IADC ANNUAL MEETING 2025

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How To "Win" At Mediation

A. PREPARING FOR MEDIATION

Prepare to "win" at mediation. That is not an oxymoron. Consider a new paradigm for approaching mediation success that rejects the old paradigm of "a good settlement is when both parties are unhappy with it." That paradigm is wrong on two points:

1. It's irrelevant how the plaintiff feels about settlement as long as you believe you have pushed plaintiff to the point of maximum compromise; and

2. The defendant and insurer should not settle a case if they're unhappy with the proposed result. The dissatisfaction means the result of negotiation does not match their assessment of the case that brought them to mediation in the first place. If that is the case, they should consider trial as the best alternative to a negotiated agreement ("BATNA").

Once the mediator is retained and the logistics are set, the defendant, defense counsel, and insurer should work together to prepare for an optimal outcome at mediation. That includes tactical decisions about how the hearing will proceed.

Everything you do in preparing for and presenting your case at mediation should be based on ***efficacy*** and ***expectation management***. Efficacy means that everything that you do and say is designed to achieve the desired result-achieving settlement consistent with your case assessment and settlement authority.

Expectation management is a tool to eliminate disruption and avoid surprises at the mediation. This includes not only preparing your client and insurer, but also the opposing party and counsel.

Pre-mediation considerations:

Consider timing – do you need to conduct discovery to have a meaningful mediation hearing, or can you resolve the case with the information you already have.

Conduct due diligence on parallel tracks. Discreet investigation can be conducted outside of and to supplement discovery. For example, use public record requests, investigators, site inspections, social media, etc.

Evidence preservation – send litigation "hold" letters to preserve evidence and avoid any spoliation.

Prejudgment interest (12% per year from the date of filing in MA) can make timing a major factor in settlement.

Require plaintiff to provide a settlement demand package – don't "buy a pig in a poke" – insist on a detailed settlement demand with backup documentation as a condition of going to mediation.

Don't "poke the bear" – antagonism is counterproductive to settlement.

Preserve and perfect your client's rights to "contribution" by third parties who might not be at mediation.

Notify your insurers – early and often -remember excess insurers and co- insurers.

Tender indemnity and insurance rights or lose them.

Insurance – the sword and the shield:

a. Provide prompt written notice to your insurer(s) as required by the policy.

b. Remember the "cooperation clause" and "no voluntary payment" provisions in the policy. Get the insurer on board for mediation before you commit to it.

c. Reservation of rights, eroding policy limits, exclusions, and sub parts. Know your insurance policy and how it may affect mediation.

Prehearing spade work.

After retaining the mediator, try to have all counsel agree that prehearing written position statements will be exchanged among the parties. Too often parties keep their case secret and then wonder why their mediation negotiations are inefficient and ineffective. It's impossible for the parties to achieve progress, even with the best mediator, if they are hearing about their opponent's case, witnesses, and exhibits for the first time at the mediation hearing.

To avoid a slow start to meaningful negotiations, agree to exchange "privileged" mediation memoranda at least two weeks before the mediation hearing. Parties are, of course, free to hold back some smoking gun evidence (to the extent that even exist following modern discovery). Before concealing it, however, consider whether sharing that information, if it is already locked into evidence, will help you to achieve your settlement goals at mediation.

Next, ask the mediator to schedule two short planning calls before the hearing. The first call should be after the mediation briefs have been exchanged, and it involves all counsel and the mediator. The mediator can review logistics for the hearing itself (e.g. will the parties agree to meet together with each other and the mediator for a brief opening session, will counsel make opening statements in front of the mediator and opposing side/counsel? Will anyone participate remotely?). In addition to the logistical coordination, this initial call helps the opposing attorneys to meet in a civil, constructive setting, and allows the mediator to develop familiarity and rapport with counsel before the hearing.

Following the "all counsel" call, the mediator should follow up with each counsel separately for a confidential call to determine whether there are any issues of concern, client control, lack of settlement authority, etc. that can be addressed constructively before the hearing starts.

B. PRESENTING THE CASE AT MEDIATION

1. THE OPENING SESSION

The mediator is the trusted, neutral party whom counsel and clients expect to set a constructive tone for the hearing. Consistent with that important role the mediator should almost always insist on a brief opening session at which all parties and counsel are present in the same conference room to review the plan for the day. The mediator, seated at the head of the table to reflect her neutral stance in the

proceeding, can ensure that there are basic introductions that will be designed to promote civility and constructive negotiations. Putting aside for the moment whether the parties will do opening statements, the mediator should explain to the non-lawyer participants what mediation is (a voluntary, confidential, and non-binding settlement conference overseen by a jointly retained, neutral third-party mediator). This is designed to alleviate anxiety and concerns about the process. Much of the anxiety is born of uncertainty, so to the extent the mediator can help the parties know what to expect that may help lower the temperature in the room.

The opening session also helps to achieve the goal of expectation management. The parties should know in advance how long the hearing is booked for, whether there will be breaks during the day, whether the parties will work through lunch with sandwiches brought in, etc. The opening session promotes clarity, reduces anxiety, and personalizes the mediator's role. Mediation involves a unique interpersonal human dynamic akin to negotiating a peace treaty. Absent extreme hostility between the parties or counsel, the opening session can help start the day off on a constructive note through handshakes, introductions, use of names, eye contact, etc. Even boxers tap gloves in the center of the ring with the referee before the fight starts.

The mediator will know from the pre-hearing phone calls whether counsel plan to make brief opening statements at the conclusion of the Joint Session. If so, counsel should design and deliver an opening that is geared toward efficacy and expectation management.

2. OPENING STATEMENTS

The choice about whether to make an opening statement is a critical consideration. Again, it should be done only if a well delivered opening statement is likely to promote the prospect for settlement. It should not be used if the opening statement will be counterproductive by insulting or antagonizing the opposing counsel and party. Mediation is sometimes called “conciliation.” Opening statements can be most effective by being conciliatory, albeit firm, strong and professional, too. This approach brings down barriers your opponents naturally have to considering your arguments and earns you license to present your case in a non-offensive manner. Remember the objective in mediation is to persuade the other side to settle within your case assessment and monetary parameters.

To that end, counsel should incorporate silent advocacy techniques to complement the oral presentation. Consider your body language; it makes up 55%

of your impression on others. Will you present your opening standing up or seated at the table? How much eye contact will you make with your adversary or his client? Will you dress like mediation is a court appearance or studiously appear more business casual for mediation? Will you specifically address or acknowledge opposing counsel, the opposing party, or the mediator?

Also remember that it's not what you say, but how you say it that matters most (the latter makes up the next 38 % of your impression--this means that only 7% of your message's impact is provided by the diction you use in the opening). What tone, tenor, and volume will you use when speaking? What will your pitch and pace be? How will you persuade the opposing party to consider your point of view?

Is this case so emotionally fraught with bad feelings that you should limit your opening comments to thanking the participants and expressing your desire that all participants work together to reach a mutually acceptable resolution? The content and delivery of an efficacious opening statement is much different in a dry, complicated contractual dispute than in a hotly contested, wrongful death case, emotional assault, or employment discrimination suit. Design and deliver your customized opening accordingly.