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First dance

Making the best use of first-dance mediations


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By Miles B. Cooper

The lawyer spoke with the mediator a few days before mediation. A typical and useful check in. The mediator felt the defense wasn't ready to pay the kind of money the lawyer was looking for, yet felt it would be useful. The adjuster needed to see how well the client came across. And the adjuster needed someone aside from the flat-earth defense lawyer to tell the adjuster about defense risks. A first dance. The lawyer acknowledged the benefits and agreed to proceed, noting that the client would need expectations set accordingly.

Building the foundation

What's the goal in any case? Getting the client the best outcome. While many lawyers love trial, clients tend not to. Our best work is done building the case in a way where the other side sees no alternative but settlement. The method is simple. Educate the adjuster with an early overview, medical records, wage loss – anything helpful to set reserves. During the case, show one's hand. We've got four aces over here, buddy – look! Something needs expert substantiation? Provide the report early. Defense needs to examine your person? Let them. Finally, share the mediation brief two to four weeks before the mediation. Just these steps increase settlement value, shorten case duration, and drastically reduce first dance mediation.

And yet...

Sometimes we still find ourselves at a first dance. That's okay. Recognize it, prepare for it, and use it. With any mediation, having an informal pre-mediation mediator call helps. That's where one learns it may be a first dance. Sometimes it results in a canceled mediation. A first dance is different than a wasted day. The committee hasn't met? They suddenly decided they needed a summary judgment ruling? Table it and return later.

If the mediator feels there's a benefit, however, consider proceeding. The adjuster might need to meet the client. A facilitated lawyer-to-lawyer discussion may narrow issues, leading to resolution down the line. Assuming one agrees, one next apprises the client. Client mediation preparation involves guiding them to be open to outcome instead of attached to outcome. A client who believes the case will settle that day is likely to be upset. Similarly, that client may, despite lawyer advice, want to accept a lower number. Let the client know it likely won't settle, why not, and why the mediation is still useful.

Dance me to the end...

Whether one knows it will be a first dance or the fact reveals itself, take advantage of it. It becomes an opportunity to show, tell, and learn. Show the client and how well the client can come across in joint session. This is best done by letting the mediator lob softballs to the client or opening the client to get-to-know-you questions from the defense. The latter has the most credibility – they know for sure the answers are not rehearsed.

Tell the mediator what is needed from the defense to sit down again. Summary judgment threat? Bring it and reset talks post-hearing. They have an expert who will blow up the case? Get them to provide the report, an interview, or an early deposition. Sometimes, some (or all) of the defense team got high on their own supply. The mediator, as neutral, can offer feedback with more gravitas than the plaintiff's lawyer. Some mediators follow this with a white paper the defense team can present to the carrier committee to reassess value. This is where picking a mediator who engages and follows through after mediation makes a difference.

It is said we have two ears and one mouth for a reason. Telling helps. So does listening and learning. What does the defense need to understand one's case valuation? Turn that first dance into a planning session. What depositions, what background material, what experts might one consider providing pre-disclosure so that the defense can understand the exposure? Create an actionable to-do list and follow through on it while at the same time selecting the right timeframe to return to mediation. Some of the better mediators book months out!

Remain engaged

Some mediators mediate for a day and are then done. With so many great mediators out there, consider whether this style advantages the client. We find mediators with robust follow-up and check-ins have greater success resolving cases. They don't let go. Sometimes they even get a deal done without a second session. Keep working with the mediator and the other side, get done what needs to get done, and get it in position to resolve in the best possible way for the client. Or at the very least, know what that trial gamble is against.

Outro

Back to our lawyer. The lawyer prepared the client for a non-settling mediation day, presented the client for questions from the defense, and developed a homework list. The mediator remained engaged and, once the homework was done, facilitated a resolution without the need for another formal mediation day. A job well done by everyone involved.

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