



# Current trends in personal-injury mediation

*Early mediation, multiple mediation sessions, absent decision makers and joint sessions vs. private sessions*

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## The early mediation

It is not uncommon for the defense in major-injury cases to propose an early mediation not long after the case is at issue but before much discovery has occurred. From the defense point of view, the early mediation has several advantages: to gain useful information to evaluate the case; to size up the plaintiff and his or her attorney; and to settle the case at a substantial discount.

If consumer attorneys are aware of these defense motivations, then there is no problem and plaintiff's counsel has three options: First, attend the mediation wanting to settle the case early at a discounted sum (usually because there are problems with the case that will only be highlighted by discovery). Second, attend the mediation with little expectation of settling now, but laying the groundwork for a settlement at an acceptable value later. Third, not attend the mediation at all.

The problem arises when plaintiff's counsel does not anticipate the potential defense motivations or lacks an effective strategy for the early mediation. To avoid attending a mediation that does not serve a useful purpose in settling the plaintiff's case, consider the following strategies and techniques:

- Gain as much information as possible from defense counsel about the defense perspective concerning the claim and the purpose of the mediation.

- Find out from defense counsel who will be attending the mediation on behalf of the insurer or the self-insured party. Find out from defense counsel whether the claim has been reviewed by management.

- Find out if the insurance representative or self-insured party representative attending the mediation has complete authority to settle or must obtain authority from someone who will not be attending the mediation.

- If liability and damages are particularly strong and there is little to fear by further discovery, communicate to defense counsel your client is prepared to litigate further in the event the parties cannot agree on a fair settlement.

- Work with mediators who do substantial pre-mediation preparation, including contacts with the attorneys, so that any misunderstandings between the parties about the purpose of the mediation can be nipped in the bud.

- If you have a particularly strong case on liability and damages and there is value to attending the mediation, do so with an open mind and a negotiating plan. Use the session as an opportunity to establish rapport and trust with the other side.

## Multiple mediation sessions

Today, it is common for significant defense concessions in major personal-injury cases to occur over the course of two or more mediation sessions. Sometimes, this needs to happen for the defense to learn enough about the facts and obtain the necessary levels of authority to settle at fair value. Other times, the defense may be

looking for weaknesses and opportunities to settle the claim for less.

Consumer attorneys can make strategic choices about whether to permit this or not. In some instances, particularly where liability and damages are particularly strong, plaintiff's counsel may decide to not go through this exercise. That communicates strength, but it also forestalls fruitful settlement dialogue. In other instances, plaintiff's counsel may decide to approach multiple sessions as a necessary means of achieving the best settlement possible. This may take patience and discipline, but the results may justify more than one session. The choice is ultimately a strategic one: what is the most effective way of maximizing a recovery for the client, attending multiple mediation sessions or not?

## Presence of decision makers

For years, insurers in minor- to moderate-value personal-injury cases often have sent to the mediation either a claims adjuster or a third-party claims administrator with limited authority. That practice continues today.

Historically, that same practice did not occur in major cases. Not any more. Recently, mediators and consumer attorneys have experienced absent decision makers in major cases, particularly those involving multiple layers of insurance coverage. This complicates and delays settlement discussions at the mediation. That effect can be an intended tactic: a settlement negotiation that must pass through layers of authority being released in slow increments by absent decision makers



beyond the immediate influence of the mediation process. Understandably, this yields fewer defense concessions than one with all decision makers present.

The absence of important decision makers can also be the bad luck of logistics. Either way, when decision makers are not at the mediation table, it is harder for consumer attorneys to settle cases for fair value. Plaintiff attorneys can minimize the problems created by absent decision makers in several ways:

- Talk to defense counsel beforehand and find out who is attending the mediation.
- Determine whether those attending the mediation are the principal decision makers for each level of coverage at risk on the claim.
- Be clear with defense counsel that the mediation will not go forward without all necessary principal decision makers being present.
- Work with mediators whose pre-mediation preparation will reveal and address any potential decision-maker issues before the mediation.

### Old approaches rejuvenated

Mediators are becoming much more creative in bringing about settlements of personal-injury cases. The following are just a few of the techniques mediators use today to settle personal-injury cases:

**Joint sessions:** In major cases, a joint session carefully orchestrated by the mediator can change the insurer's perspective about the plaintiff and the claim. For example, a joint session at which the plaintiff's attorney presents a brief, well-organized, and emotionally powerful PowerPoint™ of the key liability facts, the injuries, the damages value, and the impact on the plaintiff and his or her family can yield big results. Presentations like this work their magic when the mediator talks privately with the insurance representative after the session. Additionally, a joint session can permit the plaintiff or the family to be observed and heard by the adjuster, which may be

important to the adjuster's valuation of the case. The joint session used in this way only works if the plaintiff is well-prepared and presents effectively.

**Private sessions:** In major cases, mediators are using the private sessions to listen to the plaintiff, establish rapport, and help the plaintiff through the process of negotiating the value of his or her case. In the old days, mediators used the private sessions to jump to the numbers dance. This does not work well in major personal-injury cases because the plaintiff, who has suffered a severe injury or the death of a loved one, needs time to process his or her grief and think rationally about the negotiation process. Mediators use patience, empathy, and good listening skills to get the plaintiff to the point where he can attempt to objectively negotiate through his attorney. Additionally, private sessions with the plaintiff and defense sides permit the mediator to test unrealistic assumptions about the case. Today, mediators use a variety of styles and approaches for reality testing other than the old style, "that's not going to happen and here's why."

**Pre-mediation preparation:** Successful mediators do significant pre-mediation preparation, typically by reviewing the briefs and talking to the lawyers well before the mediation. Such preparation can give the mediator information essential to crafting a successful mediation process. For example, the mediator may learn whether the mediation should begin in a joint session or in private sessions; who made the last move in the negotiation; who should make the first move at the mediation; the material issues upon which the parties agree in principle; those issues upon which agreement has proven elusive; the personalities of the participants; who the key decision makers are; what flash points to avoid; jury verdicts research; coverage issues; discovery issues; and settlement signals the attorneys have given each other.

**Vigorous follow-up:** In major cases, it is not uncommon for the mediation to end at an impasse. Good mediators don't

fear this; impasse is inevitable in most cases, the only question is how to get past it. If all the tools in the mediator's belt cannot yield a settlement at the end of the day, more mediators now are comfortable with the parties ending the session to accomplish tasks necessary to an eventual settlement, including medical examinations, document review, expert consultations, further insurer management review, and depositions. Then the mediator follows up with the attorneys at the appropriate time to see if there is an opening for further negotiation. The best mediators today energetically follow up to settle cases, most often without any additional charge to the parties.

The mediation of personal-injury cases today is a blend of both old and new processes and techniques. The keys to successfully mediating personal-injury cases, however, remain the same as they always have for mediators and attorneys alike: preparation and strategy. In that respect, the more things change, the more they remain the same.



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