**A MASTER CLASS IN MEDIATION**
**Mediation Tips and Strategies for the Defense**

Mediation is a widely utilized method of dispute resolution where Plaintiffs, Defendants, and a third-party impartial mediator can engage in a meaningful exchange of thoughts regarding a case to ultimately come to a mutually beneficial settlement. Mediation is a beneficial form of dispute resolution in that it allows parties to speak freely about the case at hand, focus on the case at the same time, control mutually beneficial financial outcomes of the case, and resolve matters quickly and at a lower cost than proceeding to trial. The mediation process involves opening statements by the disputants, joint discussions between the disputants, private caucuses between each party and the mediator, and closure. However beneficial this mediation process might be, it does leave open a question for the defense about what is happening in the Plaintiff's room during their private caucus time. This paper will discuss various aspects of the mediation process, examine these aspects from the Plaintiff's point of view, and analyze how defense attorneys can best use this understanding to obtain favorable outcomes for their clients in mediation.

## I. TIMING OF MEDIATION

There are many windows of opportunity during which parties can explore the possibility of mediation, ranging from when the dispute arises, to after discovery, all the way up until trial. Most often, mediation takes place after the exchange of written discovery and the deposition of the Plaintiff. However, given the variety of times that mediation can take place, it is important to consider if and how the Plaintiff's tactics vary based on when the case is being mediated.

### *A. Pre-Suit Mediation*

The earlier in the claims/litigation process that a case is, the easier it is to negotiate better settlements with the Plaintiff, making pre-suit mediation an attractive option for defense counsel. Plaintiffs can be more likely to settle for less money early on for several reasons. First, offering to settle early puts pressure on Plaintiff's attorneys to settle, as if they recommend settlement, they are essentially assuring their client that they can increase their net recovery, without the expenses incurred during further prosecution of the case. Additionally, Plaintiffs themselves are more likely to accept settlements early on, as opposed to going through the emotional and practical time and energy commitment of years of discovery and litigation. However, when a Plaintiff has unrealistic expectations about a case, then going through discovery or partial discovery before mediation might be a better option.

### *B. Mediation Early in the Discovery Process*

Similarly to pre-suit mediation, Plaintiffs also tend to be inclined to pursue mediation and accept settlements early on in the discovery process. This allows them to avoid the time, expense, and emotional trauma of extending the discovery process longer than need be. Of

course, if early discovery proves extremely favorable for the Plaintiff, they will be less willing to pursue mediation and early settlement, but if it goes poorly, they will be more likely to settle. At this point, it is most important to know your case, understand the strengths and weaknesses, and anticipate how Plaintiff is most likely feeling about their case to understand how likely they are to settle.

*C. Mediation Pending Summary Judgment/Motions in Limine*

When motions are pending that could significantly impact the outcome of a case, parties tend to develop a heightened awareness of the risks involved in letting the controversy be decided by a third party rather than through mutual agreement. This can encourage mediation in and of itself. When considering this from the Plaintiff's perspective, this may push the Plaintiff to give more consideration to settlement offers that they may have declined before.

*D. Mediation on the Eve of Trial*

When mediation comes late in the process, the emphasis of the process changes. The process becomes almost solely focused on developing settlement terms that both parties will find agreeable and acceptable, and does away with dealing with other components of mediation like parties underlying emotions. This means that if a Plaintiff and/or opposing counsel has previously been irrational, over emotional, or not agreeable, this is when they are most likely to act and accept reasonable settlements. Late-stage mediations generally serve a purpose to avoid the high risks of trial, so even emotional and argumentative Plaintiffs may be willing to settle on a reasonable deal here, even if they had not been willing to previously.

## II. JOINT OPENING SESSIONS

Another key evaluation that the Defense will want to consider is whether or not an opening session will be helpful or harmful in the resolution of the case. The opening session generally serves several purposes in that it allows the mediator to explain the mediation process and establish ground rules for the mediation, permits parties to see and assess one another, enables attorneys to share their clients' positions, and allows the parties to speak directly to the opposing party's decision maker. However beneficial opening sessions may be, sometimes they are better foregone in the mediation process.

*A. When is a Joint Opening Session Helpful or Harmful?*

An opening session, per the purposes listed above, can be beneficial for both parties in that it promotes constructive discussion and transparency that lays a foundation that allows issues to be resolved more quickly. However, sometimes opening sessions may be more harmful and ought to be avoided. For example, in situations where a Plaintiff seems overly emotional or irrational in their desires, this may hinder their ability to negotiate well in a group setting. In situations such as these, it may be better to resolve to negotiate from behind closed doors in

order to minimize the likelihood of aggravating the Plaintiff. Similarly, if there is animosity between counsel and the Plaintiff's counsel seems unwilling to listen to arguments coming from the Defense, it may be wise to forego a joint opening session to avoid the wasted time of presenting arguments that will, ultimately, be ignored by the other side.

*B. Best Methods to Increase Efficacy of Joint Opening Sessions*

If you have chosen to hold a joint opening session, the following may be helpful in increasing the efficacy of the session:

- Call the opposing counsel prior to the mediation. Here you can ask the opposing counsel to explain her client's position, find out if they need any more information from you before proceeding, determine the attorney's relationship with their client, and build rapport with the opposing counsel before entering an adversarial environment.
- Call the mediator prior to the mediation. This will allow you to set the stage for the mediator and let them know of any unique facts or concerns you have about the mediation and opening session. This will allow them to better moderate the situation.
- Only use demonstrative aids in the opening session with clear purpose. Use aids that help your opponent better understand your position but without being so long in presentation as to lose the aid's desired effect.
- Think about how you can use this session to show the other side the merits of your case and convince them of your position, as this is likely the only time you have to speak directly to the opposing party.
- Address the other side, not the mediator. Again, this may be your only chance to address them, so use this to your advantage.
- Make it expressly clear that you are willing to listen thoughtfully to the other side and understand and consider their position, and ask that they do the same for you.
- If your client is credible and presents well, consider letting them speak during the opening session. This will allow the other side to see that your client would be a strength for your case at trial, and additionally, it might have a therapeutic value for the disputing clients.

## III. INITIAL ROUND

After the opening session, if one took place, parties will separate and begin private caucuses with the mediator. The mediator typically uses this initial caucus to develop a trusting relationship with the parties and to better understand the facts, law, and controversy from each party's point of view. The mediator also, generally, tries to obtain an initial offer or demand in the first round of caucuses, and tries to encourage reasonableness from the get-go. Given the individual and sequential nature of the caucuses, however, it is important to consider what is happening in the other room during the initial private caucus.

*A. The Plaintiff's Room*

Typically, the mediator starts in the Plaintiff's room unless circumstances would indicate that it makes more sense to start with the Defendant, i.e., if prior negotiations left a Plaintiff's previous offer unanswered. As mentioned before, the mediator will use this time to build trust and better understand the Plaintiff's theory of the case. The mediator may also use this as time to read the room and understand the situation in its entirety; for example, who was control of the room – Plaintiff, or counsel? Additionally, they may note whether or not the Plaintiff seems emotional about the case to the extent that it might make it difficult to engage in meaningful negotiations. If that is the case, the mediator might spend more time in the Plaintiff's room to quell these emotions before moving on to substantive negotiations. Once the initial caucus with the Plaintiff has concluded, the mediator will move on to the Defense's room. Before departure, mediators will typically give the Plaintiff's room some things to think about in their absence, for example, issues that may have come up during opening that the mediator thinks would benefit the Plaintiff and counsel to discuss further in their absence.

*B. The Defendant's Room*

The Defendant's initial caucus will, typically, be similar to that of the Plaintiff's in that the mediator has the same goals of building trust and increasing their understanding. Of course, at this point, the mediator has already heard the Plaintiff's point of view. Sometimes, this leads the Defense to treat their initial round as an essential opportunity to persuade the mediator on the merits of their case. However, mediators report that this is not the most productive use of this initial meeting. The goal of the mediation is to persuade the other side to settle, not the mediator. While, of course, it is important to explain the merits of your case, mediators are typically reluctant to too quickly embrace one side's theory. This means that your time here is better spent being candid and factual rather than overly persuasive. This will lead to the most transparent opening caucus, which will increase both the mediator's efficiency, as well as a favorable view of your party.

*C. What Information is Shared Between the Parties?*

Because mediation involves at least two parties, sometimes more if there are co-defendants, the mediator will be going between different rooms to facilitate discussions and share information. A question may then arise about what, and how much, information is the mediator sharing between rooms. Rules with respect to confidentiality vary between jurisdictions and mediators. However, mediators should never disclose anything that parties reasonably expect to be kept confidential without someone's explicit permission. In terms of during an initial round, a mediator is less likely to share a lot of information between rooms. This is because of the nature of the initial round as a method to increase trust and simply understand issues better. After this has been established, mediators begin to share more information between rooms in the following rounds.

## IV. FOLLOWING ROUNDS

The following rounds of private caucuses are where the actual settlement negotiation truly starts and finishes. These caucuses can give rise to some tricky situations involving the Plaintiff, some of which are detailed below.

*A. Delivering Difficult News*

No client likes to hear bad news about his or her case. However, frequently, during mediation, a mediator will identify the weaknesses of a party's case, such as strong legal defenses from the other side that eliminate the claim, damage defenses that significantly lower the value of the Plaintiff's case, and witness problems with the case. When this is the case, the mediator typically bears the burden of delivering this bad news. As such, when the mediator must deliver bad news to a Plaintiff, they are typically experienced in cushioning negative responses. While of course some Plaintiffs will be angry, upset, or emotional, Plaintiffs typically handle bad news better coming from a mediator, someone who serves as a neutral agent of reality, as opposed to their counsel, someone who they see as their advocate. The impact of clients who do not handle bad news well is discussed in the next section on Difficult Plaintiffs.

*B. Discussions without the Plaintiff*

Sometimes, it may be beneficial for attorneys to meet privately either with each other or with the mediator. Mediators report that this tends to be an efficient method of settling cases swiftly that seemed as though they may have been at an impasse. Taking the two attorneys and the mediator to the side can allow for some transparency in discussion about where they are in the mediation and why. Being out of the earshot of the Plaintiff can frequently lead to quicker settlements, so if things are going poorly during the mediation, consider requesting a conference without the Plaintiff present.

*C. Reconvening the Parties*

During the course of mediation, parties should consider the possibility of meeting with the opposing counsel. This is especially useful if it appears as though parties have reached a potential impasse. Consider asking the mediator if they think it would be helpful to meet with the opposing counsel, either with or without the clients. This meeting can be used to ask what is going on in the other room, to clarify either client's position, and to see if settlement is likely or possible. This can provide you with some insight as to what is happening behind closed doors and either come to a resolution more quickly, or cease mediation if it appears that a settlement cannot be reached.

*D. Dealing with Animosity Between Counsel*

Mediators report that they are frequently discouraged and disappointed by opposing attorneys who foster a great amount of animosity towards one another during the mediation process. When mediators notice this animosity, it signals to them that counsel has an unwillingness to compromise or settle. Negotiations between feuding attorneys tend to be less successful as a

result of clouded judgment. Here, the best advice is truly to treat the opposing counsel with respect and show a willingness to listen and negotiate in good faith. The importance of this cannot be overstated for defense counsel – Plaintiffs are frequently upset and feel victimized or ignored by the Defendant. If defense counsel can show sympathy and willingness to listen, agreements are often reached more quickly. If, to the best of your efforts, the animosity is still not being subdued, as a last resort, see if it may be possible to bring in one of your partners for the mediation instead.

## V. DIFFICULT PLAINTIFFS

There are a variety of types of Plaintiffs that one may encounter in the mediation process. Depending on how a Plaintiff feels and behaves, mediation strategies may need to be adjusted in order to effectively accommodate the Plaintiff. Below are several types of commonly difficult Plaintiffs and tactics for handling them.

### *A. Types of Difficult Plaintiffs*

- The Angry Plaintiff: The angry Plaintiff may be angry about the incident giving rise to the claim but without any real damages, angry about the incident and unrealistic about how litigation will unfold, or some combination thereof.
- The Emotional Plaintiff: The emotional Plaintiff may be too emotional or sad about the incident to be rational about the value of the case.
- The Know-It-All Plaintiff: The know-it-all Plaintiff somehow seems to know more than the mediator, attorneys, judges, and jurors combined.
- The Uncontrollable Plaintiff: The uncontrollable Plaintiff is one where even Plaintiff's counsel cannot gain control over a Plaintiff's expectations, or they have set the Plaintiff's expectations too high.

### *B. Tactics to Handle Difficult Plaintiffs*

The first thing to do when you know you are dealing with an emotional or difficult Plaintiff is to inform the mediator before mediation begins. The mediator's knowledge of the Plaintiff's difficulties will allow them to best prepare to handle the situation when the mediation actually occurs. It is important to note that dealing with an emotional plaintiff is primarily the job of the mediator, not the Defense, and will primarily take place behind closed doors during private caucuses. This means two things: 1) the more information you can share with the mediator, the better, as it will allow them to be as prepared as possible to deal with potential irrationalities; and 2) you must remember to be patient during the process when dealing with emotional Plaintiffs. Mediators may need to spend more time in the Plaintiff's room, since they are discussing not only the settlements at hand, but the emotions involved as well. Delays can be viewed as a good thing when dealing with difficult Plaintiffs, as it likely means a mediator is doing everything they can to quell the Plaintiff's emotions before engaging in talks of settlement.

Another tactic to consider when you are dealing with a Plaintiff who you know is emotional is to either decline a joint session or opening statement, or at the very least, be very selective in your word choice during these sessions, if they transpire. You will want to sound as non-confrontational and non-argumentative as possible in order to avoid upsetting the Plaintiff further. Also, in these sessions, consider offering a statement of sincere sympathy and condolences on the client's behalf. This can easily be done without making admissions of fault, and serves an excellent purpose of defusing anger before negotiations really get started to open the way to serious settlement discussions.

Something to note in all cases with difficult Plaintiffs is that it may be hard or impossible to settle if a Plaintiff is overly emotional or irrational about the issues at hand. In these cases, if mediation is clearly not leading towards a mutually beneficial settlement, the Defense can still garner some benefits from engaging in the mediation process. First, the Defense should still be able to leave the mediation with a better understanding of the Plaintiff's case. Discussions had in opening, as well as Plaintiff's proposed settlements, will allow the Defense to better understand what the Plaintiff's expectations are, perhaps what their theory of the case is, and how to best proceed going forward with this new information. Second, the Defense should be able to least see what the bottom line number that the Plaintiff will accept is. Even if a case cannot be settled at mediation proper because of an irrational Plaintiff, given that most cases settle, having this information will allow Defense counsel to better negotiate and strategize going forward about how to settle the case, and at what cost.

## VI. CONTROLLING THE MEDIATOR

In addition to all advice already given about how to appear favorably to the mediator, consider the following to have an overall positive impact on the mediator and increase your chances of success in the mediation:

- Know your case: Credibility and knowledge are two of the most powerful sources of success in mediation. Counsel should know the merits of the case, as well as the weaknesses, and discuss these knowledgably and openly with the client as well as the mediator. Appearing prepared makes the mediator more likely to respond to your position favorably.
- Anticipate the other side's position: Having a knowledge and understanding of the other side's finances, incentives, BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement), and PATNA (probable alternative to a negotiated agreement) will allow you to negotiate effectively and focus the mediator on issues that are going to be potential barriers to settlement.
- Send the mediator information in advance: Any information provided to the mediator prior to the mediation will give them a better understanding of the factual and legal issues, especially from your perspective. This will make the mediator more prepared to explain and argue for your client's position in the mediation.
- Be reasonable and provide evidence for all offers: If you propose wildly unreasonable offers and/or do not provide evidence for why you are offering what you are offering, the mediator is less likely to see you as taking the mediation as seriously, and, as a

result, is less likely to take you and your position seriously. Being realistic and reasonable will be attractive to the mediator and encourage them to be an effective advocate for you when they are in the Plaintiff's room.

## VII. IMPACT OF ADJUSTERS ON THE MEDIATION PROCESS

In situations where the Defendant is or involves an insurance carrier, insurance adjusters become interested parties in the mediation process. Whether attending the mediation or not, adjusters certainly can play a crucial role in the success of a mediation.

### *A. Settlement Authority*

One of the biggest problems that mediators point to in mediations involving insurance carriers is the lack of proper settlement authority. When adjusters do not attend the mediation, they are depending on counsel to come to an appropriate settlement during the mediation. However, they are also intending for counsel to negotiate a settlement within a predetermined range that they find to be acceptable and have therefore authorized. Sometimes, the mediation process does not go according to plan, or perhaps even reveals new information that changes the possible settlement amount drastically. When this is the case, counsel may not have proper authority to agree to the most reasonable settlement. In these situations, counsel will then have to spend time contacting and phoning the adjuster, sometimes multiple times, in order to get proper authority. Not only does this irritate mediators and Plaintiffs, but sometimes it jeopardizes and leads to ultimate failure of a settlement altogether. Adjusters should make sure to work with counsel closely to provide proper settlement authority prior to mediations to account for all potential circumstances.

### *B. Plaintiff Tactics*

When adjusters are involved in attending the mediation, Plaintiffs and counsel sometimes use this to their advantage. Up until this point, the Plaintiff has been but a faceless claimant to the adjuster. When faced with the Plaintiff directly, Plaintiffs and their counsel frequently seize this opportunity to speak as highly, personally, and humanely about the Plaintiff and their situation as possible so as to humanize the Plaintiff to the adjuster. Ideally, this tactic is used to garner sympathy and increase the limit of where the adjuster is willing to settle. Adjusters should be aware of this tactic and keep the concrete facts of the case at the forefront of their decision-making.

## VIII. PLAINTIFF'S ADVANTAGES AND DISADVANTAGES

When considering what is going on in the Plaintiff's room during a mediation, one important consideration to keep in mind is what inherent advantages and disadvantages a Plaintiff has in every mediation. Some of these are detailed below and ought to be kept in mind when considering strategy from the Defense's point of view.

*A. Plaintiff's Advantages*

- Defendant's Exposure: Oftentimes, the Defendant in a case will be an insurance company or a corporation. When this is the case, Plaintiffs find themselves with some negotiating leverage in mediations, since Defendants usually prefer settlement over going to trial in order to minimize any negative exposure.
- Circumstantial Advantages: Sometimes various circumstances lead to a Plaintiff's advantage in mediation. These include if the Plaintiff was severely and/or obviously injured, if the Plaintiff would appear to be a favorable witness, or if the Defendant and/or the Defendant's industry is looked upon negatively by society at large. If any of these are the case in a mediation, the Plaintiff may be able to use this to their advantage.

*B. Plaintiff's Disadvantages*

- Emotional Involvement: Plaintiffs tend to be more emotionally invested in a case than a Defendant, especially when the Defendant is a corporation or insurance company. To a company, the Plaintiff's case is just another claim, but to the Plaintiff, it is viewed as a lot more. This can impact a Plaintiff to their detriment in a mediation in several ways, for example, inefficient negotiation as a result, or clouded judgment.
- Financial Involvement: Plaintiffs are also usually more financially invested into a case than the Defendant. The Plaintiff bears the financial cost of a lawsuit until payment is rendered, whereas Defendants are not out much until the time of payment. This puts the Plaintiff at a negotiating disadvantage and makes them more likely to settle.

## IX. CONCLUSION

In sum, while mediation is frequently a cost-effective and time-saving method of resolving controversies, it is most beneficial for the Defense to understand their opposing counsel and what mediation looks like from the Plaintiff's perspective before the mediation actually begins. By evaluating the timing of the mediation, the emotions of the Plaintiff, the strategy behind choosing whether or not to engage in joint sessions and more, Defense counsel will be substantially more effective in obtaining favorable results for their clients by understanding not only their client's needs and positions, but those of the Plaintiff as well.

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