



Mediation: Managing your client's settlement expectations

How did your client get the idea about how much the case is worth?

BY BRADLEY BOSTICK

Prior to the mediation, it is important to manage your client's settlement expectations. If your client's expectations are wildly out of line with what you know is a fair settlement range, it can be dangerous not to address this before the mediation.

Ideally, this should begin as early as possible so that by the time of the mediation you and your client are in full agreement about settlement value. Yet, some attorneys are reluctant to confront unrealistic client expectations, fearing that they will jeopardize the relationship. You don't want the client to conclude that they picked the wrong attorney.

When clients have an inflated notion of the value of their case, it may help to start the discussion in a non-threatening way by asking an open-ended question about where the client's understanding of value is coming from. For example, a client may have heard about a big verdict in a similar case and believes their case is worth at least as much, if not more.

Sometimes, the client's idea of what their case is worth emanates from the intensity of their subjective experience.

You can advance the delicate process of adjusting your client's expectations before the mediation by discussing generic problems without focusing on the particular flaws with their case. This includes the dangers, costs and uncertainty of jury trials, the inherent problems with soft tissue cases (if applicable,) venue considerations and reported results in similar cases. If they are comparing their case to one that

they have read or heard about, you can usually identify a number of distinguishing factors that can help the client understand why such comparisons may not be reliable.

At a minimum, your client should be willing to keep an open mind during the mediation and listen to the other side's arguments. Sometimes it works to have them imagine that they have been selected as a juror on their own case and as a juror, they need to hear all of the evidence, good or bad. Only then can they make a fully informed decision.

The client should also understand that the demand in your brief is only a starting point for negotiation and may bear little or no relationship to what the case ultimately settles for. By the same token, the initial defense offer usually does not reflect what the other side will ultimately pay and should not be seen as an insult or taken personally.

If your client's expectations still seem out of control and you are comfortable with the mediator, getting the mediator's input can be helpful. One thing the mediator can do is tailor what they say to your client at the mediation. Most mediators start out with a softer approach when reality testing. However, if there is too much resistance, the mediator can risk being more direct in taking on irrational ideas and pointing out specific weaknesses. This takes the pressure off the attorney to be the bearer of bad news. If there has to be a fall guy, let it be the mediator.

Some mediators are selected specifically for their ability to help the unrealistic client come to terms with the real value of

their case. This may require talking through and diffusing emotional issues that are distorting case value. Distortion can occur when there are residual feelings of anger or betrayal. These can include feelings of anger at a rude driver, a discourteous store clerk, an insensitive employer, an argumentative claim representative, a hostile opposing attorney or the system in general. Often a misplaced sense of justice or the need to stand on principle impedes rational decisions. Or a client may have a misunderstanding of what a trial is likely to accomplish. Some mediators take on the role of grief counselors as they work the client through a Kubler-Ross-like process starting with denial, anger, grief and finally acceptance in order to help the client come to terms with the realities of their case.

Beyond the emotional impediments to settlement, a mediator can reinforce the inherent risks of going to trial in the client's mind. The mediator may tell the client that only they can really know what happened whereas the trial is about what they can prove based on restrictive rules of evidence. This helps them distinguish between their own experience of being wronged and injured versus the difficult challenge of getting that point across to twelve "strangers." Furthermore, the jurors are going to hear two competing versions of reality. To a jury, both versions may seem equally plausible.

Sometimes, simply asking the client how they would prove something, where the proof is manifestly lacking, will help them reflect upon and reconsider their position.



As a final caveat, it is important to explain to the client before the mediation that there is often new information presented during the mediation that can change the value of the case. New facts presented during the mediation could justify reexamining what you and the client

previously believed was a reasonable settlement range. If this happens, the client will need to be flexible in their response.

At the end of the day, if you take the time to understand and address your client's expectations, you are more likely to have a satisfied client when the case settles.

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