

Preparing (Your Opponent) for Mediation

By John A. Lassey¹

Most attorneys experienced in personal injury mediation are aware of the fact that plaintiffs themselves usually come in knowing very little about the process. When everybody arrives and sits around the same table with the mediator, the plaintiff is usually the loneliest person in the room. Most of the other people present — including the mediator — are lawyers, and the rest are experienced claims adjusters. The “pros” tend to call each other by their first names, talk in jargon, and maybe joke a little bit to “put everybody at ease.” Often, the effect of all of this will be to make the plaintiff feel even more isolated.

When the discussion gets going, the culture shock can be so great that the poor plaintiff starts having visions of following the White Rabbit down the hole to Wonderland. Put yourself in the plaintiff’s shoes: “My life has been ruined because of the incompetence of some lead-footed jerk (who doesn’t even have to be here), and all these people can do is joke around and talk about money — and not much of it, at that — after piously proclaiming how sorry they are!”

Typically, plaintiffs tend to be suspicious, ill at ease, and generally have only a dim idea of what to expect from the mediation. All they know about the legal system comes from their own attorney or from watching TV. They may start out with an exaggerated idea of what they are entitled to, and their thought process may have gone no further than: “I’ve been hurt. It wasn’t my fault. Isn’t that what insurance is for?”

They are probably only vaguely aware of things most lawyers would take for granted. For example, we tend to organize our thoughts and parse the case into the four elements of the plaintiff’s burden of proof: duty; negligence; causation; and damages. Insurance company claims representatives do the same, but plaintiffs are not typically wired to organize their thoughts in that direction.

Unless plaintiffs have been well prepared in advance, they do not come to a mediation fully understanding that insurance companies approach questions of value and settlement differently from the way they do. They normally haven’t thought through the fact that companies have lots of cases and can afford to play the odds, while they have only one. Plaintiffs tend to focus on themselves and how the case has changed their lives. Companies focus on bell curves; *i.e.*, on the range of values clustered about the mean, rather than on the “home run” cases out on the fringes.

Cases normally do not settle — and in my view, shouldn’t settle — until both sides have roughly the same idea of value.² Given the cultural differences between plaintiffs and insurance companies, agreement on the range of values is hampered unless the plaintiff has had a fair amount of preparation in advance.

As defense counsel in our adversarial system, one of your goals should be to increase the likelihood that plaintiffs will get over their culture shock as soon as possible so they can start to take an objective

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² If the parties disagree on the range of value, but settle anyway, the settlement cannot be truly voluntary; *i.e.*, someone has been coerced in some fashion.

approach closer to your clients' approach to settlement. Of course, plaintiffs are not likely to be on the same page 100%, but your goal is to get your opponents thinking along those lines. Most of the time, if the plaintiff's attorney is experienced, this education process will have started well in advance of the mediation and you may not have to worry too much about it. The plaintiff's attorney will have taken pains to educate his or her client and perhaps lower expectations of settlement value.

But you cannot always count on opposing counsel to succeed with such efforts. Even though the plaintiff's attorney may be very skilled and experienced, not all people learn at the same rate. Not all people can be convinced by being told and instead must be shown.

Defense counsel can and should help with this learning process. Of course, you cannot communicate directly with the plaintiff. But throughout the course of preparation for trial/settlement, you will have opportunities to "educate" the plaintiff yourself. Usually, the best time to educate the plaintiff is at his or her deposition. This is your opportunity to (a) psych out the plaintiff; (b) talk directly with him or her; (c) help form the impression that you are not a jerk and that your views are likely to be reliable; and (d) to subtly impress the other side with the weaknesses in their case.

Often, you will be lending some support to opposing counsel's education efforts, if your views are shared by your opposite number.

The educational benefits of the plaintiff's deposition are significant enough that only in exceptional circumstances should you mediate a case without first deposing the plaintiff. Even if you think that you and your company know enough about the case, the injuries, the liability, etc., without a deposition, you should not forgo the deposition just to save a few bucks.

Also, and not unimportantly, by taking your opponent's deposition, you are allowing the plaintiff a rough approximation of his or her "day in court." The opportunity to "vent" can help to eliminate emotional barriers to settlement well in advance of mediation.

After depositions, expert disclosures, etc., give some thought to taking a leaf out of the plaintiff's lawyer play book. Prepare a settlement package. Send out what I call a "reverse demand letter." Make an offer and discuss persuasively all the reasons why the offer is what it is. To be effective, the offer should be in the ballpark where you want the case to end up. Don't start in the neighborhood sandlot if you truly believe the case belongs in Fenway Park.

It is best, in my view, to start somewhere near the bottom of what you and your company believe to be the normal range of values in order to encourage your opponent to come back in the same vein and to leave yourself ample room to move up, if need be.

Don't beat your chest; don't engage in hyperbole. You want to give a preview of your opening statement, the evidence you expect to come in at trial, your closing argument, and the law you expect the judge to give the jury. Include appropriate exhibits. You should explain your approach to value in language focused directly toward the plaintiff — just like you will be telling the jury.

When the day of mediation arrives, prior preparation along these lines can significantly increase the likelihood that the plaintiff will have a better understanding of the process, will be emotionally ready to negotiate, and will be more prepared to reach a settlement and move on with his or her life.