



**“...the tumblers fall into place and the lock will open.”**

# The *quid pro quo* of mediation

*Eliminate obstacles, prepare thoroughly and give the other side what they need so that you will get reasonable case value the first time around*

**By JERRY SPOLTER**

When the plaintiff’s attorney adequately prepares and gives the mediator – and the other side – what they need well in advance of the mediation, there is no reason that every case shouldn’t settle on acceptable terms at the first mediation session.

When I started mediating back in 1985, mediation was in the infant stages and “trial” attorneys snubbed their noses at the concept of even suggesting mediation as it would be perceived as weakness. Today’s savvy litigator knows that he/she will mediate 25 cases to every one that is

tried to a jury. Consequently, 3,000-plus mediations later, the following outline of do’s and don’t’s is borne from this former litigator’s real-time perceptions of what successful practitioners do to maximize their clients’ opportunities to settle on favorable terms at the first mediation session.

### **The fatal flaws**

There are three primary reasons that mediations fail to resolve at the initial mediation session:

1. Insurance and Coverage Issues are not addressed/resolved in advance of the mediation;
2. One of the critical party’s decision-makers is not in the room and/or has not acquired adequate authority in advance of the mediation; and
3. The plaintiff’s counsel has failed to ascertain and provide all the necessary information and documentation to the other side(s) well in advance of the mediation.

The above fatal flaws are so painfully obvious that it amazes this mediator that time and again at least one of the three surface during the mediation. And whose fault is this? Plaintiff’s attorney. Do *not* schedule a mediation until all three of the above fatal flaws have been adequately



addressed well in advance of the prospective mediation date.

• **Insurance coverage**

You want the several defendants and multiple insurance interests to have their ducks in order (i.e., coverage issues resolved) before you pay several thousand dollars to come to the mediation and chill in a separate room for hours while the defendants argue over who has the obligation to pay for plaintiff's damages. It is not uncommon for plaintiffs to "waste" a day at mediation while the multiple defendants with numerous insurance policies argue over implied and contractual indemnity, additional insureds, horizontal and vertical coverages, and numerous other coverage disputes.

How can the plaintiff's attorney address this in advance of the mediation? Easy. Ask defense counsel if all coverage issues have been addressed and resolved. If not, then suggest that defense counsel and their competing coverage attorneys arrange a "pre-mediation" mediation to iron out the coverage disputes. (Insurance coverage obstacles often arise in mold, sexual abuse, construction-related personal injuries, products liability and nearly all multi-party cases.)

Another question: Are there claims outside of coverage (e.g., punitive damages) for which the carrier has issued a "reservation of rights"? If so, inquire of opposing counsel whether the insured has acquired "personal counsel" who will be attending the mediation. (Defendant's personal counsel may prove to be your most valuable ally at the mediation — and someone whom you will want to identify and communicate with in advance of the session.)

• **Missing person(s)**

This is what is known as the "invisible hierarchy," the Mr./Mrs. Bigg back at the insurance company or decision-making entity who is NOT in the room (and therefore devoid of context), but is calling the shots. What good is the mediation session if, after showcasing your plaintiff, finest evidence and most eloquent argument, the real decision-maker isn't in the room and,

worse, won't pick up the phone and listen to the attorney and representative who has been sent in his/her stead? How often do we find toward the end of the mediation that the "invisible hierarchy" has either left the office and is not available or simply won't listen to his/her counsel, representative or the mediator?

Talk about frustration! And whose fault is this? Plaintiff's counsel. How can it be remedied? Easy. Before setting a date and writing a check for your share of the mediation fees, call opposing counsel and confirm in writing who the carrier's or company's representative will be at the mediation *and* confirm that that person will have the horsepower to make a deal. (It is astonishing how often plaintiff's counsel has no clue who the carrier is — doesn't anyone read the 4.0 rogs? — and whether there is excess coverage, or failed to follow up with an ambiguous/evaluative response to 4.0.)

There will be times that certain defendants simply will not agree to allow the critical decision-maker to travel/ attend the mediation. That is not totally surprising in view of either the value of the case and/or other economic/scheduling concerns, but the plaintiff's attorney should not agree to mediate without first obtaining something in writing from defense counsel assuring that the file has been adequately reviewed and that the defense rep will be available by phone during the entire mediation and on speaker phone for the joint session, if requested.

There is no reason that the plaintiff decision-maker be present if the defense can't reasonably assure plaintiff's counsel that the defense equivalent will also be participating. (I often hear plaintiff's counsel lament the "bad faith" of the defense for failure to have "adequate authority" at the mediation. My response is that the plaintiff's counsel should never have agreed to mediate without adequate assurance in advance from defense counsel that the right person will be in the room — or on phone standby — and that the defense has adequate information and has had adequate time to acquire appropriate settlement authority.)

• **Don't hide the ball**

Since the plaintiff has the burden of proof at trial — as they do at the mediation — why in the world wouldn't a competent plaintiff's attorney ensure that the other side has all the information necessary to properly evaluate plaintiff's case and acquire appropriate settlement authority well before the mediation date?

It still astounds me that some plaintiff's attorneys do not share their mediation briefs with the other side. Huh? Don't you want the other side's decision makers to understand the facts, law and argument of how plaintiff intends to prove liability, causation and damages? Plaintiff's counsel is always welcome — and, in fact, encouraged — to submit a separate "confidential" brief to the mediator addressing any sensitive legal/factual/personality matters. It bewilders me, however, that when I arrive at a mediation, after having digested an excellent plaintiff's mediation brief replete with well reasoned argument and supporting documentation, I find it wasn't exchanged with the other side. Why not? Don't you want the other side to understand what an excellent case and well prepared, articulate attorney your client has?

Lastly, since we're on the subject of the pre-mediation checklist, make a phone call to opposing counsel and inquire of him/her: "Do you have everything you need to be able to intelligently evaluate and negotiate at the mediation?" You don't want to get to the mediation and find out that the defense needs a critical deposition or a defense medical exam or documentation of wage loss, etc. Make the call — or even take opposing counsel out to lunch to discuss the case — to ensure the other side has done all its homework and will be ready to engage in meaningful negotiations at the mediation.

Now with coverage issues satisfactorily addressed and with the opposing party's settlement authority accounted for, let's dig down to get the brief, and you — yes, plaintiff's counsel — and the client ready for the mediation.



## The mediation

Three elements influence the outcome at mediation:

1. The attorney's written brief;
2. The attorney; and
3. The client.

The quality and interplay of these three components will determine the degree of success, mediocrity or failure of your client's case.

There is an adage that any plaintiff's attorney can turn a \$5 million case into a \$3 million case; it is the exceptional plaintiff's attorney that converts the \$5 million case into an \$8 million settlement. The exceptional negotiator achieves exceptional results. Poor negotiation skills are manifest when the plaintiff's attorney leaves substantial money "on the table."

What plaintiff's counsel needs to do to succeed is provide opposing counsel everything needed to intelligently evaluate your client's case, plus add equal doses of credibility, ethics and trustworthiness.

## The brief

Recognize that the purpose of the brief, while it is being addressed to the mediator, is written to persuade the other side. The brief may be the first opportunity that you have to package your case and penetrate beyond opposing counsel to reach the actual decision-maker who is holding the defendant's purse strings. A sloppy brief (replete with typos and dangling participles), submitted late and with argument unsupported by law or evidence, will not only be unpersuasive, but will send the wrong message from the start.

It is in the brief that the attorney sets forth the summary of the facts, application of the law and exposition of damages. It is in the exhibits that the attorney's statements derive their credibility and persuasive force.

### For example:

- Support statements of the law not only with legal citations, but also with highlighted copies of applicable jury instructions, appellate decisions or, if "negligence per se" is being asserted, applicable

statutes, ordinances or regulations.

- Discussion of injuries and surgical procedures should be supported graphically with anatomical charts, medical illustrations reflecting the various steps of the surgery, reverse positive X-ray photographs depicting location of residual hardware and footnotes or parenthetical definitions of medical or technical terminology.

- Statements attributable to witnesses should be supported by highlighted deposition testimony excerpts, written statements, declarations under penalty of perjury, police or other official reports. (Do *not* attach entire depo transcripts to your brief; just the highlighted, critical excerpts.)

- Allegations as to what the future holds — e.g., future surgery in a personal injury case or loss of profits in a patent infringement case — must be supported by an expert's report and, incidentally, include the expert's curriculum vitae for the reader's ready reference;

- Photographs, diagrams and illustrations can miraculously convert eight paragraphs of complicated text into the reader's mind's eye of your view of the case. (It is becoming common, and proving very effective, to integrate the photos, diagrams and demonstrative exhibits into the body of the brief where a pertinent issue is being addressed.)

- Present objective sources to establish case value, e.g., reported verdicts and settlements of similar fact patterns in similar jurisdictions, articles discussing similar cases or, preferably, verdicts or articles addressing your (or your firm's) trial accomplishments. (An attorney's personal opinion as to the value of a case carries little weight, whereas his/her proven trial track record in similar cases is worth its weight in gold.)

Exhibits are limited only by your imagination. No statement should be made without some document in support of it.

Send two copies of the brief at least two weeks in advance of the mediation to opposing counsel: the extra one to be

forwarded without delay — and with no risk of poorly copied exhibits — to the principal/decision-maker. (In today's electronic age, particularly where so many businesses and insurance carriers are "paperless," the brief sent in "pdf" format to opposing counsel will achieve your goal and save a tree at the same time.)

When issues are raised in the brief that you receive from opposing counsel, consider addressing them prior to the mediation in a supplemental brief, again, with supporting documents.

Once the written brief is complete and received well in advance of the mediation, that attorney's stature as a prepared and well-reasoned negotiator will have been established. Now that component No. 1 has been locked in, elements two and three come into play: the attorney and the client.

## The attorney

The first 10 minutes of a mediation are crucial in terms of attitudes expressed — verbally and nonverbally — and the tone that is set for the balance of the day. Attorneys who "smile when they talk," explore a common ground for "small talk" unrelated to the mediation (kids, sports, travel, diets, current events) and exhibit cooperative and trustworthy signals, quickly promote a "We can get this thing done" atmosphere. On the other hand, counsel who arrive at the mediation with an entirely different position than last communicated (e.g., a plaintiff's attorney who had previously demanded \$150,000 now demands \$330,000), or present last-minute documents or expert reports, will offend their opponents and seriously diminish any chance for success.

One successful plaintiff's attorney told me that he perceives his job as follows: determine what the defense needs to document their file or to answer their questions, then provide that information in a timely manner "...so that each of the tumblers falls into place and then the lock will open."

There is an expression: "Honey goes further than vinegar." Attorneys who adopt



offensive, argumentative, bombastic and/or arrogant styles at mediation do not serve their clients well. Attacking your opponent, their witnesses or representatives generally does not endear you to the other side, nor does it either foster an exchange of information or promote a desire to do business with you. On the other hand, the negotiator who concedes the weaknesses of his/her case and acknowledges the strengths of the opponent's case, generates immediate respect and credibility with the by-product of encouraging equivalent behavior from the other side.

At the mediation's joint session (a subject worthy of its own article addressing case appropriateness, timing, etc.), the attorney's opening comments should be those of a forceful advocate and should address the most important facts and issues of the case. The use of diagrams, PowerPoint™ presentations, select portions of video depositions, photo enlargements and expert witnesses (in person, by videoconferencing or speaker phone) are all worthwhile tactics to facilitate the other side's understanding of the critical points in your case, and to demonstrate your professional abilities and financial commitment to your client. (The reader should review the article by Cogent Legal's Morgan Smith entitled "Go Graphic in Mediation, Not Just in Trial" which appeared in last month's Plaintiff Magazine.)

As for "smoking guns," whether to reveal them is a matter of strategy that often depends on the smoking gun-toter's perception of the other side's credibility, willingness to share information and whether the gap in negotiation is sufficiently narrow to warrant release of key surprise evidence. Good negotiators know how/when to divulge them,

and it is always worth soliciting the advice of the mediator.

### The client

The third component in the equation is the plaintiff. Counsel should assiduously prepare plaintiff for the mediation session so that he/she knows what to expect and what to say and what not to say.

What a party does is often as important as what the party says, so instructing your client on the basics of body language and non-verbal behavior is every bit as important as the old standby to "stop talking if I kick you under the table." (For example, the client who says, "I want to go to trial," while shaking his head "no," betrays the attorney's expressed bravado of going to trial at all costs.)

It is often said that "plaintiff is Exhibit A." Therefore, the plaintiff's conduct — nonverbal as well as verbal messages — can have an enormous impact on the outcome of the negotiations. Although there are a few rare circumstances where an attorney may want to put a sock in his/her client's mouth, the client who has been well prepared in advance of the mediation can definitely add value to the case. (It frustrates the mediator when a plaintiff's attorney won't let the client speak in a joint session, and then in the private caucus the client's warmth, honesty, sincerity and genuine sense of loss shine through. This missed opportunity cannot be conveyed by the mediator in the private session with opposing counsel in the same way that spontaneity in the joint session would have.)

The plaintiff and his/her attorney are a team, and perceived as "one" by the folks on the other side of the table. Any deficiency of one attaches to the other.

The overdramatized limp, the exaggerated wage loss, the feigned neck rubbing and the disingenuous claim, especially when combined with expressions of hostility and personal vindictiveness, will quickly turn off the folks with the money. On the other hand, a warm handshake coupled with a touch of stoicism and genuine likeability on the part of the plaintiff can maximize settlement value at the mediation.

### Quid pro quo

If you follow the foregoing comprehensive checklist, then you will have the combination to successfully mediate your case as "...the tumblers fall into place and the lock will open." From personal experience, my mediator's translation of "Quid Pro Quo" is: Eliminate obstacles, prepare thoroughly, and give the other side what they need so that you will get reasonable case value the first time around.



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