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Ask the mediator

Common situations that can slow down or end your mediation

By Debra F. Bogaards

After a recent speaking engagement as a mediator at the WTLA Sun Valley Ski Seminar, several plaintiffs' counsel came up to me with interesting questions. Here are some situations that you may find yourself in.

CCP 998 demands vs. demand at mediation

As plaintiff's counsel, you make C.C.P. 998s purposefully lower than the case value for strategic reasons. Can you make a demand at mediation that is higher?

A California Code of Civil Procedure Section 998 Offer to Compromise ("C.C.P. § 998") is often used strategically at the beginning of a case. Oftentimes, the plaintiff's counsel will make a lower-than-case-value demand because there are virtually no litigation costs. Counsel hasn't hired experts, taken depositions, or incurred substantial costs. The client may be eager to settle the case without getting too involved and waiting over a year for trial. So, there is a reason to make a demand that is perceived by you as a good deal for the defense. In other words, take it now or else my number will only go up!

The defense counsel, on the other hand, may perceive your strategically low demand as a reasonable starting place for negotiations, or think it is still too high, and reject it. Then, when you get to mediation, and start at a much higher number, the defense counsel and his/her claims representative may get upset, and not want to engage in settlement discussions. A big lament by claims representatives is that your number went higher, not lower, which is how ordinarily, settlement negotiations go.

So, I would highly recommend that when you send your C.C.P. § 998 to defense counsel, you include a cover letter. Tell the defense counsel (and claims representative) that you are making a strategic C.C.P. § 998 that is significantly lower than the value of the case in an effort to settle it early on. However, should your C.C.P. § 998 be rejected, then your number at a subsequent mediation after much litigation will be for full case value and substantially higher.

Then, when mediation rolls around, be sure to put your C.C.P. § 998 number and explanation in a paragraph under either settlement history or conclusion in your mediation brief and attach your cover letter explaining why the C.C.P. § 998 is so low.

Joint sessions at a Zoom mediation

You abhor joint sessions at the beginning of a Zoom mediation. Should you choose a new mediator?

Simply raise the issue and your views during a pre-mediation phone call with the mediator, or tell the case manager when you schedule your mediation. Most mediators are very willing to accommodate your request. Personally, I like to start with "introductions" at the beginning of my Zoom mediations. That means during the five minutes it usually takes for all parties, counsel, and claims representatives to sign on, we chat about the weather or the Giants. We do not talk about the facts of the case.

Since it's the plaintiff's big day when they may settle and conclude their case, I like the plaintiff to see that there are a lot of people on the defense side who care enough about their case to be there. Also, the claims representative has an opportunity to see the plaintiff, who hopefully has been prepped and makes a good first impression. However, in cases where emotions run high like employment/sexual harassment cases, I often start with staggered times.

Each case is different, and your mediator should be accommodating to your preference.

Managing client expectations

You have a client control problem and need help in managing your client's expectations. What can you do at mediation?

Be honest with your mediator. It is important to develop a good working relationship with your mediator, which you can do over multiple mediations using the same mediator. Repeated mediations give both you and the mediator an opportunity to learn each other's style and to gain each other's trust. I appreciate when plaintiff's counsel shares with me during our pre-mediation phone call that their client is difficult and has unrealistic settlement expectations. That knowledge gives me the confidence to share with the plaintiff in their breakout room the weaknesses in their case and risks, as well as discuss settlement value. My imparting this knowledge as a neutral party may be easier for the plaintiff to hear than coming from their own attorney, or it may reinforce what they have already heard from their attorney.

Defense counsel has failed to disclose an expert

You know that defense counsel has failed to disclose an important expert. The time for a supplemental expert disclosure has passed. How do you convey this information most effectively, while still maintaining a good relationship with defense counsel and substantially increasing your settlement demand?

Tell the mediator. In a recent mediation, once plaintiff's counsel shared the details with me (defense counsel had withdrawn their neuropsychologist who performed the IME and failed to disclose another neuropsychologist in response to plaintiff's supplemental disclosure), I was able to explain to the claims representative that while their belief that plaintiff's brain-injury testing was "junk science" might be true, they lacked an expert to espouse their views to the jury. Absent this expert, the risk at trial of failing to persuade the jury based solely on their attorneys' cross-examination of plaintiff's multiple brain-injury experts (neuroradiologist, neuropsychologist and neurosurgeon) is too great. That gave me an opportunity, through my mediator's proposal, to push the claims representative to go back and secure four times the settlement authority that he brought to mediation.

Get your questions answered here

Send any questions of general interest to debra@bogaards.law for use in future columns.



Bogaards

Debra Bogaards is a sought-after mediator in her own practice, Bogaards Mediation. *She has a background with 38 years in insurance defense, mostly for State Farm clients, and an overlapping 20 years as a plaintiff's personal injury and employment lawyer.*

She also will be an adjunct professor with the UC Law Center for Negotiation and Dispute Resolution in the fall of 2023. While most of her mediations are conducted over Zoom, she welcomes in-person mediations at her Jackson Square District offices in San Francisco.

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