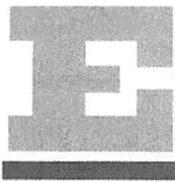


# Negotiation in Mediation



EXPERIENCED MEDIATORS CAN PROVIDE ASSISTANCE to parties who are struggling to resolve cases, especially during the preparation of settlement demands and responses in personal injury litigation.

Helping litigants fashion opening demands and offers

is the foundation for success in mediation. Indeed, initial posturing will set the tone for subsequent negotiations.

## Early Staging

Before the parties exchange any settlement numbers, the mediation process needs careful management. A pre-mediation conference call—or separate calls to each side—allows the mediator to get a feel for the dynamics of the case. Through preliminary coaching, the mediator can enable both sides to project a respectful manner.

This is particularly true for the defense: The insurance adjuster at the table probably won't have met the plaintiff before entering the mediation and may need to demonstrate that the claim has been thoughtfully reviewed.

Moreover, the mediator can ask questions of the injured party to elicit the human impact underlying the case. A good presentation by the individual plaintiff may well include new information that will alter the claims adjuster's view.

During private caucuses, the mediator can prod each side to encourage intelligent decisions. Mediators should be sure to remind the parties that they currently have control over the case—something they will certainly lose if they proceed to trial. If the mediator explains the risks and costs of contested proceedings, the parties will better understand the advantages of a negotiated settlement.

## Different Perspectives

For a plaintiff, the case is a personal matter. By contrast, it is simply business for the insurance representative—just another file in a big stack of similar looking files.

What needs to occur in mediation is an attitude adjustment on both sides. The defense must understand the personal aspect of the plaintiff's case, and the plaintiff must come to grips with the need for everyone to make an informed business decision.

When meeting with the defense, the mediator may encounter a reactionary posture. If the defendants view the plaintiff's demand as too high, they may attempt to “send a message” with an excessively low opening offer. The mediator's job is to break through this cycle.

## Beyond Posturing

Defendants often contend that the plaintiff's claimed damages must be reduced, either because they are unsupported or because the amount actually paid to medical providers is less than the amount billed.

Savvy mediators will respond by asking questions. How does the defense think the injury affected the plaintiff's life? The mediator may also ask about economic losses and general damages. What does the defense think is the appropriate amount to be awarded for pain and suffering?

The mediator also can help an

injured plaintiff realistically assess his or her case. What will be the burden of an actual trial? What are the likely outcomes, and the associated risks? It's important to explain that shooting for the moon does not guarantee a big verdict. The key for both sides is to carefully parse the evidence and make settlement demands based upon it.

This type of approach helps avert a reactionary response, and may prompt the parties to think more creatively—and wisely—about a fair resolution.

## Shifting Strategies

Parties must sometimes adapt their negotiation strategy as the case unfolds. For example, it may be helpful to suggest early on that one side make a bigger move in order to keep the other side engaged.

A nimble negotiator will guide parties to reset the numbers according to how the other side acts (and reacts).

## Keep It Open

It is counterproductive for the mediator to express an opinion about the merits or damages of the case. When that happens, the parties and their counsel tend to tune out the message and—even worse—lose trust in the mediator. A neutral who asks open-ended questions gets much better results.

Of course, there is a time for “reality testing.” However, before a mediator can ask the hard questions, he or she must gain the parties' trust. Then explaining practicalities (as opposed to saying one side is right or wrong) may actually win even more trust—and greatly increase the odds of success. ☪

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