Practice Tips...

Some Ideas For a Successful Mediation

Mediation works. It settles cases and saves the plaintiff time and money. Mediation saves insurers money and saves court time. While not every case is subject to mediation, a successful mediation is often in your client's interest. What follows are a few suggestions that seem to work for me in mediations.

Robert Dawson

Getting the Insurer to Mediate

Sometimes it is difficult to convince an insurance adjuster to put a case into mediation. However, most insurers have a company policy of encouraging mediation. If you run into adjuster reluctance, then a few phone calls should uncover whether the carrier does have such a policy and who you should contact.

I've heard it said that if you suggest mediation it is a "sign of weakness." If you are worried about appearing "weak," then perhaps you might consider combining your mediation request with a summons and complaint, a set of interrogatories, or several deposition notices, something that will show that you will pursue the claim vigorously in the event that the other side does not agree to mediation.

When to Mediate

You can mediate as soon as the facts are sufficiently complete for the insurer and the plaintiff to evaluate the case. Ask the adjuster if he or she has sufficient facts to fairly evaluate the case. If not, then be ready to postpone the mediation. If the insurer says that it needs to take a deposition, or obtain some additional records, or have a summary judgment motion heard, then postpone the mediation so that these concerns won't reduce the value of your case at the time of mediation. On the other hand, if your case is one that may get weaker with further discovery, then you might want to consider mediation sooner rather than later.

Pick the Right Mediator

I used to think it was important to pick a mediator who had "plaintiff leanings." No longer. To me it is important that the mediator be competent and experienced with the type of case that is being presented, and that the mediator be respected by the defense. If the mediator is respected by the defense, and the mediator sees strength in your case, then that will help settle the case. The wisdom of this was pointed out to me when a major hospital in a medical negligence case wanted to have an experienced and well-known *plaintiff's* lawyer mediate our dispute. When I expressed some surprise at this, their rationale was that they thought our case had weakness and that a well-respected plaintiff's lawyer would assist in our recognizing those weaknesses. The case settled because both sides respected the mediator.

Have Authority Present

The defense expects the plaintiff to come to a mediation prepared to settle. The plaintiff is entitled to the same expectation. The defense must have a person with authority to settle the claim available for the mediation. It is usually better to have the person present for face-to-face discussions. If the case is a significant one, then the cost of a plane ticket to bring the person to the mediation is relatively minor. At a minimum, the person with authority must be available by phone.

The Mediation Package

Your mediation package can do a lot toward getting the mediation off to a good start. What we usually send is similar to a demand letter, but with less attachments. We usually send deposition excerpts and, if medical records are sent, we highlight them. It may make sense to quote powerful passages from the medical records or doctors' reports in your mediation package rather than sending attachments.

Do not send a one-page letter to the mediator with a lot of attachments and expect the mediator to wade through the information. This sends a signal that you don't care enough about your case to distill the relevant information and present it in a logical fashion.

Calculate Subrogation and Costs

When you go to a mediation, there is a good chance that the case will settle that day. Therefore, you need to be able to calculate the net that your client will receive out of any gross settlement offer that is made. To do so, you need to know the up-to-date subrogation amounts, whether there will be any compromise, and the amount of costs advanced.

If you are seeking a compromise of subrogation claims, then you should consider involving the subrogation people in the mediation process. If a subrogation claim is substantial, then you might want the person authorized to compromise the subrogation claim to be present at the mediation. If the amounts are more modest, then simply having the person available by phone will do.

At the Mediation

To have a successful mediation there is simply no substitute for thorough

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preparation. The single-most effective thing you can do at mediation is show the defense that you are prepared to try the case and that you will obtain a fair verdict.

I like to use graphics at mediation. Some people might say that you should save the money spent on graphics, go to the mediation and see if the case settles. If it doesn't, then prepare the graphics for trial. I believe that if you prepare at least some of your graphics for use at mediation, then you've increased the chances that the case will settle. It sends a signal that you are prepared to try the case. I once had a case where the defense was at $20,000 and the plaintiff was at $130,000. Discussions had stalemated. A graphic costing $300 was used at the mediation and resulted in a settlement for $110,000.

I like to take the complete file to mediation. Our files often fill boxes. In those boxes are color-coordinated notebooks where everything is tabbed and indexed. Using a hand truck to wheel in your file shows that you are prepared to try the case if you have to.

Most mediations will start with a meeting of all the parties in one room during which each side will have a chance to summarize their position. Give careful thought to what you'll say. Those few minutes are golden time where you have a chance to look the adjuster and defense attorney in the eye, show them that you are sincere about the case, and show them that you are ready to try the case.

Everybody has a different style and you should do what feels comfortable. However, that opening meeting is probably not the place to point fingers and be overly critical of the insurance company for some aspect of its handling of the claim. I tend to favor spending a little time summarizing the case, referring to the graphics and other exhibits that we have brought to mediation, and showing the effort that has gone into the case.

Mediation is sometimes a "warm and fuzzy" process, sometimes tension-riddled and critical. If you're involved in a "warm and fuzzy" mediation, don't let your guard down. Don't let the mediator send signals to the other side that you're not prepared to send. If you tell the mediator the case will settle between $300,000 and $400,000, then the mediator is going to assume that $350,000 will settle the case and, intentional or not, that will probably be communicated to the other side. It is perfectly acceptable to tell the mediator there are things that you are not willing to discuss, including what number it will take to settle the case.

Give some thought to whether you want the mediator to disclose his or her opinion about the value of the case. Sometimes when the mediation process stalemates, a mediator will be tempted to disclose his or her opinion of the value of the case. I suggest that you privately inquire of the mediator regarding his or her value of the case. If that number is low, then instruct the mediator not to mention his opinion because it will prevent the mediation from successfully concluding, and may harm any future negotiations on the case. On the other hand, if the mediator discloses in private that the value of the case is in line with your assessment, then you may want to have that disclosed to defense counsel and to the insurance adjuster.

Be ready to walk away from the mediation. If the offer is not fair, and you have tried everything you can to encourage the mediation process to work, then walk. And don't do it for show. An insurer who has carefully evaluated the case will not be impressed. Walk out only if the insurer's offer is unfair.

Lean on the mediator to close the gap in the offers. If your number is fair, then convince the mediator it's fair and let the mediator work on the other side.

You should also be prepared for a tactic that is used by some insurers on significant cases. I call it the "two mediation tactic" Some defendants on significant cases will come to a mediation and will not move any significant amount. They want to see if you, or your client, will jump at a modest offer. If the number is too low and you walk, then often these defendants will schedule a second mediation in an attempt to resolve the case.

Depending on the case, there are probably many other things you can do to have a successful mediation. The important thing is to get everybody in the same room and let the mediation process work.

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Dear WSTLA Member:

You may know that WSTLA is now taking orders for *Tom Chambers' Trial Notebook*. Pre-publication orders are strong and WSTLA expects to begin delivery shortly after December 15, 1992.

Tom Chambers' Trial Notebook neither overlaps with the WSTLA Form Books published last year, nor does it simply repeat Tom's very successful column in *Trial News*. *Tom Chambers' Trial Notebook* is a cookbook for successful personal injury practice and, if you will pardon the pun, you will like the "recipes."

Tom Chambers' Trial Notebook is primarily a substantive guide to personal injury practice in Washington state. In Volume I Tom covers all aspects of pretrial preparation:

- Initial client interview
- Investigation liability
- Collecting, organizing, and protecting confidential medical records
- Subrogation: what it is and how to handle it
- Commencing litigation
- Initiating the UIM claim
- Minor settlements
- Discovery
- Plaintiff and defense medical exams
- Settlement

Volume II discusses trial of a personal injury lawsuit:

- Planning the trial
- Exploring the courtroom
- Quick authorities
- Jury instructions
- Motions in limine
- Jury selection
- Opening statements
- Illustrative evidence
- Documentary evidence
- Witnesses
- Closing argument
- Trial motions
- Post-trial motions
- Judgment

However, listing the contents of this reference work does not do justice to the scope of its coverage. In *Tom Chambers' Trial Notebook* you will see what William O. Douglas had to say about defense medical exams, how subrogation claims can "bite" the plaintiff's lawyer, how to spot insurance coverages available to your client, how to depose defense doctors, and how to settle cases. If the case does not settle, then Volume II, *The Trial*, will tell you how to try it.

Tom Chambers' Trial Notebook will give you access to the knowledge, experience, and trial tactics of one of Washington's premier trial attorneys. Every lawyer should have this two-volume set on his or her desk.

Sincerely,
Robert K. Dawson