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Winning Strategies and Practice Tips in Mediation

Having had the privilege of serving as mediator or arbitrator in over 7000 cases since 1990, I have had the opportunity to observe the varied strategies, presentations and practices of thousands of individual parties, their attorneys, business representatives and insurance claims handlers in presenting their case for resolution by way of alternative dispute resolution, specifically, by the processes of mediation and arbitration. Just as no two neutrals conduct themselves in the same manner, it remains fascinating that no two cases are alike and the interests, needs and presentations of the participants in an ADR process vary greatly. At times the role of the neutral is akin to a sponge, assessing such differing information, arguments, personalities and interests. The following observations, strategies and practice tips are drawn from this enthusiastic neutral's experiences in assisting parties to resolve their case effectively in mediation.

Though these tips and strategies have general application in a wide array of cases, for purposes of illustration, I would like you to consider yourself as involved as a party, attorney, business or insurance claims handler in a negligence case involving personal injury where all parties are represented by counsel and the defendants are covered by insurance policies with claims handlers also being involved.

MEDIATION

Before the Mediation:

Fully Familiarize Yourself With The Mediator And Their Style And Usual Practices.

No two mediators are alike. Each has their own style and conducts the mediation differently. If the negotiations involved in a mediation can be considered a dance, the mediator is the orchestra leader. Some mediators have more of an evaluative style and will, rightly or wrongly, express their opinions about the case early and often. Other mediators are more facilitative, more concerned with sculpting and directing a process of mediation that fosters resolution.

Look into the style and background of potential mediators before their selection, ask your co-workers, peers and references provided, of their experiences with the mediator. Is this mediator's style what your case needs?

Importantly, speak to the mediator directly before the mediation. Have them assure you that such pre-mediation conversations are confidential. Good mediators welcome such communications. Have the mediator describe to you the process of mediation that he or she will employ, for example, their expectations as to pre-mediation written submissions, the conduct of the initial joint session, the use of private confidential caucuses with each party, and how and when settlement documents will be prepared if and when the case resolves. Discuss with the mediator particular issues or concerns that you, your client or your insured may have that he/she needs to know in advance. Are there particular obstacles to settlement, i.e., emotions, anger, unreasonable expectations of a party? Ask how the mediator will deal with such issues. Review carefully the mediation agreement, rules and guidelines of the ADR provider involved. Be sure that the mediation agreement is signed by all and clearly delineates the strict confidentiality of the mediation process. Ask all of your questions *before* the mediation session.

Prepare yourself, your client or your insured well for the mediation.

Know your case well. Be prepared to make a concise statement of the relevant facts, your position and perspective, or that of your client. Organize and be prepared to show critical documents promptly at the mediation. Anticipate and be prepared to counter all of the other side's arguments. If representing a party, clearly describe to them the process of mediation that will be employed by the mediator. Decide who will talk and, most likely, when. What tone of opening comments will best foster resolution as opposed to resentment and entrenchment. Describe to your client what the confidentiality of the mediation process means and its importance. Describe to clients the process and benefits of private, confidential caucuses with the mediator. Appreciate and/or explain to your clients the strengths and weaknesses of the case. Though advisable to discuss and determine your client's goals at the mediation, your client is well advised to come to mediation with an open mind, with a willingness to listen, both to the other side and the impartial mediator, and should avoid coming with bottom lines and pre-determined positions.

Assure in advance that all parties and all individuals with needed settlement authority will be attending the mediation in person.

Research and experience shows that when the plaintiff, the defendant, an insurance representative or any other individual with *full* settlement authority does not appear at the mediation, the chances of settlement decrease dramatically. To be most effective, a mediator wants to look into the eyes of all needed decision makers, or insurance representatives with full monetary authority. Particularly frustrating to mediators is when such a needed, authorized decision maker is not present, even when they may be reachable by phone from time to time during the mediation session.

Too often as well, a mediator is faced with relying on an attorney or other representative having all telephone conversations with a decision maker and is at times prevented from speaking directly to them. In such cases, it is difficult for the representative who is present to accurately convey the ebbs, flows and subtleties involved in a mediation process to the decision maker. Further, it is often the case that the representative present may find it difficult, in view of his perceived role as an advocate, to fully emphasize the weaknesses of their case as effectively as an impartial mediator could and would, at least confidentially, to the decision maker if they were physically present.

Insurers should always have personnel with needed settlement authority appear at the mediation session. Claims handlers and defense attorneys should be sure that the opposing party, and not just their attorney or other representative, is going to attend the mediation. In the rare circumstance where the party or a person with needed settlement authority is unable to attend, their representative should advise all parties of this before the mediation. This should not come as a surprise to the opponent when they arrive at the session. At times, due to geography or other circumstances, a party or person whose authority is needed to settle the case may be unavailable. In such cases, and only with the assent and knowledge of all parties, they may be able to participate by telephone, Skype or other video conferencing service during the course of the mediation session.

Provide Written, Concise and Well Organized Materials to the Mediator in Advance.

Determine from the mediator the type of mediation statement or documents they would like before the mediation session. Presenting mediation materials at the beginning of a session deters from the mediator's ability to thoroughly process and consider important information. Determine and decide whether to send a confidential mediation statement to the mediator or one that is shared with the other parties. In either event, the mediator should understand the case, the key issues, and your position, or that of your client or insured, in advance of the session. Critical pieces of documentary proof should be forwarded to him in advance, for example, expert reports on liability and damages, key

photographs or portions of pleadings, discovery materials or depositions. However, don't bury the mediator with materials. Experienced mediators know what materials are important. If further materials are supportive to your case, they can be submitted at the mediation session. The status of any negotiations should be made known to the mediator. Providing such information in advance to the mediator will save time at the mediation session and allow the mediator to more efficiently focus all involved on settlement.

Determine the existence of, the amount of, and arrange for the participation of, all lien holders at the mediation session.

All too often it occurs that final settlement at a mediation is prevented because certain lien holders were not contacted and engaged to participate at the session. These lien holders often include, but are not limited to, workers compensation carriers, medical care providers, health insurers, Medicare and Medicaid, Mass Health and others.

Though the claimant or his attorney are customarily charged with dealing with lien holders, a diligent defendant, his counsel or his insurer coming to mediation is well advised to proactively take steps to assure that all lien holders have been dealt with and/or will be available and/or participating at the mediation session, whether this means speaking to the plaintiff's counsel in advance or speaking to those lien holders who are permitted and willing to have such discussions, such as workers compensation carriers.

At a mediation session, a claimant wants to know what their net recovery will be, in their pockets, after attorney's fees, legal expenses and any liens are taken, before accepting a settlement at a mediation session. Too often the momentum and opportunity for settlement at a mediation session is lost when the session needs to be suspended to obtain lien information. Often the claimant's demands reach a standstill because the lien holders' position is not known, and at times insurers are unwilling to offer their top dollar at the mediation session if there is a contingency on acceptance, such as the successful negotiation of a lien. So, consider inviting the lien holder to come to the mediation. If they cannot or will not attend, be sure their representative, with full settlement authority, is available by telephone during the course of the mediation session. Consider having them talk directly to the impartial mediator about negotiating and /or discharging their lien as part of the mediation process. Often they will listen to an impartial mediator's perspective.

At The Mediation

Be firm in your opening statements but avoid alienating or offending the opposing party.

There is an understandable tendency by an aggrieved party or his attorney in his role as advocate to make a strong opening statement at a mediation, often with a showing of some bravado. A strong opening statement has the advantage of impressing on the opposing side, his attorney or his insurer, the strength of your arguments, your belief in your case and your preparedness to proceed to trial if mediation is not successful. However mediation is not a trial and remarks made in a joint session should not be inflammatory, belligerent, nor personally offensive to the opponents or their representatives. Such statements often have the result of widening the rifts that exist between disputants at a mediation. In such instances a mediator finds himself expending precious time at the session in effect rehabilitating the offended party to a point where compromise and collaboration on his part is possible. At the very least, consider expressing during the joint session words to the general effect that that you and/or your client are willing to listen and proceed in good faith, with the assistance of the mediator, in efforts to resolve the case and avoid, if possible, further litigation and trial. Music to a mediator's ears and a jumpstart to a fruitful mediation process!

In cases where emotions between the disputants are boiling, opening comments by the parties and their counsel may be limited, curtailed or simply not held, in favor of private caucuses with the mediator. In such cases, consider advising the mediator in advance of such emotional obstacles so the neutral can consider making helpful adjustments to the mediation process to maximize settlement prospects.

Make realistic demands and offers consistent with the facts and law in your case.

At times a party, or their representative, follows up an overly aggressive opening statement with an unrealistic or arguably insulting opening offer or opening demand, landing a *one-two punch* that may be satisfying to them but may in fact seriously impair the prospects of collaborative settlement discussions at the session. Most mediators will tell you that an unrealistic opening offer or demand usually is responded to by an equally unrealistic response, so the question is, what has been gained? What possibly has been lost is the credibility of a party or their representative, a quality upon which much is placed by the mediator and all involved at a successful mediation.

This is not to suggest that opening offers or demands need to be reflective of so called bottom line positions. Rather, offers and demands ideally should at least find reasonable support in the facts, circumstances and the law involved in each case, such that a party or representative can credibly support such positions both to the other party and to the mediator. Too often, maintaining unrealistic demands or offers leads the opposing side to be unwilling to disclose what they may been willing to do otherwise.

If representing a party or insured at a mediation session, let them speak their piece, either in the joint session or certainly in private caucuses with the mediator.

It is important for mediators to establish a rapport with the parties, as well as their attorneys and representatives. Mediators want and need to listen to the parties directly so as to clearly understand their thoughts, needs and interests. It is, in fact, their day. Many parties have waited months or years since the dispute or claim arose to be heard. Many have by then also endured the slings and arrows of aggressive litigation and discovery. A party who has had been afforded the opportunity to clearly state their case at a mediation, even if primarily in private caucuses to the mediator, is more likely to be amenable to closure and settlement. Emotions often need to be vented before an aggrieved party can consider resolution. Perhaps a party has unrealistic expectations or cannot appreciate or accept the risks involved to them in proceeding to trial, even when duly counseled by their attorney or representatives. In such cases a skillful mediator, after having established a rapport with the party, and having demonstrated themselves by then as being both impartial and experienced, can speak to the party, whether a plaintiff, a defendant or an insurer, in private caucus, about their thoughts and expectations and rationally discuss the risks involved in proceeding to trial, existing judge or jury trends in the type of case involved, the time and expense ordinarily involved in reaching trial, as well as the anxiety and frustration too often accompanying that path. Attorneys and representatives should consider the advantages involved in direct client participation, at least with the mediator, as they fulfill their role as both advocate and advisor to the client at the mediation session.

When a case reaches settlement at a mediation session, take the time to prepare and sign settlement agreements and/or releases.

Particularly after an arduous but successful mediation session, participants may be anxious to depart and, at times, do not heed advice to remain for the processing of a signed settlement agreement, rather choosing to prepare and sign such an agreement in the following days. While often this is accomplished, most mediators know of those cases where, for various reasons, the agreed upon settlement falls through, whether because a party changed their mind, misunderstandings as to the specific terms agreed upon, or that the devil lurked in details, perhaps unforeseen. Because of this, most mediators will stress the need for at least a minimal, written, signed and legally binding settlement document at the end of a successful mediation. Take the time to have it prepared. You, your client and your representatives have worked too hard to have the settlement that you have reached be deemed unenforceable.

We at MDRS hope that these tips and strategies are helpful to you in getting the best return on your investment in ADR.