MAXIMIZING MEDIATION

Strategic Preparation Tips to Ensure Effective Negotiations

By Cayce E. Lynch and Kelly Hopper Moore

Rising legal costs and an aversion to interminable jury trials have fueled the popularity of mediation, which is often a cost-effective, efficient way to resolve claims. A carefully orchestrated mediation increases the likelihood of successfully resolving a matter, whether at the mediation itself or through post-mediation efforts. By taking a thoughtful and meaningful approach to mediation and implementing simple tactics throughout, parties may be able to quickly achieve a fair and reasonable settlement. Here are some strategic tips to help ensure that you are prepared to effectively negotiate on behalf of a client.

Start early! Many cases can be settled early on. Early mediation may result in the best outcome since often there is enough information gleaned during the claims-handling process to evaluate and negotiate resolution. Engaging in early settlement dialogue can also preclude parties from becoming intransigent in their respective positions, increasing the likelihood of later resolution if early mediation fails.

If early mediation does not resolve the matter, the process can still help with fact-finding that frames a targeted defense plan. For instance, discovery can be specified and efficient based on positions taken and information learned during negotiations. It can also clarify causes of disparate positions, allowing for the development of an overall strategy to break down those barriers. Finally, you will gain clarity as to how the parties will present at trial

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Strategic timing before trial. If the parties choose not to engage in early alternative dispute resolution (ADR), the strategic timing of mediation later in litigation is critical. From a trial firm's perspective, the best time to go to mediation is at least 90 days before trial. At this point in the case, the parties should know everything needed to have a meaningful settlement discussion. Past this point in the case, costs for both sides increase to prepare for trial, which may later discourage settlement motivations.

Apply leverage. Set mediation to strategically position the case for an optimal settlement. Dispositive or impactful motions may be pending to encourage both sides to acknowledge the risk in proceeding with the case. As an example, mediation often occurs during the pendency of a motion for summary judgment. Motions also provide the mediator with a point of reference if there are client-control or comprehension issues. Propounding strategic discovery requests prior to mediation can also assist.

Do your homework. Preparation is the key to successful mediation for all parties involved. Mediation is a waste of resources if you have not done your research, including understanding related legal issues. Understand all of the facts of the case, as well as the timeline, liability, and causation arguments. Know your numbers going into mediation, including defense economic damage numbers, recent similar jury verdicts, defense liability analysis, and the defense's potential exposure at trial.

Use concrete evidence to ground and justify defense offers. For example, rooting settlement offers based on property damage, loss of earnings, and medical expenses the defense believes may be related to the accident—reduced by any comparative fault—may go a long way to securing a reasonable final settlement figure.

Consider a joint session. To make the most out of mediation, ask for a joint session. While the use of joint sessions varies across the country and seems to be declining, particularly in Southern California, embracing one of the few opportunities to speak directly to a plaintiff may help the defense leverage a settlement.

Most important for joint sessions is that defense counsel should show good will. Anything expressed in joint session must come from a place of compassion and understanding. The defense should highlight the points of the case that may be credible by stating something like "I understand this tragic event has happened. We are here today in good faith to hopefully resolve this matter so we can all move forward. If we are not able to settle today, we will have to proceed with trial preparation."

Defense counsel can also highlight the strengths of the defense for the case, the defense's trial record, familiarity with the judge, and anything favorable about the jury pool to show confidence in the defense's ability to secure a positive outcome at trial. Accepting some responsibility on your side increases credibility with a plaintiff, who will then need to make some concessions to maintain a reasonable position.

Expect and prepare for a competitive negotiation. Meet the other side halfway if they are smart enough to make the leap, and put out a final offer that represents a reasonable value of the matter and would cut off future defense costs. If the plaintiff or claimant is too short-sighted to accept, then you can feel confident you made your best efforts to resolve the matter for the right price.

The bottom line is that mediation offers a great opportunity for both sides to hear their strengths and weaknesses, but it is not useful if neither side has any expectation or intention of settling the case.

As defense attorneys and claims professionals, our natural instinct is to battle with claimants and plaintiffs at every turn. This is not only exhausting, but also counterproductive during mediation, so adopt an attitude of success. Be patient. Give up where it is reasonable to do so, and dig in where you get the most benefit. When analyzing and negotiating the plaintiff's damages claim, acknowledge if a plaintiff was injured and should be compensated. Again, this will give you credibility, which is key. Give up on the past to get what you want in the future. ■