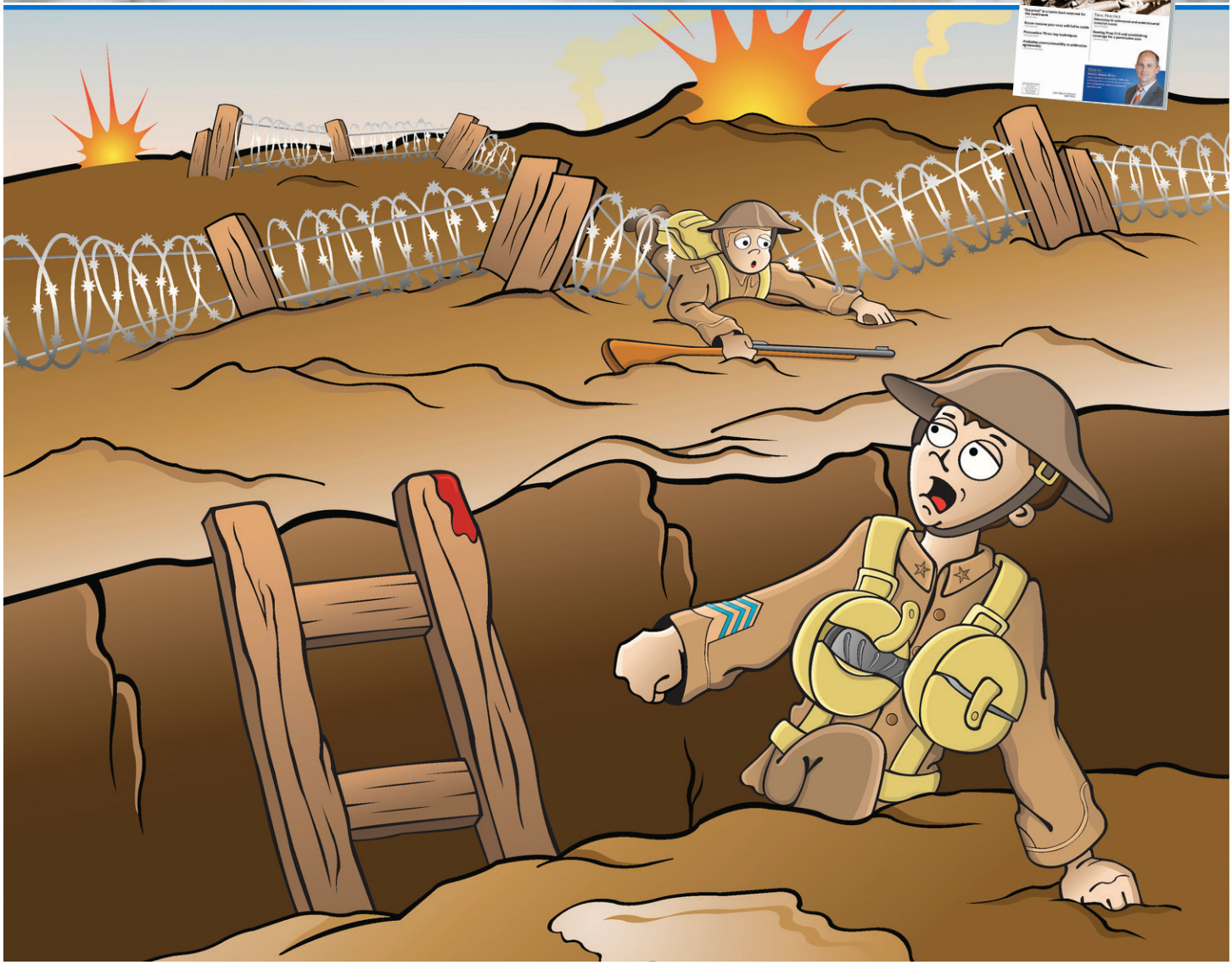


Mediation tips from the trenches

Better-informed parties enhance the chance of reaching a good settlement. "Surprise!" is a tactic best reserved for the courtroom

By John M. Drath

I first started doing mediations in the mid-nineties when the Contra Costa County Superior Court started the EASE program. Since that time much has changed, but in many ways very little has changed when it comes to successful mediation tactics. With mediations so ubiquitous, it is easy for busy attorneys to overlook some of the best practices. I offer the following refresher course along with one or two new notions.

Prepare the defense

I have made this point in previous articles, and I still hear plaintiff attorneys asking why they should do the defense attorney's work. After all, isn't that what they are being paid to do? Point taken. But you and your client want money and the defendant or insurance company has the money. You want them to understand the case from your point of view and, ideally, why it makes sense to settle the case in the range of your evaluation. Yes, your mediation brief provides everything the other side needs to know, but that is usually too late to have an impact on the

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defense evaluation at mediation. Let me explain.

I was on the defense side until moving to a full-time mediation practice several years ago, and from my discussions with former colleagues the nature of the practice at least in terms of reporting to insurance companies has not changed. Although the timing may vary from company to company, most insurers want a comprehensive report from defense counsel 30 to 45 days before the mediation date. That report, based on the discovery to that point, covers liability, causation and damages. Typically, the attorney will review the strengths and weaknesses of liability, often assigning a percentage to the likelihood of a defense verdict as well as a range of comparative fault. If there are multiple defendants, percentages of liability are assigned to each of them.

Moving to causation and damages, the report will address which injuries were caused by the defendant, and which ones might be debatable. The attorney will outline the economic damages claimed, opine as to the damages which are supported and those which may be contested. A percentage is sometimes set forth as to the possibility of the contested damages being awarded. Next, the report will cover non-economic damages, again giving a range of verdicts. Finally, the reporter will set forth a range for settlement value. If there were any settlement discussions prior to writing that report, this information would be included.

The company wants this information well in advance of the mediation because settlement authority must be issued to the claims representative who will attend the mediation. Sometimes, particularly in a large case, this authority comes from a committee after reviewing the defense attorney's report along with any other information in the file. Or it may come from a supervisor, reviewing that same information. The point is that the claims representative at the mediation typically has limited ability to offer more than the authority he or she has, and if it is not enough to settle the case, then the focus turns to post-mediation remedies. While those may succeed, getting to resolution on the day of mediation when the decision makers are present and your client is in the right frame of mind is the preferred result.

But what if you could send your own report to the company addressing all the same issues in the defense report? Then the evaluators would have two reports to consider. Your report might well bring up evidence and arguments overlooked by defense counsel, damage claims that might have been missed or underemphasized, compelling jury arguments that need to be considered. Actually, you can and should send that report in the form of a well-reasoned, factual and non-threatening demand letter that will arrive in time to be included in the pre-mediation review. That effectively eliminates any claim of surprise at the mediation and will require defense counsel to address your arguments and evidence.

Even before the demand letter is written, review your discovery responses to be certain that everything you will be relying on has been disclosed. If you have medical or other records that have not been sought by the defense but are important to your evaluation, send them with or without a request. No attorney wants to base an evaluation on incomplete or inaccurate information. Write defense counsel and ask if there is anything else the defense needs to prepare for the mediation.

Finally, you will hopefully have a good enough relationship to pick up the phone and have a candid discussion with your adversary about your mutual expectations at mediation. This discussion may or may not include specific offers but having made a demand, you should get some assurance that the defense is going to be realistic. Cases in which those conversations have taken place enjoy an extremely high settlement rate.

Prepare your client for used-car dickering

Mediation often results in an adjustment of expectations but if the adjustment is too severe, you will end up with an unhappy client. The plaintiff should not be hearing about liability and causation issues for the first time from the mediator, or about the costs involved in going to trial. Your client may not fully appreciate these issues going into mediation but might after hearing about them again from the mediator. It is much better to have a mediator reinforcing points you have already made than introducing them for the first time. Otherwise, the mediator will be viewed by your client as an advocate for the defense and will have less ability to assist you in settling the case.

Preparing your client for the mediation process too is helpful. It can be a slow and grinding event and is often unlike anything they have experienced before. They have been dealt a painful and perhaps disabling injury and the two attorneys act like they are dickering for a used car. A plaintiff forewarned is much less likely to find the process so offensive. Discuss your strategy with the client and the concept of mid-points. I always ask plaintiffs to have patience and to avoid taking offense at anything offered or argued by the other side, and I appreciate it when the plaintiff has already heard this from their attorney.

Prepare the mediator

Pre-mediation calls with the mediator are never a bad idea and, in some cases, essential. Mediators often initiate those calls, but you should not wait to be contacted if you have important information to convey, information that you cannot put in a brief or do not want to convey in your client's presence. This could entail any number of issues: a client control problem, whether to present offers in the client's presence, conversations with defense counsel, whether to have a joint session, etc. If you have never used this mediator, this is your opportunity

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to get to know him or her and find out how they will approach the session.

Something old, something new: The joint session

Back in the last century when mediations were born, they invariably started with a joint session. Over time most mediators abandoned them. Like Ohio State Coach Woody Hayes felt about the forward pass in football, three things could result from a joint session and two of them are bad. At the very least, valuable negotiating time was lost. At worst, statements could be made that caused positions to harden or emotions to rise. Those possibilities still exist, but that does not mean that there is *never* a good reason to have a joint session.

At one end of the scale is a simple "meet and greet" which will tell you who is there for the defense, and sometimes importantly, who is not there. This can be nothing more than a round of introductions and an exchange of pleasantries. Moving up the advocacy scale, there may be some difference between the *Howell* numbers or wage-loss calculations that can be clarified. There may be damage issues or arguments that the defense is missing that can be raised in a non-confrontational style.

At the other end of the scale is a full presentation, possibly including accident reconstruction animation or a "day in the life" video. Done improperly or in the wrong case, there is the risk of a negative reaction. But, this is your one and only opportunity to directly address the decision makers in the defense room. If you have a strong case, one in which the defense has little to talk about, then this is one way to be sure that the decision makers hear what they need to hear.

There are a number of options to take into consideration when making a full presentation. Should your client be present? Depending on the case, you may not want to subject your client to a retelling of the facts and the injuries. At the very least you need to prepare them for the experience. How detailed should you be? Keeping in mind that the decision makers are (or should be) quite familiar with the case, then just highlighting the facts and damages that should cause concern for the defense is effective. Anything more than that dilutes the impact of the presentation. Finally, stick to arguments that are based on solid evidence. Presenting an accident reconstruction animation unsupported by clearly provable facts will undermine your credibility on the rest of your arguments.

A brief word about briefs

Ideally you have sent a detailed demand letter well in advance of mediation, so the main purpose of the brief is to educate the mediator about the case in a clear and concise manner. It should be sent far enough in advance of the mediation to give a busy mediator time to review it and, if warranted, have a pre-mediation call with you. Unless your case involves an unusual area of law, you should assume that the mediator is well acquainted with the usual tort concepts of standard of care, causation and damages. Too often I receive briefs full of discussions of general law which have been cut and pasted from some law and motion brief and, rightly or wrongly, suggests a lack of experience.

Exhibits too, should be given some thought. Often, we are sent voluminous exhibits: medical records, deposition transcripts, even discovery responses. Do not expect the mediator to read the entirety of those exhibits. In my case, I usually do not have the time and I do not want to charge the parties for taking that amount of time. What I do read are the specific portions referred to in the briefs or highlighted in the exhibits themselves. Make it easy for the mediator to follow the evidence supporting your arguments.

About that demand

A very successful plaintiff attorney said that the opening demand should be high but credible. But what constitutes credible? Obviously, that is a case-specific question, but there is one constant: A demand that includes overreaching damages will not be considered credible. Too often I see attorneys falling in love with causation arguments that are at best, thin. They fail to appreciate how those arguments are going to be received by a jury, and what effect that can have on the more solid damage claims. This is not lost on the defense, and it can temper their offers at mediation. It is one thing to include those damages in your brief, but keeping them in the equation beyond the first round or two is usually unproductive.

Acceptable or not, you want to know the highest number the defense would pay at mediation. You will never learn that if you stay at a level that you know is well outside a likely verdict range.

What are they prepared to pay?

While you want to know the highest amount the defense is willing to pay, it is also in your best interest to let the defense know at least the neighborhood of your settlement range. Why, you ask, if the defense will never get there? Well, I learned long ago to never say never in a mediation. I also know that a claims representative is more willing to get more authority if it will definitely settle the case. You do not want to come to your bottom line, and rightly so, without some assurance that it would be paid. One way to get there is to invite a mediator's proposal in your settlement range. If the mediator gets the sense that the defense might agree to that number, then that is one way to go. Practices vary among mediators, but for me it is a move of last resort, and a negotiated settlement is the preferred result.

So how to achieve that when, after several moves, the parties remain light years apart? Let's consider an example. You have a case that you feel has a jury range of $500,000 to $1,000,000. You have advised your client that you would recommend any settlement over $700,000. You started at $2,000,000, which the defense viewed as unreasonable. Four moves later you are at $1,800,000 and the defense just got to

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$100,000. Both sides are frustrated, and the mediation is in jeopardy. The mediator opines that the defense might get to $500,000 but probably no higher. The defense is not making big moves because the mid-point ($950,000) is too high. You have hinted to the mediator where the case might settle, but your moves tell a different story. What to do?

You have two reasonable options. One is to make a big drop with a message that a move of like kind is expected. If indeed the defense evaluation is $500,000, the response may be disappointing. And it does not tell the defense your settlement range. Option two is to propose a bracket,[1] which would provide that information. Your bracket might be $350,000 and $1,300,000, the midpoint being $825,000. As the mediator, I would encourage the defense to propose their own bracket, assuming they are unwilling to accept yours. The defense bracket might be $250,000 and $700,000, which would reinforce what the mediator thought would be their range.

At this point you could respond with another bracket but that would lower your midpoint without leaving you much room to move. Or you can safely return to traditional back and forth negotiating, having informed the defense where you want to go. You could start at $1,300,000 and see how the defense responds. Is the case likely to settle that day? Probably not unless the defense was keeping a lot in reserve. However, if the mediator thinks your evaluation is more realistic, that allows him or her to work on the defense over the ensuing days, comfortable with the knowledge of what it would take to settle the case.

It often requires patience, and it is rarely a linear process. Negotiations can stutter and stall, and then get back on track. When it appears that an impasse has been reached, both sides may want to get a mediator's proposal. Regardless, you do not want to leave the mediation without knowing what the defense was prepared to pay.

Wrap up

Information is the currency of the mediation process. The better informed the parties, the greater the chance of reaching a good settlement. The element of surprise is a tactic best reserved for the courtroom. Making every effort to educate your adversary and the mediator will pay off in good results and satisfied clients.


Drath

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Endnote:

[1] For anyone unfamiliar with this negotiating tool, the proposer is asking the other side to go to one number if the proposer goes to another. The midpoint of those two numbers is generally regarded as the number at which the proposer is willing to settle. It is a form of communication useful when there is a large gap separating the parties.

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