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10 steps to successful mediation

By Jack Daniels

1. Case selection: Your initial decision on taking the case must be supported by clear evidence to prove liability and damages, and reasonable certainty that the judgment is collectible. If any of those three do not exist, you should not have taken the case in the first place.

2. Timing: The timing of the mediation must be made on a case-by-case basis. Some cases can be mediated early on, while other cases require that all of the discovery, including expert witness depositions, need to be completed before there can be a successful mediation. The typical personal-injury case involves a complete discovery of all the facts before mediation, while the depositions of the expert witnesses are deferred until after the mediation. This is a cost-saving device for all parties, and it can be great leverage for settlement.

3. Court panel or private mediator? If the case does not warrant the expense of a private mediation, then you probably shouldn't have taken it in the first place. The major advantages of private mediation include:

- The services of an experienced, full-time mediator;
- An appropriate setting with sufficient conference rooms for all parties to have privacy if necessary;
- Reasonable certainty that the mediation will take place at the agreed time and venue. Many court panels use part-time mediators and the scheduled mediation may be continued with little notice, causing great losses of time to you and your client.

4. Selection of the mediator: Find out all you can about the proposed mediator *before* you agree to the selection. You can learn a lot from the mediator's own Web site and the Web site of the mediation service provider. You should check the references they provide and seek independent references through your network of plaintiffs' attorneys. Don't be afraid to talk with the proposed mediator on case-specific questions.

5. Briefing: You should not go into any mediation without preparing a written brief for the mediator. Get it to the mediator *at least* a day prior to the mediation so that the mediator has a chance to read it. I recommend that all the parties exchange briefs so that each side can see how the other is presenting the facts and the law rather than having those presentations filtered through me.

Most briefs are titled as "confidential mediation brief," but there really isn't anything in the brief that the other side either doesn't know or won't know by the time of trial. If you have a true "smoking gun," keep it for trial unless you feel the case is very close to settlement and the smoking gun will give it a final push.

6. Preparing your client: Explain the concept of mediation to your client prior to the first session – it will reduce their stress level. Explain that the mediator does not make a decision on the case; that the mediator is a facilitator towards settlement. Explain the rules of confidentiality to your client. Explain that there may or may not be a joint session.

Find out from the mediator ahead of time if he or she plans a joint session, and also ask if the mediator expects your client to make any statement at the mediation. Most of my cases do not involve a joint session that includes the clients. My experience with the joint sessions is that lawyers, with their clients present, feel compelled to make strong arguments and this usually drives the parties further apart. I frequently have joint sessions between the lawyers during the course of the mediation without the clients being present.

7. The money confusion: The client is many times confused about the progress of the monetary negotiation as the case moves toward resolution. The clients are sometimes angered at the other side's first demands or offers and then become entrenched in their positions. I have found it extremely helpful to have all of the monetary negotiations separate from clients who have little or no experience with mediation.

8. Decision maker participation: The main reason for failed mediations is that the decision maker is not present. It is too easy for the decision maker to say "no" on the phone when the mediation has been filtered through counsel. They miss the dynamics of the parties and the dynamics of the mediator.

9. Structured settlement advisor: Structured offers are very common, so be prepared to evaluate it. Make sure you have access to your own structured settlement advisor. Most plaintiffs' lawyers want to work on the cash value of settlement before evaluating structures, while insurance companies like to start by presenting a written offer that indicates an actual cash value and shows various structure alternatives including periodic lump sum payments, college education funds, steady monthly income payments, etc.

10. The value of structured settlements: Structured settlements provide built-in

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money management and prevent dissipation of the settlement funds. They also have tax benefits; for example, if a lump sum settlement were invested in a certificate of deposit, the interest income would be taxable. With a properly designed structured settlement, none of it will be taxable. Be certain to warn your clients about the charlatans who advertise on radio and television to buy out their structures for a lump sum, often 10 to 20 cents on the dollar.

Jack Daniels is a full-time mediator concentrating on catastrophic personal injury, wrongful death and malpractice. He was a trial lawyer for 43 years, serving as president of the ABOTA chapter in Los Angeles and for the State of California. While his career focused largely on insurance defense, he was honored for his professionalism by the Consumer Attorneys of California in 2002. Contact him through Judicate West (www.adjudicateinc.com).


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