

Pro tips for rising stars

You can avoid rookie mistakes in mediation

By Hon. Lynn Duryee (Ret.)

It's hard to be a beginner, especially in a profession as competitive as law. Nobody wants to be the shy girl with the unbattered briefcase or the new guy with the price tag still attached to his jacket sleeve. It's wonderful to be young but intimidating to be inexperienced.

When it comes to settling cases, we can't bear to think that our inexperience might cause our client to receive a less-than-optimal outcome. We are anxious to prove we can do superb work, and we hate – we really, really hate! – to make stupid mistakes. Sure, there's no substitute for experience, but is there any way to avoid rookie errors?

Fear not, Tiny Grasshopper. A smart lawyer like you can learn from the mistakes of others. Here, then, is your guide to dodging beginner's errors so you can nail your mediation like the rising star that you are.

Submit a carefully crafted brief well in advance of the mediation

Many lawyers assume that briefs are superfluous and that all the important decisions occur at the mediation. Wrong! An informative and concise brief is the time-honored way to convince your neutral – and maybe your opponent as well – of the merits of your case. Start writing your brief two weeks before the due date so that you will have plenty of time to think through your evidence and arguments, while still leaving sufficient time to edit extensively. (Yes, I'm serious. Two weeks!) When you first sit down to write, force yourself to complete a full first draft before you tinker with the wording. You will learn much more by writing your draft all the way through than by spending hours perfecting the opening paragraph.

When you are ready to edit the first draft, be certain that you lead off with a compelling, single-sentence description of your case. "This high speed rear-end accident on Sir Francis Drake Boulevard left the plaintiff triathlete unable to run." or "Plaintiff Juan Doe suffered a broken hip when his foot got caught in a vacuum cord carelessly left in the aisle of defendant's hardware shop in Oakland."

Conclude the brief with a clear and reasonable demand (more on that later).

Once your brief is polished and you feel proud of it, challenge yourself to eliminate 300 words. Then 100, then 50, then 10. Your goal is not to fill as many pages as possible, but to make every word count. You will be amazed by how much better your brief is when you trim every ounce of fat.

Finally, submit the brief on time, or, even better, ahead of deadline. As a plaintiff, your best chance of making an impact is to ensure your opponent can read it and pass it on to decision-makers well before the mediation. And don't even think about submitting a confidential brief. You're the plaintiff. You want money. You have no secrets.

A well-written brief will impress your opponent with your preparation and professionalism. It will help your neutral understand your case. It will soothe your client. And – a real confidence booster – it will clarify your thinking about the case.

Don't make the rookie mistake of submitting a sloppy, late brief.

Cultivate a relationship with your opposing counsel

It is naïve to think that lawsuits are resolved on the basis of the facts and the law. One huge factor in the way a case is litigated and resolved is who the players are and how they relate to one another. An enduring myth in the legal profession has it that the snarling bulldog is the superior advocate, because he will make life miserable for his adversary and ensure that his client recovers every last dollar. While it is indisputable that such an advocate may make life awful for his opponent, it is simply not true that his client necessarily obtains the best result. Why? Because it always comes down to the people. Would you voluntarily give your last dollar to the mad dog who made your life miserable? No, and neither will experienced adjusters. As they say in life (and litigation), "He who lives by the sword dies by the sword."

By contrast, lawyers who maintain professional relationships accomplish the work of their clients with relative ease and efficiency. When it comes time to mediate, respectful adversaries make enormous strides because they genuinely respect each other and are interested in the other's viewpoint. Does this favorable attitude make a difference when the parties are perilously close to settlement and nobody wants to budge on the last $5,000? All the difference. These are lawyers who have developed respect and cooperation. They are going to find a way to make it work. When they encounter the inevitable roadblock, they continue talking – long after the bulldog has stormed from the room and slammed the door behind him.

Don't treat your opponent as an enemy.

Lead off with a reasonable demand

It is simply not the case that you will recover more money for your client if you start with an astronomical demand. If you demand $1 million on a case worth, say, $75,000 to $100,000, two things are likely to happen. First, your adversary will roll her eyes and scoff. That's never a good thing. Second, if you're to settle the case, you're going to have to make a precipitous drop during negotiations, and that's

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going to make you feel like the rookie you're trying not to be.

So don't put yourself in that position. Instead, spend some time developing a reasonable demand. Not the number you will settle the case for, but the number that will inspire the defense to negotiate with you. What are juries doing with cases like yours in your venue? Conduct some research, maybe contact lawyers who have handled similar cases and see if they can give you some insight into their verdict or your case. Veteran PI lawyers are notoriously generous with their time and many are happy to help a new lawyer by discussing strategy and case evaluation (and, okay, maybe bragging just a tiny bit about their last big verdict).

Your opening demand should not be a mystery. Whether you are appearing for mediation or for a Mandatory Settlement Conference, your brief should end with a settlement demand. Keeping your number a secret, as some lawyers like to do, does not add intrigue to the case – it adds only difficulty. Develop a reasonable opening demand and deliver it in advance of the mediation so that the defense has the opportunity to fully digest and evaluate it.

Don't start with an exorbitant demand.

Say it with pictures

As lawyers, we believe in words. We love them! Can't get enough of them! So we often forget that seeing is believing. How can you best illustrate your case? Day-in-the-life videos are impressive, but not every case merits an outlay so time-consuming and expensive. It could be something as simple as enlarged color photographs of the accident, scene, or injuries (as opposed to the usual black-and-white photocopies better suited to a Rorschach than a visual aid). What about a brief PowerPoint with pictures of the injuries or defects? Or a mockup of the defective product? Or the blind turn where the accident happened, captured on a video you made with your smartphone the night before the mediation?

Here's one real benefit of your youth: You are part of a generation comfortable with technology – now's the time to demonstrate your expertise. Use your facility with video, photography and recording to show your case. Visual aids are a great tool for the joint session because they're efficient, interesting and persuasive. So save your breath and say it with pictures. Go pro!

Don't overlook the use of demonstrative evidence in your mediation.

Prepare your client for the process

Countless movies and TV series have been made about jury trials, so your client has a clear – if not completely accurate – picture of what a trial might look like. By contrast, few movies or TV shows glamorize mediation. Your client is unlikely to know what to expect. How long will it take, who is going to be there, what is going to happen and what is expected of her? One of the most common mistakes plaintiffs' lawyers make is failing to prepare their client for the process. It's a big one too, because a prepared client vastly increases the likelihood of settlement at mediation.

Wise PI lawyers will tell you that they set aside significant time to prepare the client for mediation. The client should know that the case could take all day, the neutral will want to talk to her about her losses, that the first offer is apt to feel insulting and there will be long stretches of time when the neutral is not even in the room. Inform your client that the day may be long and emotional, that there may be periods of disappointment and uncertainty, you never know at the beginning of the day how the day will end, but that the most likely ending will be a settlement. The client should hear about the risks of not settling, and, specifically, the risk – however remote – that she could lose the case at trial. When all of those things happen, your client will feel satisfied by your representation and ready to say yes to the deal.

Don't wait for the day of mediation to tell your client what to expect during the process.

Have everything you need to settle the case completely

Your goal in mediation is to leave with a signed settlement agreement in the file. While it is true that cases can and do settle after mediation, you will save yourself and your client a ton of time and aggravation by hammering down loose nails on the day of mediation. That means that before the mediation, you will have to think about what you need to accomplish to settle the case fully. Perhaps it is tax advice, a signed deed, or a reduction of a lien. If you will be negotiating with a lienholder, arrange to have your contact person available to talk numbers with you late in the day. Your client will want to know how much he will net from the settlement, so prepare a list of your office's litigation expenses and have it with you during the mediation. Knowing in advance what you need to settle the case completely reduces the possibility of overlooking an important detail. It also gives you a valuable template for working with your opponent and for helping your client make an informed decision.

Don't wait until after the mediation to attend to final details of the case.

Help your client trust the process

The magic of mediation is mysterious and unknowable, but it works best when parties come to trust and engage in the process. The parties should feel comfortable sharing their story with the neutral. They should have a full opportunity to discuss the strengths and vulnerabilities of both sides of the case. By the end of the day, they should feel as if they have had their day in court. If at that point the parties haven't been able to agree on a number, the neutral might suggest a way the case could settle. Ideally, the neutral has earned the trust and confidence of the participants, and the number he proposes is wise and fair. If so, participants will say "yes" to the neutral's suggestion and the case settles.

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A common mistake lawyers make in mediation is impeding their client's ability to trust the process. For example, when the first offer is made from the defense, the wise lawyer might turn to her client and say, "This is a good start. It's what we expected. We knew they would start off low, and this number is low. But we are now on our way to negotiating a good number. Let's talk about the best way to respond." This is so much more helpful to the client and to the process than the lawyer who reacts with scorn and outrage. "See what I mean about those jerks? What a ridiculous offer! They're acting in bad faith!"

Another way the lawyer can encourage his client to trust the process is to let the neutral explain the risks of the case to the plaintiff. Many lawyers feel obligated to jump in and argue with the neutral. Because your client trusts you, she will think she too should disregard the neutral's thoughts. This will affect the neutral's ability to connect with your client. Instead, let the neutral explain to your client her concerns about the case and how to best respond to what the other side has said.

Don't show your frustration with the process or argue with the neutral.

Listen carefully

On the bench and in the bar, we are a profession of know-it-alls. We love knowing all the answers. We love correcting our adversaries. We love getting the judge to change her tentative ruling. The problem is, if we think we already know everything, it can be awfully hard to learn anything. And when it comes to learning about your case at mediation, the already-knew-that attitude can be a real obstacle.

There is always something to learn during your day of mediation. For starters, it's probably the first time both sides have spoken candidly about the case. If you're listening, you can learn about how your opponent truly views your case. You can learn what your opponent thinks about you. You can learn the strengths of your opponent's case. If you're paying attention to your client, you could probably learn something about her too. Wouldn't it be good to know about these matters?

Listening isn't easy. In order to do so, you will have to acknowledge that you may not know everything and then make a point of listening for something new. When your neutral brings you news from the other camp, you will have to restrain the impulse to reject it and make an effort to take it in.

A gift that often goes begging at mediation is the opportunity to learn something new. Make a point of accepting all the gifts the day has to offer. And anyway, who likes a know-it-all?

Don't assume you already know everything there is to know about your case.

Ask for help

One of the rare and truly effective tools I've observed in ambitious young lawyers is asking for help. This is the opposite of being a know-it-all. It is not a sign of weakness to turn to the neutral, the client, or even the adversary and ask how they think he should proceed. I've heard young lawyers say, "You have a lot more experience than I do. What do you recommend that we do?" I've heard them say to their adversary, "I have a lot more to learn before I know half as much as you. What do you think I should do next?"

Many lawyers would rather die than ask for help. All I can say is, I knew I had truly hit my stride as a judge when I could confidently say to the lawyers that I didn't know the answer to their question. By that point in my career, I was clear that no one could know all the law, and that asking for help was the best way of getting it.

Don't be too proud to ask for help.

Calculate the real cost of going forward

At the beginning of the mediation, you and your client likely fixed a number against which you would try the case. By the end of the day, you will have learned your opponent's best number. If it is lower than your bottom line, you might be tempted to reflexively reject it. You could, however, compare the dollars on the table with the true cost of going forward. Your calculation should include attorney's fees, expert and other litigation costs, risks of trial, benefits achievable by settlement but not by litigation (e.g., confidentiality), and – one often-overlooked factor – the investment of time by the client.

A comparison of the actual deal now – rather than the one you imagined at the beginning of the day – to the cost of going forward gives you and your client the most accurate way of truly evaluating the current offer. You might discover that the offer has more value than you'd originally thought.

Don't reject the defendant's highest and best offer simply because it falls short of where you'd hoped to settle.

You've got it all

So now you've got it all – a prestigious law degree, a good plaintiff's case and sure-fire strategies for achieving your best outcome at mediation. What with your native intelligence, youthful enthusiasm, and hours of preparation, you're on your way to certain success. Do your thing and make the grizzled old timers (like me) wish they could be young again.


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