Personal Injury Mediation

by Joel P. Franciosa

Preparation is the key to success, whether in the context of a client meeting, negotiating a business deal, going into a deposition or trial, or arguing an appeal.

But preparation is especially important with respect to the mediation of a personal injury case. In fact, preparing a client's case is only half the picture. A talented advocate will make sure the other side is also prepared.

This advance work is not about helping an opponent score points. Rather, it's about making sure an adversary has all the information necessary to justify an appropriate settlement.

How does an attorney properly prepare for a successful PI mediation? The answer depends on who the client is.

The Plaintiff's View
The key for plaintiffs counsel is to provide everything the defense needs to evaluate the case and assign the necessary authority (read: *money*) to the file. Smart lawyers provide this information *before* the defense asks for it. A fully documented demand letter—supported by jury verdicts, reports, medical bills, receipts, and other evidence pertinent to amount of money requested—goes a long way.

Once that is done, counsel should follow up with phone calls to attorneys on the other side to make sure they have everything they need to evaluate the case.

Along the way, plaintiffs counsel must review the same records that have been subpoenaed by the defense—and must know those records inside and out.

By the time the case reaches mediation, both sides should have had the opportunity to intelligently assess the injuries, the treatment, the damages incurred, the realistic prospects for recovery—and liability.

Law is a people business. Counsel on both sides must objectively evaluate the plaintiff and get a realistic sense of how that person presents as a witness. Then the attorneys must discuss that issue with opposing counsel, since it will affect the value of the case.

A full understanding of the case dynamics will permit a plaintiffs lawyer to determine the best dollar level to begin negotiations, as well as what moves to make during negotiations. Most important, a smart lawyer will remain flexible, keeping an open mind about a reasonable ending number.

Savvy plaintiffs counsel know that making the defense claims representative's job easier leads to success. Indeed, it is not uncommon to hear mediators relate that the plaintiffs attorneys who volunteer pertinent information to the defense consistently get more money in settlement than attorneys who guard such information as if it were a state secret.

The Defense View
Insurance claims representatives review piles of data for every case, and to them each one looks the same. Defense attorneys often walk a line between their own evaluation and that of a claims rep. Sometimes that difference makes settlement difficult, but a reality check can help bridge the gap.

From the defense perspective, everything is paper driven. If there is no medical record, wage record, photograph, property damage estimate, police report, or other supporting documentation, the plaintiff's claim will be viewed with skepticism. And the questions never change: What's the injury? When and how did it happen? Who are the witnesses? Are there photos, reports, records, and testimony? Asking for documentation is not a personal attack on the plaintiff or plaintiffs counsel. It is merely a request for the type of data that justifies writing a check. A lawyer who wants money from the defense must expect to lay the supporting information on the table.

A Mediator's Role

Effective mediators understand these realities. They can help the parties get ready for a productive mediation by making sure each side's information gets to the other. For example, if a key deposition will change the case dynamics, perhaps it should be completed so the case is truly ripe for negotiation.

Good mediators will also advise counsel that ex parte communication with the mediator to discuss the issues is perfectly fine. In fact, it should be encouraged, since the objective is for the parties to rely on the mediator as an honest broker of information.

Mediators often contact the parties, jointly or individually, to determine whether the scheduled mediation date will be productive and if something more needs to be done to make it so.

Perceptive mediators help the parties understand key dynamics. The plaintiff may not only be physically injured; he or she may also harbor feelings of resentment stemming from rude treatment at the accident scene or, perhaps, an early interaction with an insurance representative. A mediator who picks up on these subtleties will alert the defense so the situation can be corrected. Sometimes an apology is in order—and if so, it must be sincere. A respectful apology opens the door for the defense to explain the carrier's legitimate concerns, and to have them heard and appreciated by the injured party.

Experienced mediators will take the time to fully explain the claims procedure to the plaintiff, noting that the claims representative who is expected to authorize settlement needs to make a face-to-face evaluation of the person bringing the claim. Without this, the plaintiff may not appreciate that prior to mediation all the claims rep has is a report from defense counsel explaining how the injured person testified. Mediation is usually the first meeting between the real decision makers, and it is crucial for everyone to recognize that.

For a productive mediation, the parties should acknowledge that the case involves human beings on both sides who must work toward a mutually beneficial result.

Successful mediation is the result of good preparation by the plaintiff, the defendant, and the mediator. In the end it's a team effort, and when the team comes together at the same place and time, everyone benefits.

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