Stilettos in mediation

New mediator and former defense counsel on "the art of successful mediation"

By Debra Bogaards

The perfect setup

Once the mediator is selected, the next step is to pin down the date. That sounds rather easy. A ministerial task, no? It becomes ridiculously difficult when the email thread with all counsel and the mediator spans the course of weeks to nail down one mutually convenient date. One difficult-to-reach or non-responsive attorney can prolong the process unnecessarily, as once-available dates become unavailable. My wish as a new mediator is for counsel to adopt a 24-hour rule: all parties agree to select a mutually convenient date within 24 hours whether by diligent email thread or better yet, a conference call with the mediator.

Recently, I had an unnecessarily frustrating experience with an in-house defense counsel who never responded to the email thread to select a date for the mediation. When he did respond, weeks later, he would give a date not on the list of dates being considered. On the next email thread, he would give a date offered in a much earlier email that was no longer available. He would on occasion take my call just to inform me that he couldn't discuss dates then because he was in a deposition. His seemingly passive-aggressive nature was a roadblock to moving forward with mediation. Oy! Finally, he agreed upon a date, the mediation went forward as scheduled, and the case settled at mediation.

Pre-mediation phone call

A joint mediation phone call is a time to focus on what things and people are needed at mediation. First, is the defense counsel bringing the claims representative? Often the claims representative is on telephone standby instead of schlepping to the mediation.

Plaintiff's counsel should know whether the claims representative is going to be there in person or available by phone so that he or she can inform their client. Second, does the defense need certain documentation from plaintiff's counsel to obtain higher settlement authority? Sometimes the defense needs updated medical records from recent doctors' visits, a new diagnostic study (i.e., MRI) and updated medical bills. Or, employment records like W-2s or a wage loss verification. If those documents aren't provided well before the mediation, should the mediation be continued so defense counsel has time to obtain more settlement authority? Third, do the parties contemplate a confidentiality stipulation? The joint mediation phone call is a very useful tool and underutilized.

Oftentimes, plaintiff's counsel will call me to discuss impediments to settlement. Once, a plaintiff's counsel told me that his case wouldn't settle because he would only accept the policy limits of $100,000 since there was a newly discovered excess policy of $1 million. In a second phone call from the same counsel, received on the way to my office for mediation, he asked me to explain the weaknesses in his client's case to her. Once I reviewed the mediation briefs and exhibits, I realized that counsel initially thought the self-employment income loss was over a million dollars and when he much later got his client's medical and financial records, he realized that the case wasn't in that value range after all. Those calls were very helpful to me because I knew the client's expectations were unreasonably high and plaintiff's counsel was using my experience and authority as the mediator to help him get the case settled for a more realistic sum.

The defense calls me on occasion before the mediation to candidly discuss specific weaknesses in their case to emphasize with the claims representative if the defense is having difficulty obtaining their requested settlement authority.

Mediation briefs and exhibits – the timeline

As a new and energized mediator who wants to keep her 100 percent success rate, with a background of 37 years in insurance defense and 15 of those last years (and continuing) also on the plaintiff's side, mediation briefs and exhibits are everything.

Get the plaintiff's mediation brief and exhibits to the defense six weeks before the mediation; this is key to obtaining settlement authority. Too often I see plaintiff's counsel giving their brief to the defense the day before mediation.

Understand how the defense operates: once the plaintiff's counsel provides its brief, the defense counsel needs time to review it and summarize the exhibits in the form of a report, comparing plaintiff's numbers with the defense numbers, and updating the defense evaluation.

Then, the claims representative must be present (i.e., not on vacation, in endless meetings, or out sick) and be able to review the report. The claims representative then prepares his or her own report on a specific form and sends up the form to the team manager. If the settlement authority is above the manager's limits, then the manager must send the report up to corporate; if there are questions that defense counsel will first need to answer, it further delays any decision. It's like trying to change the course of a cruise ship – it takes time.

The heart of your case

On the other hand, while ideally all counsel will provide me with mediation briefs and exhibits five days in advance, even the day before can work. The three-to-five-page brief, without exhibits, slapped together in an hour is useless. In a personal-injury case, for example, the thoughtful, detailed brief with medical records, bills and chronology, wage loss documentation, police report, repair estimates of the vehicles and photographs of the damage result in the best outcome. Those exhibits provide a glimpse into the heart of your case.

As an accounting and finance major at U.C. Berkeley, president of Beta Alpha Psi, and tax specialist at Peat Marwick, my strength is in the numbers, spreadsheets and chronologies. I like to review all the exhibits and create charts with the numbers. Not only do the charts help me understand the case, but I use them to discuss the underlying facts with the parties and their counsel.

For example, a plaintiff who was a self-employed dentist provided her financial documents to show her annual income for three years before the accident and three years after the accident. The plaintiff hired independent contractors – other dentists – to provide dental services to her patients before and after the accident. The dentist also met her now-husband after the accident, underwent infertility treatment and gave birth to twins. She hired a full-time nanny after the accident, presumably due to her injuries and need to work when she felt able to do so.

Based on all of this, I created a chart to show her earnings by year. She made more money after the accident, so hiring independent contractors seemed to be a good business decision. And hiring a full-time nanny for twins as a young professional is very normal even without an accident. The optics weren't good. The numbers are the numbers. Plaintiff's counsel had invited me to share with his client the weaknesses in her case and the charts helped me do so.

Numbers also help me as the mediator get to agreement on the economic damages. The best plaintiff's personal-injury counsel uses both actual and *Hanif/Howell/Corenbaum* numbers for the medical specials. At some point, I get consensus on the medical numbers that will be used at trial. Next, we attempt to agree on a range of numbers on the wage loss claim. That leaves pain and suffering as our focus for the rest of the mediation.

In an employment case, it's easier since the salary is known, the bonus may be in question and whether the shares or options have vested is often in dispute. In a tenant's rights case, the rent is a given and often we are trying to value a buy-out and habitability claims. In tech cases, it's all about the numbers.

Budgets for trial

Speaking of numbers, one of my strengths as a mediator is years of drafting budgets for all phases of discovery in every report to the insurance carrier, including the budget for trial. After 37 jury trials and one bench trial, I can do budgets in the time it takes to make an espresso.

When we do a budget together in the break out room for the costs from mediation through trial, it becomes a lightning rod for further settlement negotiations. The costs of experts to review voluminous materials, prepare for deposition, give testimony at deposition, review their deposition transcript, review other experts' deposition transcripts as well as, prepare for and testify at trial is huge. Usually at least $20,000 to $40,000.

When faced with a reasonable Code of Civil Procedure section 998 demand or offer, it is important to run these numbers so both the plaintiff and the defendant are well informed. Often, counsel hasn't shared these numbers in this detail with their clients. As the mediator, this is another useful tool when the parties are close.

The numbers add clarity when the plaintiff has a good offer on the table but has unreasonable expectations. Plaintiff's counsel will look to me for concrete, hands-on assistance. Sometimes, money at mediation today is better for the plaintiff than having the cost for experts, trial exhibits, and court reporters deducted from the settlement before trial. Not to mention the risk of trial.

What is a good settlement?

For plaintiffs, as your mediator, my goal isn't to get you a "fair and reasonable settlement." Rather, my goal is to get you the highest possible settlement. Most often, I can persuade the defense to pay more than I ever did when I was a defense lawyer on a similar case.

The goal is to bring the parties together and settle the case. To the insurance company on the defense side, "a closed file is a happy file." Some insurance companies will give settlement authority to their defense attorneys with the understanding that the defense attorney (and claims representative) must offer all the settlement authority at mediation. So why not get the insurance company's top dollar?

Lox of love

At mediation, I always serve a platter of bagels, lox, and cream cheese in the morning. Being a good Jewish mother, I prefer counsel and the parties break bread and fill their tummies. Human beings are much nicer when they are not hangry.

Please don't schedule a mediation when you are fasting, whether for Yom Kippur, Ramadan, or some new-age cleansing diet. In a small case – which can be the most difficult kind of case – plaintiff's counsel and plaintiff were both fasting for Ramadan. When 3:00 p.m. hit, the bewitching hour, both became hangry. Plaintiff simply left. Plaintiff's counsel yelled at me. Yet, I'm happy to report, we did manage to settle his case!

Creative elements of settlement

As a mediator, I can employ a host of creative ideas to gain closure. Sometimes, the plaintiff really wants and deserves a sincere apology from the defendant in addition to the money. And more often, the defendant really wants to express his or her remorse for the injuries or wrongful death caused by their negligence, and perhaps be forgiven. Usually, once we reach a monetary settlement, we can work on the parameters of the apology. It's important for counsel to let the parties engage in this process if the parties want an apology and forgiveness to be part of the mediation.

In a bizarre landlord-tenant case, one week before trial, the parties were close to reaching a settlement after three years of contentious litigation. The numbers were almost there. One party threw in a token amount – $2,500 – to be made payable to St. Jude's in the name of the other party's niece. Since his niece was in good health, that offer didn't make too much sense. But it gave me an idea. We ended up specifying that $7,500 of the low six-figure settlement would be split three ways for college funds for three children as gifts from the plaintiff who liked to be perceived as the neighborhood grandma. It worked! And the client felt like a mensch.

A profile: Compassion, empathy and relatability in stilettos

As a mother of two beautiful, accomplished daughters and wife for over 35 years of a wonderful lawyer, I believe I can relate to most plaintiffs (and kvell at the same time). As a cyclist, skier, yoga student, travel enthusiast and entrepreneur, it's easy to find commonality. I have survived when life has thrown me a curveball and I've learned how to chisel through. I have a zest for life and I'm not intimidated by big goals and aspirations. More significantly, I come from a working class family and can relate to struggles of people living paycheck to paycheck.

By way of background, my maternal grandfather, Papa Jack, lived in a shetl in Russia and escaped a Jewish pogrom in 1914. Papa Jack came to Ellis Island and as a refugee, he worked hard, starting a roofing company in Wildwood, New Jersey. My maternal grandmother was illiterate.

My parents escaped from the meshuggenah relatives and headed west to Southern California. My parents started a family and raised three children. My father worked in tool and die design for McDonnell Aircraft and Hughes Aircraft, where layoffs were frequent. My mother went back to college, earning a master's degree in English as a Second Language and Reading.

While I grew up in hand-sewn hand-me-downs, my family was rich in that education was prized and vacations in a classic station wagon driven across the country with campgrounds for overnight stays were the norm. Because of this background, I like to discuss what matters most to the plaintiffs who have been injured or who have suffered damages.

I get that being injured and not being able to ride out to Alpine Dam and the Seven Sisters, compete in a century ride after surgery, or complete a triathlon can alter one's outlook. Or, not being able to bend down and pick up one's child can have a devastating effect on one's life. I get that missing out on milestones like weddings, family trips and birthday celebrations has a huge impact. I can explain to the defense how these limitations on daily activities of living should result in higher pain and suffering dollars in settlement.

While I have excelled in my career as a trial lawyer by being the best I can be and not focusing on being a female attorney specifically, I do realize as a mediator that wearing stilettos can be an advantage. Along with tenacity, persistence, grit, and the professional skills it takes to be a top notch professional mediator, I also bring compassion, empathy and warmth. There are no war stories or braggadocio.

Instead, as a mediator, I jump right into the facts and talk to the plaintiff to understand their view of liability – what happened – and damages – how this event affected their life. That entails active listening and understanding. I try to relate to what the plaintiff has been going through and balance my understanding with the practical facts of their case.

Sometimes mediations end with a hug in the plaintiff's room. In contrast, for the defense, the claims representative is happy to pack up after logging in the details of the settlement on the computer and the defense attorney wants to get home. As a mediator, I feel good as well as a sense of relief when the parties reach a settlement.

Post-mediation follow-up

Getting the Settlement and Release Agreement from defense counsel following the successful mediation can take weeks. I have never understood why. The legal assistant usually inserts the case name, parties' names, dates, and the amounts into a boiler plate release in simple straightforward cases. In more complex cases, involving confidentiality or detailed payment terms, a boiler plate Settlement and Release Agreement on defense counsel's computer is usually modified. For that reason, I ask all defense counsel to provide me with a Settlement and Release Agreement with the settlement amount left blank at the same time the defense counsel provides their mediation brief. We have a Form W-9 and the requisite Medicare form available in the mediation packet we give to the participants at the mediation to save time.

I will follow up with both parties to ensure that the Settlement and Release Agreement is received by the plaintiff and executed in a timely matter. Then, I will also follow up to make sure that the settlement check doesn't take months to get from defense counsel.

It is a privilege to be your mediator and I look forward to mediating your next case!


Bogaards

Debra F. Bogaards has a new solo practice, Bogaards Law, *in the Union Square district of San Francisco. She is both a mediator and a plaintiff's attorney. In 2019, she stopped doing insurance defense work for State Farm and Mercury as well as private clients after 37 years. Her mediation practice is well suited for her, given her strong background in both insurance defense and plaintiff's personal injury, employment, elder abuse and tenants' rights cases. An accomplished trial attorney, she has successfully completed 37 jury trials and one bench trial, and she's been a Northern California Super-Lawyer for the past 14 consecutive years. She also is Vice President of the U.C. Hastings Board of Trustees. In her free time, Debra enjoys cycling in West Marin.*