counsel the brief electronically with a request that it be forwarded to the decision-maker.

If you are dealing with an insurance carrier, as noted above, there is often a need for multiple decision-makers to weigh in, in order to set and adjust reserves, where appropriate. If you hold back and present a surprise at mediation, there will often be no vehicle available to move the case to resolution during that session. On the other hand, if you provide a well-reasoned brief with sufficient data points to adequately express the risk and couple that with a well-reasoned settlement proposal, you will get the attention of the decision makers on the other side.

Phil Baker, principal at Baker Keener Nahra advises:

> The most successful mediations really rest on preparation by both sides. For the plaintiff, turning over information early such as damage documents, accident reports, etc. quash the defense's ability to claim that a settlement is premature due to incomplete information. For the defense, issues of coverage and thorough evaluations of exposure have to be discussed before the mediation or it ends up with defendants unable and possibly unwilling to realistically discuss payment options.

Joseph Barrett, President of CAALA, strongly re-enforces the point that, as a plaintiff's attorney, it is your job to prepare the other side and give them the tools to evaluate risk and settle:

> The first step is an open discussion with defense counsel regarding what I call "risk equations" and whether they believe that given the liability dispute, negotiations would be fruitful.
>
> The second step is to put together the best and most persuasive evidence of how I would present my case-in-chief, so *they* can see my best evidence. I might get experts to provide reports or a summary to include. But I will assemble the best evidence I have in scene and liability photos, witness statements or deposition excerpts, legal analysis, CACI instructions – my *best* evidence. (Joe is not afraid to lay it out!)
>
> Finally, assuming the defense thinks a mediation would be timely and fruitful, and I have the evidence assembled, I then draft what I hope is a very persuasive brief with supporting evidence, and I also sometimes have a settlement video prepared. I ensure those materials are given to the mediator, the defense counsel, and with their permission, the carrier shot-caller who gets authority. Or I send defense counsel two sets, one for them and one for the carrier. Oh, and if possible, I get this information to the defense and mediator a month in advance whenever possible. Needs time to percolate to get authority. The more lead time, the better. If it is a short set, since I have already assembled the material, I do whatever I can to expedite delivery.
>
> It is those mediations where both sides are prepared on the real issues – policy limits, reservation issues, real damage analysis – where you can resolve the matter."

Brian Kabateck, managing partner of Kabateck Brown Kellner and past president of Consumer Attorneys of California believes strongly that plaintiff lawyers must prepare, prepare and prepare.

> That they must present the relevant information to the defense, not hold-back, and do it early.

Kabatek also believes strongly that not enough cases are being tried:

> Make sure the other side knows you try cases. Don't take their value as the value of a case. Insurers are more and more basing a value on what they settled the last batch of cases for now what the verdict potential is.

On the subject of preparation Kabateck points out that lawyers need to start talking:

> There has to be a frank discussion before setting the mediation, 'look, we are going to be in the $1.75 million range. I know it's a little high for you and I may have some room to move. If you are interested in talking or mediating let me know.' Make sure you are in the same universe.

The mediator

From the mediator point of view, both lawyers are suggesting that the

See Polsky, Next Page

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necessary information be exchanged early, and that expectations be ferreted out prior to mediation, to narrow the range.

The takeaway here is that preparation, analysis and communication are the keys to a successful settlement effort by all concerned. Without these components, the first mediation session will not be the last.

Where this is the case, the mediator should not express the following: "You are too far apart" and then send the parties home at hour three of a full-day mediation. Our job is to ascertain that which is missing, try to supply it, secure telephonic participation of decision-makers as needed, and keep the process alive. The one case I cannot settle is the one where the parties leave my office! If a second session is needed, the mediator should work with the parties to set an action plan and return date. Our job is to never, never, never give up. We owe it to the process and to the parties.

So prepare, share and communicate and let's meet on the settlement trail.

Alexander Polsky has practiced full time in ADR since 1994. He is a principal of JAMS and a Professor of Negotiation/ ADR at USC, and has received nearly every accolade in ADR and practices throughout the USA and internationally. He has mediated thousands of employment, personal injury, mass/class cases (where he has served as federal court settlement officer and allocator in MDL/MASS cases), medical malpractice, and maritime. He is considered an expert in the area of insurance coverage and regularly mediates coverage and bad-faith claims, and other insurance-related matters. www.jamsadr.com/polsky.