Mediating High-Value Cases Effectively

By Joe Epstein, Esq.

There is an enormous investment in time, money and emotion by all parties who participate in complex, high-value and/or multi-party mediation. Most parties are looking for closure at such mediations. Having mediated and/or arbitrated over 2500 cases, I have concluded that the key ingredient to more effective and productive mediations is pre-mediation design and preparation. It is insufficient and short-sighted for parties to set a case for mediation and then forget about the mediation until they prepare a pre-mediation statement just days before the scheduled mediation. Instead, parties must take an assertive approach to designing a mediation process that "fits" their case. There is no sense in ordering a size 40 short suit when a case requires a 46 long suit. Similarly, the parties have to make sure that each party has the data necessary for a comprehensive evaluation and that the necessary decision-makers participate in the case evaluation and/or will be available at the mediation.

I suggest that parties prepare for mediation the same way they prepare for trial. The same thought, forethought and preparation should go into mediation preparation as goes into trial preparation. Since most cases settle, it makes sense for all parties to schedule the date of their mediation after they have gathered sufficient data for a comprehensive case evaluation, but while there is still an opportunity for transactional cost savings.

For a productive mediation, certain information should be obtained and analyzed prior to the mediation. For products liability cases, it is generally necessary for the parties to explore both the facts of the accidents and the facts surrounding prior similar accidents, if any, beforehand. In medical malpractice cases, the deposition of the plaintiff, the defendants and the key experts are generally necessary before both parties can fairly evaluate their case. In the typical insurance bad-faith case, it generally is necessary for an adjuster or two to be deposed before conducting a fruitful mediation.

In multi-party cases, I urge parties to consider a pre-mediation caucus with the mediator well in advance of the mediation. At my urging, the plaintiffs in a recent sixteen-party case made his or her demand to the defendants and met with me one month before the mediation. Shortly thereafter, I met with each of the defendants. Between the time of these pre-mediation caucuses and the mediation, the plaintiffs were pushed to provide missing damage and subrogation information, while I got a handle on the hotly contested and complex liability scenario.

In another case, where an injury left a vibrant, well paid executive a quadriplegic, it became apparent to me that a visit to the accident scene with both parties was imperative to a fair analysis of both the plaintiff's and the defendant's case. Counsel, the adjuster and I walked the scene together and used that experience as a building block for the ensuing mediation. Not only did the adjuster and I get to see the scene, we also got to meet participants in the mediation we had not met before. The rapport which developed with the adjuster, counsel and I was also quite helpful during the mediation.

Pre-mediation discussions between me and the parties have led to parties bringing front-end loaders, medical devices, PowerPoint or CD Rom presentations, etc. to mediations. I frequently suggest that plaintiff's counsel provide PowerPoint and/or CD Rom presentations with any demand packages to the defendants well before the mediation. This increases the chances that such presentations get to important decision-makers at "home" who do not go to the mediation.

Parties might also discuss with the mediator whether they want a general session at the beginning of the mediation and, if so, how it would be conducted. Opening statements can serve an important, positive purpose; but they can also be polarizing. Generally, I recommend that parties focus on key issues of their case. I have been known, on occasion, to ask a party to argue his or her opponent's case. In some high-stakes cases, it has paid off to put principals together. Some decisions such as this one, while difficult to make in advance, can be more readily anticipated with pre-mediation preparation and design. My bias is to get cases done with one mediation, so I use a

proactive approach to mediation and suggest the same to parties. Just as attorneys develop check lists for trial preparation, I suggest they do the same in their mediation preparation. Below are several checklists which I hope you will find useful.

Pre-Mediation Check List

All Parties

1. Counsel should consider whether or not it would be useful to meet with the mediator to specifically design the mediation process to fit the case.
2. Counsel should consider whether or not a pre-mediation caucus with the mediator, a pre-mediation site visit with the mediator, etc. would be useful.
3. All parties need to provide opposing parties and the mediator with all the information necessary to educate and to persuade them in a timely manner.
4. Counsel and the mediator should determine who needs to be at the mediation to educate, to persuade and to close the case.
5. Parties may want to consider creating a pre-mediation settlement bracket.
6. Counsel should provide the mediator with significant motions, briefs, orders, photographic charts, graphs, etc.
7. Counsel should review their best and worst case and the likely outcome range with their clients before the mediation.
8. In commercial cases, all parties should asses the financial state of their opponents.

The Plaintiff's Counsel

1. The plaintiff's counsel should prepare his or her clients for mediation in the same manner he would prepare his clients for trial.
2. The plaintiff's counsel must provide the defendants and the mediator with any economic loss projections and life care plans well in advance of the mediation.
3. The plaintiff's counsel should have complete and accurate subrogation and lien information in advance of the mediation and have subrogation or lien claimants at the mediation or available by telephone.
4. The plaintiff's counsel should consider making a demand in advance of the mediation. As a general rule, the greater the demand the further in advance of the mediation it should be made.
5. Depending on the value of the case, the plaintiff's counsel should consider providing the defense team with a demand letter, a settlement brochure, a settlement DVD or a PowerPoint settlement brochure.
6. The plaintiff's counsel should obtain coverage information in advance of the mediation and determine how it affects his or her negotiations strategy.
7. In multi-party cases the plaintiff's counsel may have to negotiate as a unit. Given these circumstances, counsel should devise a mechanism for dividing any settlement before hand.

Defense Counsel

1. The defense team should consider how it will deal with acknowledgement and apology in advance of the mediation.
2. In professional liability cases, the defense counsel must advise the mediator and the plaintiff's counsel of consent to settle issues in advance of the mediation.
3. When the defense is relying upon independent medical evaluations, they should be given to the plaintiff and the mediator in advance of the mediation.
4. The defense counsel should put excess carriers on notice in advance of the mediation in order to allow for the meaningful participation in the process.

Mediation Checklist

All Parties

1. All participants should treat each other with dignity and respect.
2. All participants should control their anger and frustrations and be gracious.
3. All participants should remember "process" of mediation is important for a positive outcome.
4. Opening presentations should focus on key issues and they should be objective, candid and persuasive.
5. Parties should remember to listen, to be prepared, to shed their partisan perspectives, to remain reasonably flexible, to reconsider their position and to reflect on new information and different perspectives.
6. Parties should be creative in connecting to the opposing decision-maker and in breaking impasse.
7. All participants should be prepared to build a golden bridge over which their opponent(s) can retreat and allow them to save face.
8. Parties should consider how they can create credible fear in their opponent(s).
9. Parties should consider how to measure their own and their opponent's risk tolerance.
10. Parties should consider how they can create trust with the other parties and with the mediator.
11. Parties should remember that they are at the mediation to reach closure.

The Plaintiff's Counsel

1. If possible the plaintiff's counsel should let his or her client sell his or her case.
2. The plaintiff's counsel should present himself or herself as prepared for trial and confident of his or her ability to produce at trial.
3. The plaintiff's team should focus upon the opposing decision-maker(s) but not lose sight of the opposing gate-keeper.
4. The plaintiff's counsel should determine what aspects of his his or her case are best "sold" by the mediator.
5. The plaintiff's counsel must have strategy for utilizing his or her

punitive damage claim, if any, at mediation.

The Defense Counsel

1. The defense team should acknowledge the severity of the plaintiff's injury and where appropriate provide sincere apology.
2. In multi-party cases defendants should be more concerned with their own risk assessment than the percentage split amongst co-defendants.
3. The defense team should consider the plaintiff's need to have his or her day in court, to be heard, and to have a sense that justice has been served via mediation.
4. The defense counsel has to measure the plaintiff's desire for closure and finality and appeal to those feelings.

Conclusion

Mediation of high-value cases requires thoughtful preparation, exquisite patience, creativity, legal and emotional insight, energy and even courage. Parties need to understand both interpersonal and intrapersonal issues that arise in mediation. Parties should not shy from utilizing both their intuition and imagination. Flexibility and awareness of partisan perception when combined with effective persuasive techniques are tools that advocates need to utilize to be effective in high-value mediation. It is my hope that the above guidelines will assist parties in their preparation and participation in their high-value mediations.

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