Some Thoughts on Defense Preparation for Mediation
For Insurance Claim Professionals and their Attorneys

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It's Mediation Day. In many cases, this is the biggest event in your case. The internet and the legal literature are brimming with articles and lists of things necessary to prepare for a successful mediation. In preparing my remarks for today's talk I was never in short supply of articles containing ten, twelve, or even twenty tips to prepare for mediation. While adjurations concerning last days or hours preparations for what you are going to do just before or during mediations are helpful, they are not necessarily the things most likely to help you to resolve your case. The things which are most likely to lead to a successful mediation are things which cannot be done in the final days or weeks before you sit down at the table. If these things are not important throughout your case, then your chances of success in settling at a one-day mediation are greatly decreased. Let's talk about the things you need to consider whenever a claim arises.

Select the Proper Attorney for Your Insured and for Your Case.

We will talk today at some length about selecting the proper mediator. Perhaps that is the single most important aspect of successful mediation. But for you in the insurance industry, I would suggest that step one, and maybe just as important, is that you select the correct attorney to handle your case from the beginning and that you make your companies' preferences regarding case management known to him/her right away.

During my career, I have received case assignments from insurers who take many different approaches regarding selection of their defense attorneys. I have worked for many (in the past) who value above all other traits in their attorneys, what they call the "aggressiveness." If your plan is never to settle cases, that is, if your company believes that the evaluation of a case by your claims professionals is sacrosanct, that you will never change your view of the case, and that you will fight to the end, then go for the scorched earth lawyer.

If, on the other hand, you are open to the possibility that you are paying a lawyer, after all, for advice and not just meanness, if you from time to time encounter cases that are going to need to be settled, and if you place value on the relationship that your lawyer will need to have with your insured, then I would suggest that you consider hiring a lawyer for your insured who has sufficient experience in the community where the litigation is filed to be known to the other side's lawyer, whose reputation for honesty, reasonableness, and professionalism precedes him or her, and who is both as an effective advocate and a thoughtful lawyer. As important as any quality for a lawyer, is patience. There is a time and place for "pushing back" against an opponent, but that time is when the seasoned attorney knows that push back will help your case, rather than create pointless side issues in the litigation.

In a mediation or in any negotiation, what you want is a lawyer who is firm and confident, but not combative, a lawyer with enough experience that, when he tells the opposing counsel the weaknesses of his case, he will be taken seriously. Your lawyer very much needs to be one who is known to try cases, is known to have tried them against good plaintiff's attorneys, and to have been successful.

Pick the Right Time to Mediate.

Among the observations I read in preparing this paper was this one: "In a perfect world parties would agree to mediate as soon as possible after their disputes arose. In the real world they are often inclined to do the opposite and wait until the eve of trial."

I beg to differ. I strongly disagree with the first observation and more mildly with the second one. The statement that early mediation is always desirable in every case, is misleading. There are at least three different stages within the concept of "early mediation." The first stage, "as soon as possible after their disputes arose," suggests mediating with little investigation into the claim or your insured. The last of these three stages, the period just after suit is filed and issues are joined, is only indicated, if then, when the defense knows that its case is dead on arrival and he has not been able to establish a dialogue with plaintiff's counsel before filing. If that is the case, then you should have mediated before suit was ever filed. The "just right" time for pre-litigation mediation is a little before suit is filed. If you, as the representative of the insured are aware of who the lawyer for the plaintiff is, what his/her expectations might be, have a level of comfort that you understand the value of the case in your venue, and your company does not tie your hands with strict negotiation guidelines and authority, then go for it.

For whatever reason, the act of filing the complaint is akin to "crossing the Rubicon," or the opening kickoff in a football game. It carries with it the sense of commitment to action from the other side which is likely to lower rather than raise the possibility of settlement. A proposal to mediate before suit is filed, on the other hand, has the ring of good faith and reasonableness to it. An offer to mediate upon receipt of a complaint, has the hollow ring of weakness and likely capitulation.

Once a case is underway, assuming that there are good faith defenses that bear exposing and developing support for, one is well-advised to proceed with and use the process of discovery to probe into the case details. When the litigation is young and green, it is extraordinarily "green" in the eyes of plaintiff and plaintiff attorney. This is the time to let the litigation mature, to show that this is "just another case" that you aren't scared of. This is the time to allow the early ardor surrounding the case to cool. In this period, whatever you may think from an in-house standpoint, time is working for you, not against you. The plaintiff's lawyer has fallen in love with his latest case. This case puts on more weight every day and the plaintiff is no longer buying everything that his lawyer is selling. There is great line in the movie, Annie Hall, "Love Fades." Let it play out.

In this writer's view, probably the very best time to discuss settlement via mediation or otherwise, is at or near the end of discovery. The long desert of depositions, document reviews, and other drudgery has been crossed. The mountain of trial preparation looms ahead. Everyone should know what the reasonable value of the case is by this point but no one has really faced up to the time and cost necessary to prepare for and try this case.

While some say that opponents can be beaten down on the eve of trial when uncertainty of trial outcome is at its highest, don't forget, that's a two-way street. You may just as easily be beaten down by the "flighty expert," the abusive judge, or the trembling insured client as the opposing side is. This is why I think the better time to negotiate "fairly" is the point at which the combination of case-fatigue, client anxiety, uncertainty of outcome, and remaining workload are at their combined peak.

Choose the right mediator.

This is absolutely, positively, the most important thing that predicts the success of the mediation. Do not settle for less than the very best person that you know. If there are no time restraints, wait for him or her.

The world is full of burned out lawyers who think that mediating is a way to stop having to work hard or work under stress. There is nothing easy about being a good mediator and it can be very stressful. A good mediator must have a very high energy level, an inordinate amount of patience, and an even temperament. The burn-out lawyers do not last long as mediators, but there are two more to replace every one that gives up. There are also "burned out mediators." If you want someone to tell you that he/she knows more about the value of a case than you do and tell you exactly what you ought to pay and the other guy ought to take, pick one of these. If you are going to pick a retired judge, pick one who had a meaningful private practice career. Remember, in this day and age, judges come from all walks. Many are former prosecutors, government lawyers, and politicians. Once these folks are on the bench, they may eventually learn about which cases are won or lost, but you should remember that in all likelihood, you, your lawyer, and your opponent probably have a lot more experience in evaluating what a case is really worth for settlement purposes than someone who was a prosecutor for 20 years and now spends ¾ of his/her time trying criminal matters.

Style.

Mediators have their own styles. I have heard it said that there are two kinds of mediators: facilitators and evaluators. In theory, facilitators are those who promote communication between the parties in order to help them reach a mutually acceptable resolution. The pure facilitator will supposedly refrain from expressing any opinion on the merits or value of the case. The evaluators do express their opinions on what a case is worth in light of the merits of positions.

Obviously, the most effective mediators use an approach that draws upon both styles as the needs of the case require. The pure facilitator quickly becomes known as what lawyers call a "note passer," and adds very little to the process. The pure evaluator is often a burned out mediator, who no longer has the patience to put up with the process and becomes disdainful of the lawyers on one or both sides in his case.

As indicated, a good mediator is both. The effective mediator starts as more of a facilitator, but works with the goal of building the confidence of the participants that he or she is "on their side"

and wants to help. Gradually, this chimera morphs into an evaluator of sorts. When the parties are within shouting distance, he can then risk telling them what the right number is in his mind. He gauges the push back, facilitates, remains patient, is creative, and perseveres.

Familiarity with Parties and Subject Matter.

In my own mind, the primary positive from knowing your mediator is that you have a body of work to judge his/her effectiveness. I think that if one side has familiarity with the mediator, it is probably best that both sides know the mediator. This will tamp down the tendency to think that the mediator is "on his friend's side." In the end, however, an effective mediator has the traits that should make both sides like and respect him/her. Many litigators believe that the best mediator to use is the one that the other side knows and wants since the mediation is more likely to succeed if the adversary trusts the mediator.

Subject matter expertise and familiarity is very important and key to the mediator's developing the parties' and lawyers' confidence as he moves from facilitator to evaluator. As someone who has defended medical malpractice cases in Georgia for 30 plus years, I estimate that 75% of mediations in malpractice cases in the metro Atlanta area handled by five or six mediators. One particular individual handles at least half of the 75% shared by the main group. That person was a defense lawyer for 15 years and a plaintiff lawyer for a similar time. He is uniformly personable, very energetic and optimistic, and unstinting in his praise of lawyers to the plaintiffs. Most importantly, he knows a lot of medicine, he knows how hard it is for plaintiffs to win malpractice cases, and he knows how big risk defense lawyers face of a runaway verdict.

There are, I am sure, many more fields where litigation is frequent and in which subject matter expertise can shorten the process of mediation and give the parties greater confidence that their negotiations are being led by someone with an appropriate frame of reference and appreciation of the pitfalls of the trial process peculiar to their type of case. These would include any sort of professional liability case (especially those with technical issues, e.g., engineering, accounting, etc.), construction disputes, product liability, complicated business relations, intellectual property, and more.

Preparedness for the mediation.

I read over and over admonitions from mediators, that, just as in trial work, preparation is the key to successful mediation. Here is a statement I found on a mediator's website: "It is essential that you bring with you all of the ammunition that you can muster in order to persuade the other side."

I respond with a mild "Balderdash." I may be in the minority among lawyers, but I find that huge amounts of time are wasted in mediations as lawyers fumble through Power Point presentations, point at presentation boards, and give prepared speeches. Is there really anyone who thinks it is a good idea to start a mediation at 10:00 A.M, waste an hour with preliminaries, listen to the mediator talk about what a superior talent he is, and then have the plaintiffs' attorney launch into a presentation that lasts into and sometimes through the lunch hour? I have a notion that very few mediations which effectively commence at 1:00 P.M. or later, succeed. While I am thinking about it, unless there is some real reason to start as late as 10:00, insist upon a 9:00 A.M. kickoff.

I understand that the mediator's statement is primarily addressed to the parties, and primarily the plaintiff (in a personal injury case). It need not exceed 5-10 minutes. I also understand that plaintiff's expect to hear their lawyers "speak for them." One would think at times that plaintiffs become so excited by their lawyer's presentations that they must not give the defense lawyers credit for having read the complaint or worked on their case. So, that presentation is psychologically important for the plaintiff and it can be equally important for the defendant to hear the case as it will be presented in court. But, enough is enough. Have a little respect for your adversary and the mediator and those who are paying the bill. Twenty minutes is more than enough.

On behalf of a defendant, I rarely speak for more than five minutes, or ten in a special case. I do not want the lights off for a Power Point. I want the other side to see me and I want to make eye contact. I want to accomplish three things. I want the plaintiff to see my client and me as human beings who have appropriate empathy for their problems. If I cannot make them like my client, I want to try at least to make them like me. Secondly, I want them to understand that we are at the table in good faith and with every intention of resolving the case before the sun goes down (that's another reason to start at 9:00, not 10:00 A.M.). Finally, I want to tell the plaintiff as quietly as I can that the defense has strong arguments and positions in the case, that my client is a respected professional, who trained for many years to do exactly the sort of thing he was attempting to do for you, and that we will put up real experts who we asked to just the case neutrally.

Patience.

I have been involved in many mediations, as an attorney, which required long hours, more than one session, or extensive follow up work on the telephone. This is why I will never be, could never be a mediator. The mediators say, "You must resist the temptation to rush the process." Mediators love to think of the process as a sort of alchemy.

I suppose that I agree, but for a couple of different reasons. Mediators may present a façade of sublime reserve and serenity. I have a theory that many of them are, on the inside, a seething cauldron of frustration. It will never work to your advantage to show your own agitation to the mediator. If you are done, out of money, or out of patience, then thank one and all, and politely let everyone that you must walk away while inviting the other side to continue in the future.

A second reason to allow the process to play out is this, you are going to have to convince the mediator early on that you are willing to try your case and you may even have to appear unreasonable to a point. Why? Because mediators are human, like a liquid, they will follow the path of least resistance. When I was a younger lawyer, I thought that one could prosper in mediation by being reasonable. What I discovered was that if I went to a mediation with a co-defendant it was poison to be more generous than my co-defendant. Why? Because many mediators, even some with pretty good reputations, do not value reasonable behavior on its face, they see it as weakness. If you put up more money than another defendant you believe has a similar share of liability to that of your client, then it is you who will be bullied and talked down to by the mediator.

I find that the longer I practice, the more I encounter attorneys who come to mediation only to try and find out what the other parties are willing to pay or accept. These folks would rather die than make the first meaningful move toward settlement. These are the same lawyers who have the four our Power Points. Whenever I am tempted to leave a mediation at lunch time rather than accept the pummeling I think is getting me nowhere, I remember the "Rumble in the Jungle," when Muhammad Ali fought the young chiseled Adonis, George Foreman, in Kinshasa, Zaire, in 1974. No one gave Ali a chance. When the fight started, Ali danced. When Foreman pinned him on the ropes, Ali, put his gloves over his face to protect it and drew in his elbows to protect himself from body blows. Ali would lean so far back on the ropes that it seemed at times that he might fall out of the ring altogether. Still Foreman stood and swung, reaching out at the distant target with all of his might. As the fight wore on, Foreman grew more and more tired, his punches less and less powerful. No longer in fear of Foreman's power, when the bell rang for the 8th round, Ali came out threw a 5 punch combination, and knocked Foreman out. The strategy was the "rope a dope," i.e., lean on the ropes and let the dope, Foreman, exhaust himself punching Ali's hands and forearms.

Patience is a virtue. I know because my grandmother said so, but it can be soooooo hard to be patient. Sometimes, you just have to be patient, you have to be willing to take the other side's blows, to have the mediator lecture you, and wait for things to run their course. You'll probably get home by 9:00 P.M., and you might even have settled a case you didn't think you could.