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Effective Mediation Strategies for Complex Cases

Saturday, May 18, 2019
Sandestin Golf & Beach Resort
Baytowne Conference Center
Destin, Florida

Hon. Charles Price
Circuit Judge (ret.)
15th Judicial Circuit
Montgomery County

Hon. John H. England, III
United States Magistrate Judge
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EFFECTIVE MEDIATION STRATEGIES FOR COMPLEX CASES

1. Gather all necessary documentation and supply it to opposing counsel.

Well in advance of the mediation, Plaintiff's counsel should provide both the mediator and opposing counsel damages documentation such as the following:

- Medical records
- Medical bills
- Hospital liens
- Medicare/Medicaid liens
- Medicare set asides
- Subrogation liens
  - Property
  - Health insurance providers
- Wage loss verification

2. Recognize that off-the-record, pre-mediation settlement discussions can lead to mass confusion.

"Surprisingly often, the attorneys will have differing recollections of the negotiation history and may need to spend some time at the mediation session sorting out what has already happened. The mediator will try to move them past their prior baggage and encourage them to make a fresh start, but a sense of the negotiation history will help the mediator minimize the "he said-she said" battle over prior proposals.

In some instances, attorneys will talk "off the record" with one another prior to mediation, with one of them sending signals about what amount "might" settle the case. In most instances these "non-offer" signals are sent without the client's authorization, and unless they are immediately greeted with acceptance by the other party, they will come back at mediation to haunt the attorney who sent them. Invariably, the attorney for the other party will insist on viewing such a signal as an actual offer, to which his or her client is prepared to respond with a counter-

proposal at mediation. The counter-party will expect the signaling party to move beyond the signaled level. This creates not only a dispute about what was actually said or intended in the conversation between the attorneys, but also a potential source of conflict between the signaling attorney and his or her client. The client may view the attorney's comments as worse than unauthorized, perhaps even a betrayal of the client's trust. This may affect the client's willingness to participate in mediation candidly. Counsel should reveal to the mediator in advance any "non-offer" signals he or she may have sent, so that the mediator may assist the parties in moving past the communications, rather than negotiating about where their negotiations are."[1]

3. Avoid confusing communications in pre-mediation negotiations.

- Make written settlement demands which are consistent with informal conversations between counsel.

- If plaintiff's outstanding settlement demands are going to be increased prior to the mediation, provide defense counsel with documentation of, or a rationale for, the increase a sufficient period of time before the mediation to allow any clients or insurers to assess the information and adjust their evaluation.

4. Ensure that the case is in a posture for settlement negotiations to be pursued meaningfully.

- Discovery completed

- Motions and responses in opposition filed

***5.* Counsel the client on the mediation process.**

- The mediator will be neutral and facilitate communications and discuss solutions

- Information conveyed in the process is confidential and cannot be used against a party

- The mediation is not a forum for vitriol, threats or ultimatums

- Mediation opening statements are not like trial opening statements

[1] Karen K. Klein, "Representing Clients In Mediation: A Twenty-Question Preparation Guide for Lawyers," NORTH DAKOTA LAW REVIEW, pp. 897-98, Vol. 844 (2008).

- The willingness to negotiate and compromise is not a sign of weakness

6. Manage client expectations by making sure the client understands:

- The strengths and weaknesses of the case
- The current litigation environment
- The litigation forum
- The economic costs of litigating to a conclusion
- The possible settlement range as well as the difficulty of achieving a settlement at the upper end of the range

7. Touch base with the mediator prior to the mediation.

- Jump start the mediation by giving the mediator an overview of the case prior to the mediation.
- The purpose isn't to acquire a tactical or strategic advantage, but rather to maximize the mediator's ability to grasp the case and assist both parties in reaching a settlement.

8. Make reasonable efforts to have someone with settlement authority present or actively engaged in the mediation process by telephone.

My standard mediation engagement letter states as follows:

"As you can appreciate, the mediation will have a better chance of success if each party's representatives include someone with full authority to negotiate and enter into a binding settlement. Accordingly, please ensure that someone with such authority is present at the mediation. My experience is that it is much more difficult for a person who is available only by telephone to get a "feel" for the flow of the mediation and adjust to the changing negotiating environment. They tend to remain fixed in their positions and, consequently, such mediations have a lower success rate. I urge you to do all you can to have present a representative with sufficient authority. If it is not possible for such a person to be present, please let me know at your earliest opportunity."

9. Governmental entities controlled by public bodies present special issues.

- They often face the twin problems of whether the representative present has any authority to bind the entity to a settlement, and how to approve a proposed settlement in the face of open meeting laws.

- The parties should understand the nature of the representative's authority (i.e., is it merely the authority to recommend a settlement) as well as the legal steps to be taken to approve and authorize a settlement (e.g., in a non-public executive session).

10. Assess all available insurance coverage.

- Determine whether insurance coverage exists, whether any coverage disputes exist, and the coverage limits.

- Any excess carriers should be put on notice in advance of the mediation and given a chance to participate.

11. Evaluate the case from a detached point of view.

- Objectively assess the case's likelihood of success, the range of outcomes, and your client's Worst and Best Alternatives to a Negotiated Agreement.

12. Prepare a reasonable estimate of the economic costs of continuing to litigate:

- Compile a list of discovery costs, expert witness fees, attorney fees, case expenses, and other expenses.

13. Know the case thoroughly.

- Preparing for mediation is similar to preparing for trial or a hearing on a major motion. The facts must be known "cold" and legal issues should be carefully vetted.

- The better mastery one has of the facts and the law, the better one can:

  - Articulate why their view of the case should prevail;

  - Evaluate both sides' strengths and weaknesses; and

  - Provide the mediator with convincing ammunition with which to disarm the opposition.

14. Decide whether you will dispense with opening statements.

- The trend is against giving opening statements as they tend to do more harm than good.

- Opening statements carry a great risk of alienating the other side, as they tend to cause the parties to throw stones and sling mud at each other.

15. Make key decisions regarding the exchange of information.

- Decide what information should be disclosed and whether any should be held back until a more opportune strategic moment.

16. Use the mediator effectively:

- As a sounding board for legal and factual positions;

- As a different set of ears to evaluate the client's story;

- As a different set of eyes to evaluate the client;

- As an objective evaluator of the case and its settlement value;

- As a referee to defuse hostile communications between the parties.

17. Consider the fact that some negotiation studies show that the party making the "first credible move" can control the pace of further negotiation and obtain a better result.

- Extreme negotiating positions, absurdly low and absurdly high numbers, and demands that an opposing party bid against them are generally unproductive.

- "Tit-for-tat" moves tend to create deadlock.

18. Consider the difference between a competitive and cooperative negotiation:

- Here is a typical competitive scenario:

  Plaintiff demands $500,000
  Defendant offers $25,000
  Plaintiff counters with $485,000
  Defendant counters with $40,000
  Plaintiff counters with $470,000
  Defendant counters with $55,000

- Under this scenario, it will be difficult to avoid frustration and a stalemate.

- Consider the following cooperative scenario involving a first credible move:

> Plaintiff demands $500,000;
> Defendant offers $25,000;
> Plaintiff counters with $475,000;
> Defendant (who wants to settle between $125,000 and $150,000) makes the first "credible" move and offers $75,000 (leaving further negotiation room);
> Plaintiff, encouraged by this move, counters to $400,000;
> Defendant Counters with $100,000;
> Plaintiff counters at $375,000;
> Defendant Counters with $115,000 (cutting down the gap from Defendant's prior counter-offer to indicate Defendant is getting close to his target amount).
> At this phase, a mediator may suggest a dramatic concession by plaintiff, for example, to $225,000[2].

19. Be willing to work through the inevitable impasse.

- Sometimes "baby steps" are needed, sometimes "giant steps" are necessary to break through and move forward.

- "Walk-outs" are rarely successful in fostering a settlement.

20. Redefine "winning."

- At trial, "winning" means getting a favorable jury verdict, sometimes on an "all-or-nothing" basis. Closure may be elusive, however. At mediation, it means getting a settlement that provides value and closure to both sides, not making the other side lose.

- The goal is to develop an opportunity for each side to resolve the case on acceptable terms. Larry Watson (of Upchurch Watson White & Max) says:

[2] This scenario is taken from Brian McDonald, "Considerations in Making Opening Demands at Mediation," Jan/Feb 2004 FORUM, ADR Services, Inc.

"[T]he client should be given a realistic definition of exactly what it means to be "successful" in mediation – what it means to prevail in the mediation process. To many participants, a successful mediation would be one that gets them settlement terms that they perceive would approximate a favorable court judgment. This concept needs immediate and forceful readjustment. "Winning" in the mediation process does not mean successfully convincing the other side to buy into a settlement agreement that would mirror a victory in court conceived without their input. "Winning" in mediation is not defined as "making the other side lose". The ultimate objective of a civil trial mediation is to put the client in a position to make a meaningful choice between continuing litigation and accepting the best settlement option available. The goal of mediation is to develop and present the best settlement option available and thus create the opportunity to accept (or reject) a viable option to the lawsuit. The "winner" in mediation, therefore, is the party who conducts themselves in such a manner that the other side is persuaded to offer up their very last and best option to litigation before any decision to accept or reject is made. The "loser" in mediation is the party who causes the termination of the process without getting the best alternative available from the other side extended."[3]

21. Avoid long delays in movement.

- Maintain an "up tempo" approach so that momentum develops and is maintained.

22. Avoid becoming unduly adversarial.

- Work cooperatively with the opposing side so that a positive and productive atmosphere is created.

23. Avoid last minute surprises and demands.

- Make sure material terms are disclosed before the "end game" comes into view.

- Do not propose unreasonable terms or last-minute demands as closure nears.

24. Avoid greed.

- A party's effort to squeeze one concession too many can backfire.

[3] Lawrence M. Watson, Jr., "Effective Advocacy in Mediation: A Planning Guide to Prepare for a Civil Trial Mediation",

25. Typical last minute surprises:

- Confidentiality Agreements with liquidated damages provisions
- Requests for installment payments
- Requests for a long delay in making a settlement payment
- Requests for unusual release provisions

26. Avoid "take it" or "leave it" proposals.

- Try to remain flexible throughout the negotiating process, yet be firm and fair.

27. Be open to "out of the box" creative thinking.

- Although most cases are resolved in a conventional manner, occasionally an opportunity for a creative resolution presents itself.

28. In cases involving multiple, separately represented defendants, navigate upfront sticky issues of proportionate responsibility.

- Which defendant will take the lead in making the first offer?
- What settlement percentage or total amount will each defendant pay?

29. Determine whether a "global" settlement is required.

- If so, determine if each plaintiff's claims can realistically be resolved.
- If they cannot all be resolved, is a pro tanto settlement a possibility?

30. In cases in which you represent multiple plaintiffs, carefully consider conflict issues.

- Does any one plaintiff object to the proposed terms?
- Must settlements amounts be equal?

31. Don't become too emotionally involved in the negotiation.

- Even though you're an advocate, the client needs objective advice at "crunch time."

- It is not about you!