

When to Initiate Negotiations

- “Be quick, but don’t hurry.” – John Wooden
 - Early settlement saves more in defense costs
 - But sometimes you have to conduct some discovery before you can evaluate settlement value
- Good times
 - After positive developments showing will to defend
 - Retaining defense counsel, filing answer, serving discovery, filing credible motion for summary judgement
 - After favorable development – ruling, discovery of evidence
- Bad times
 - When plaintiff’s expectations are highest
 - Immediately after complaint is served
 - After unfavorable development – ruling, discovery of evidence



Court-Conducted Settlement Conferences

- Many process details set by court rule – you have less control
- May be conducted by judge, magistrate or attorney volunteer – usually not very skilled in mediation
- Usually very limited in duration
 - But sometimes extended through “hall time.”
- Court rules typically require attendance by carrier representative with adequate familiarity and settlement authority
 - Hire a local independent if you don’t want to go
 - Never, never say you don’t have adequate authority to settle – the reason you won’t offer more is because the case is not worth more.
 - If you don’t play the game right, you may be sanctioned.



Constraints on Working the Clock

- Court settlement conferences
 - Usually scheduled by the court for a very limited time.
- Mediations
 - You need agreement on schedule and paying the mediation fees
 - Insist on at least ½ day, preferably with an understanding that the parties and mediator will be available to go longer if the situation warrants
 - Do not make travel plans that will prevent you from staying as long as needed.

To Mediate or Not to Mediate

1. Pros
 - An opportunity to settle a case, particular with difficult opposing counsel
 - A valuable opportunity to learn about the opposing case
2. Cons
 - We are optimistic that we can obtain dismissal or summary judgment early in the case.
 - The case is defensible, has a low exposure and can be tried simply without great cost.
 - A negotiated settlement would set an unfortunate precedent that would encourage further claims.
 - Our insured has a consent policy and will not consent to settlement.

More on Consent

- Most insureds who insist upon a scorched earth defense at the beginning of a case will lose their resolve later. You may want to have a serious heart to heart talk early in the case to try to accelerate the change of heart.
 - Emphasize saving the insured from inconvenience and possible embarrassment, not saving the insurance company from expense.
- You may wish to propose mediation even though your insured is not inclined to consent to settlement, but you should warn the plaintiff's attorney and the mediator that there may be a problem getting consent.
- Note that not all policies have consent clauses.

Selecting the Right Mediator

- Your choices may be limited by local custom. You might not like the idea of using a practicing lawyer as a mediator, but if that is the way it is customarily done where your case is, it is often a mistake to try to force the locals to do it a different way.
- If you have a choice between different types of mediators, you need to determine who are the decision makers on the other side and what style of mediator is likely to be most persuasive.





Styles of Mediation



- **Judgmental**
 - Mediator thinks his role is to tell the parties what he thinks the case is worth and persuade them to settle at that level. Good if the mediator's evaluation coincides with yours. Bad if the mediator leans towards the plaintiff's evaluation. Really bad if the mediator empowers the plaintiff attorney by providing him with arguments he didn't think of on his own. Strategy: you have to persuade the mediator that your evaluation is correct.
- **Facilitative**
 - Mediator thinks his role is simply to bring about settlement at any level regardless of what he might think of the case. This style of mediator will apply the most pressure where he thinks it is most likely to produce concession. Strategy is to show thorough preparation, confidence in your evaluation and no undue fear of trial.

Mediator Occupational Categories

- **Professional mediator**
 - May or may not be an attorney – usually has had formal training in mediation. Tends to have a facilitative style, good at talking with the parties and dealing with emotional issues.
- **Retired judge**
 - Usually has not had formal mediation training. Tends to have a judgmental mediation style. Prefers to talk to the lawyers, not always good at talking with the parties and dealing with emotional issues. However, judges carry great credibility and may assist with dealing with difficult and unreasonable plaintiffs.
- **Court Appointed Attorney**
 - Usually has no formal mediation training – greatest strength is typically that he has a good personal relationship with the attorneys on both sides – greatest weakness is that he is honored at being chosen and reluctant to deliver bad news to either side.



Where to Mediate

- Your attorney's office.
 - Advantage: making the other side come to you is a sign of power.
 - Disadvantage: it's hard to get up and threaten to walk out of your own office.
- The plaintiff attorney's office.
 - Disadvantage: going to their turf may make them feel they have a "home court advantage."
 - Advantage: you get a chance to snoop. And, of course, it is hard for the plaintiff attorney to get up and threaten to walk out of his own office.

Where to Mediate

- The mediator's office or other "neutral" location
 - A way to break the deadlock over who gets the "home court advantage".
- Telephone mediation.
 - Advantage: Avoids travel costs and travel time and may be cost-effective in simple or low-exposure cases.
 - Disadvantage: Less effective than physically meeting at the same location. People feel less pressure in telephone contact.

Who Should Attend?

- Plaintiff
 - Usually you want the plaintiff to be there in person to feel the pressure and influence of the event.
 - Also your opportunity to personally evaluate plaintiff for sympathy and credibility.
 - It's a good idea to confirm in advance that the plaintiff will attend.
- Helpers
 - Sometimes the parties want to bring friends or family members for moral support or help in making a decision.
- Client
 - Attending a mediation without any client representative may show a lack of good faith.
- Experts
 - When the value of the case hinges on very technical expert testimony, it can be extremely persuasive to bring along an expert to put on a "dog and pony show," especially if the plaintiff does not bring an expert.
 - On the other hand, too many cooks in the kitchen can be problematic.
- Adjusters
 - If the plaintiff does not know there is insurance and has not been smart enough to ask, you may consider staying away.
 - "The person with authority"

Pre-Mediation Activity

- Preparation
 - The key to success. If you know the case better than the plaintiff's attorney, you will get superior results.
- Ex Parte Communication with Mediator
 - Discuss anticipated problems and suggested approaches.
 - Educate the mediator in advance and ensure the mediator understands your case
- Mediation Briefs
 - Strongly recommended when you have a judgmental style mediator. Less valuable when you have a facilitative style mediator. Have a clear understanding as to whether briefs will be submitted and if copies will be exchange.
- Settlement Memo From Attorney to Client
 - Pre-mediation discussions between attorney and client.
 - Anticipate and discuss objectives
 - Pre-mediation discussions between insurer and insured.
 - Address coverage issues prior to mediation

Opening Session

- Advantages of Joint Session
 - Opportunity to size up the opposition
 - Opportunity to speak directly to plaintiff
 - Opportunity for parties to blow off steam
- Disadvantages of Joint Session
 - Increases acrimony
 - Waste of time
- Effective vs. Non-Effective Opening Sessions
 - Opportunity to identify, address and defuse the emotional impediments to success
 - Paying attention to the audience
 - Does plaintiff need and opportunity to be heard?
 - Invest in an effective presentation?



The Mediation: Initial Breakouts

1. Use mediator to learn about plaintiff's mediation concerns and desired outcomes
2. Build relationship of trust, confidence and candor with mediator
3. Confidential Communications With Mediator
 - Is it really “confidential”
 - Disclosing your “bottom line”
4. Listen

Mediating Fundamentals

- Opening positions
 - Pre-litigation demand letters typically state an opening position.
 - The pleadings in a lawsuit usually present extreme posturing rather than real negotiating positions.
 - If there have not been prior negotiations, someone needs to get the ball rolling by either stating or asking the other side to state a opening position.
- Who makes the first move?
 - Your opening position must leave room to move in the “dance.” As a rough rule of thumb, figure you are going to have make multiple moves before you reach agreement.
 - “Low-balling” vs. “Sending a Message”
 - Avoid the “insult” level.
- Size of moves
 - Start strong and reasonably, but do not disclose too early all you are willing to give

Mediating Fundamentals (cont)

- **Frequency of moves**
 - Patterns in movement signal goals and intentions
 - Signals may be either unconscious disclosures or conscious manipulation
 - Keep track of all your opponent’s moves and look for patterns
 - Size of move in dollars
 - Size of move in percentages
 - Where move places the midpoint
 - *Every* number that is mentioned is significant either as a position, a message or a Freudian slip.
 - Consider how the other side will read the pattern of your moves
- **Tactics and tricks**
 - If you want to settle, don’t hold back your best points for trial
 - Good Cop/Bad Cop
 - This is a little bit of play acting which can be employed by either plaintiffs or defendants.
 - The object is to convey the impression that there are two decision makers on your side.
 - It seems silly and transparent, but sometimes it actually works.

Mediating Fundamentals (Cont)

- **Irrational behavior**
 - In your own camp
 - If you have a sound evaluation and a good game plan, stick with it and don't let fear, anger or competition get you off track.
 - On the other side
 - Recognizing irrational behavior by the other side helps you to understand what the problem is, but unmasking or responding in kind seldom work.
 - A mediator whom the plaintiff's attorney will respect is often the best way to diminish irrational behavior.
- **Skip the dance?**
 - You may need to just terminate negotiations. There are a few cases that just cannot be settled and must be tried.
 - You need to be confident in your evaluation and that it is the plaintiff's unrealistic posture that has forced you to take the risks of trial after making every reasonable effort to settle.
 - There are some plaintiffs who will just hang tough with an unrealistic position as long as you keep talking, but once they realize that you are about to break off negotiations they will drop like a rock.
 - Avoid threatening to walk out too early in a mediation. Work the clock to see if time and fatigue will do the trick.
 - If liability and damages are clear and the settlement demand is reasonable, hard-ball negotiation may be bad faith.

Bottom Line: Make Them An Offer They Can't Refuse



- Mediators frequently ask, "Tell me your bottom line."
 - When does putting your bottom line on the table work?
 - When does it blow up?
 - How to effectively present a "bottom line."

Mediator Tactics

- Mediator's Proposal
 - Mediator asks your permission to propose a recommended settlement
 - In multi-party cases this is sometimes the only way to break a logjam
 - In 2-party cases, you need to “read” the mediator and feel fairly comfortable that his recommendation would be acceptable to you before you go down this road.



Calling an Impasse

- When you have the sense that a settlement will not be reached during a mediation, don't keep throwing money at it.
 - You will need to have gas in your tank when it comes time to resume negotiations after the mediation.
- Despite the “now or never” atmosphere, most cases will still settle after a failed mediation
 - Good mediators don't give up and will continue to work with the parties by phone
 - On the morning after, parties often have regrets about the deal they turned down

Mediation Results In Settlement

- Don't leave until all parties have signed a deal memo confirming key points.
 - Okay to indicate a more formal and more detailed settlement agreement will be prepared later
 - The signed deal memo greatly reduces the risk that major disagreements will arise when the formal settlement agreement is drafted.



Post-Mediation – Statutory Offers

- Many (but not all) states have a statutory offer of judgment procedure.
- If the statutory offer is not accepted and the case goes to trial and the party who rejected the offer does not get a better result at trial, then enhanced costs will be awarded.
- This ups the risk of rejecting a reasonable offer.
- Typically when one side makes a statutory offer, the other side will respond with a statutory counteroffer – two can play this game.

