MAXIMIZING PLAINTIFF RECOVERY AT MEDIATION

No two cases are the same, no two clients are the same, no two juries are the same, no two mediators are the same, and no two mediations are the same. But while each mediation is different, many aspects remain similar. With each case, to achieve optimum success, you must be ready to adapt your style using different techniques and perhaps different mediators. You should develop an overall checklist to use in your mediation cases, and modify it for each case. Every case takes unexpected turns, and every mediation takes unexpected turns. When this takes place during a mediation, our anxiety increases and it hinders our ability to negotiate effectively. Let's try to minimize the unexpected turns.

Pre-Mediation:

Some plaintiff attorneys subscribe to the theory that "if I allow the defense to select the mediator, they will be more willing to listen to that mediator." (That is the defense adjuster will give more deference to a defense oriented mediator when he or she tells them to pay, rather than a plaintiff oriented mediator whom they may think is predisposed subconsciously to identify with the plaintiff and increase the settlement evaluation.) I reject this theory. When I bring my plaintiffs case to mediation, I usually want a plaintiff oriented mediator who can explain my case with the defense in the private caucuses as I would if I were personally there. My experience is that too frequently the defense oriented mediator is spending the majority of the time trying to get me to accept less because their defense orientation tends to undervalue cases. The mediator should be an "agent of reality," but perceptions of "reality" can differ greatly based on life and professional experiences.

The best case scenario is a truly neutral mediator who will help both sides achieve a reasonable settlement (by definition within "my range"). How do I know the mediator's background and philosophy? Call the mediator prior to final selection. Ask for a curriculum vitae to be faxed to you. (As indicated in the attached Checklist, once the mediator is selected, also forward the c.v. to your client. There may be common ground or interests.) Tell the mediator a few of the important facts of your case. Ask if the mediator has had similar cases in this subject matter. Does s/he feel mediation of these cases follows certain patterns? If so, what are they? What style does the mediator favor? (Facilitative? Directive? "Touchy-feely?" Muscle? Evaluative? Transformative?)

In some of your cases, you may want a different type of approach at different stages of the same mediation. Does this mediator have training to draw upon the best features of each of these different techniques? If the mediator is a retired judge, will this simply be a hybrid form of a court settlement conference? Or will it be a facilitated mediation?[1]

[1] In recent after dinner remarks, a well-respected retired judge, who is frequently sought for mediation of complex, multi-party matters, stated that the old settlement conferences have gotten a very bad reputation. In fact, he said mediation differs very little from settlement conferences. Why? Because his mediations are settlement conferences! He evaluates each side, tells each party what is wrong with their case, and tells them the value for which the case should settle. Mediation? NO. Settlement conference? Yes. If that is what you want at a "mediation," great. If you want an opportunity to convince the other side that your case is different from similar cases and worth more than a computer figure, and you want more control over the process, you have just selected the wrong mediator.

Confirm with the mediator their process:

"Do you start with an opening statement which recites facts from the briefs?" "Does each side make an opening presentation (summarizing matters in their brief, or responding to the issues raised in the brief of the other party)?" "Do you tend to favor a short joint session or a prolonged joint session?" "What type of joint session do you feel is appropriate for this type of case?" "Do you use private caucuses?" "Is everything confidential in the private caucus, or just what a party tells the mediator to keep private?" "Do you want my client to participate in the joint session, and will you question my client or invite the other side to question my client in the joint session?" (If you have a good client, then the client may be the best person to present the difficult aspects of the case. You want your client to take an active role.) "Can I submit questions that the mediator can pose to my client in the opening session" (to avoid reactive devaluation)?

After you select the mediator:

Once your mediator is selected, in most cases you should submit a private written letter to provide a heads-up as to any sensitive or critical issues in your case - matters you do not feel appropriate to fully explore in your mediation brief. Alert the mediator that this information should be kept private until your specific authorization is given to share it with the other side. Skilled negotiators and mediators focus not only on what is above the surface, but also what is below the surface. The more you prepare the mediator, the more effective s/he will be getting below the surface in your case.

The brief:

The more you prepare the other side regarding the positive aspects of your case before the mediation, the better your result will be. You CANNOT get the same results from your presentation if the mediator and the other side receive your brief only one or two days before the session. Recognize the reality that the defense team needs to have information and full documentation upon which to formulate a settlement recommendation. Defense counsel will usually have to send a memo to their adjuster/client prior to the mediation, commenting on your brief. Put together a dynamic brief, with supporting documents, frankly conceding your weaknesses[2], but emphasizing your strengths. Use a yellow highlighter for portions of reports or depositions that strengthen the case. Do not simply attach eight pages from a deposition; rather, highlight the areas of each page that support your position and show why you elected to include this as an exhibit. If you have not prepared the defense several weeks before the mediation as to the range of value of your case, continue the mediation. You are wasting your valuable time as well as money.

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[2] One of the most effective plaintiffs opening statements at a mediation starts with ``I could lose this case for the following reasons: ..." (reciting the major strengths of the defendant's case, followed by:) "... but I think I can overcome those problems in the following way: ..." (Highlighting how you will rebut the defense positions) Follow with:".... The major strengths of my case and the reasons I will recover a $_____ verdict at trial are the following: ..." (reciting the highlighted strengths set forth in the mediation brief).

Joint session:

Don't leave your best game on the practice field: Remember, you are at the mediation to convince the other side, the people with the money, to pay in the range you are demanding. The mediator doesn't have any money! Therefore, use the Joint session to showcase the strengths of your case. This is the time to use your negotiation and presentation skills. Don't squander this opportunity. Get with it right from the start.

Examine your own style and thereafter consider how it compares with the mediator's style and your opponent's. What are some likely outcomes due to the differences and similarities of styles?

Your unique style of litigating, negotiating, interacting has brought you to where you are today, for better or for worse. As difficult as it is, you can identify your style, consider its strengths and weaknesses, and use it accordingly. On the other hand, you will have a very difficult time trying to copy or adopt someone else's style. You are better off working in your style and concentrating on fine tuning techniques to interact more effectively. The age-old advice is true: just be yourself rather than trying to change into someone you are not.

Here is an experiment that you can use to test what general style you tend to reflect: Imagine you are one of ten people, all of whom are strangers, sitting at a large round table in a conference room. Someone comes in and makes the following offer: "I will give a prize of one thousand dollars to each of the first two people who can persuade the person sitting opposite to get up, come around the table, and stand behind their chair."

You are one of the ten strangers and see the person sitting opposite from you, and see that person looking at you. The first two people who can persuade the person sitting opposite to get up, come around the table, and stand behind his or her chair get $1,000. The rest get $0.

How do you respond? You need to act quickly because all the others are also thinking about what to do.

(Stop! Close your eyes, let yourself respond. What is the first idea that occurs to you? Once you have decided, keep reading, hear the rest.)

One choice is to do nothing, suspecting a trick or not wanting to look foolish running around the table in response to a stranger's offer. This is the response of an AVOIDER - one who dislikes interpersonal conflict, has a distaste for games with winners and losers, tries to dodge situations that may provide disagreement, and prefers peace and quiet in both personal and professional life.

A second obvious response is to offer the person sitting opposite you $500 to race around and stand behind your chair. But what if the other is yelling at you to do the same thing? Will you jump and run to that chair? If your tendency is to concede and start running, you are a COMPROMISER - a fair-minded person interested in maintaining productive relations with others, favoring agreements that give each party some equitable part of every item under discussion, but in a crisis more likely to favor a

solution that preserves a relationship over one that yields an advantageous result to only one side. You like to split the difference as a routine method of approaching negotiations. You are neither too greedy nor too timid.

A third response which requires less deliberation than for the compromiser, is immediately to race around the table and stand behind your opposite's chair. You don't negotiate. Under the rules, your opposite will get the $1,000. You make the move. But the result is the stranger gets $1,000 and you get $0. This is the action of an ACCOMMODATOR - a person who likes to resolve interpersonal conflicts by solving the other person's problem. If the people you help are like you, they will share the wealth and return the favor. But if they are greedy and selfish, you get a pat on the back and end up with little or nothing.

A fourth response is that of the COMPETITOR. As you would expect, competitors like to win above all and will take risks to win more money than anyone else in the game. A competitor might yell, "Quick, get behind my chair and I'll share the money with you." Then the competitor sits tight. Unlike the compromiser, the competitor will argue over whether he or you should be the one to get up and race around. In fact, the competitor may even lie and say he has a sprained ankle and can't move. If it works, the competitor will get the lion's share, decide how to share the money, and be in position to control that negotiation. It is no surprise that many successful trial lawyers are very competitive. By nature, they like to win.

The fifth response is the most imaginative. You get out of your chair, yell to your counterpart, "Let's both get behind each other's chairs! We can each make a thousand dollars." This can work - if you are quick enough. This is the PROBLEM SOLVER - instead of trying to figure how to divide $1,000 two ways, they have an insight as to how both parties can win $1,000. This is the hardest style to implement, but it is useful in complex negotiations. It may not be practical when time is short or the other side is intent on playing hardball.[3]

Whatever the answer to this chair problem, the approach selected reflects your style preference. While you can bring different aspects of your style to different situations, this is your "emotional baseline" you need to acknowledge and work with in the differing situations presented by each case in order to maximize your results.

Keep in mind that studies show that a reputation for being an effective negotiator (as rated by your peers) is more likely to be achieved using a cooperative approach rather than a competitive one. Contrary to what you might guess, several studies have concluded that perfectly reasonable, cooperative people appear to have a strong potential to become extremely effective negotiators. It is not necessary to adopt an aggressive, take charge exterior in order to be successful.

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[3] This exercise is from "Bargaining for Advantage" by G. Richard Schell. (Penguin Books 2000)

Once you size up the type of negotiator you are, you should analyze the category in which defense counsel in your case falls. What about the adjuster? It has been shown in research that most people tend to believe others are like themselves and are motivated by the same values and react in a similar manner. Don't fall into this trap. Rather, realistically assess the opposition and tailor your presentation to address their doubts and skepticism as the most effective way to advance your case.

A Checklist for Your Client

Once you have considered some of the concepts here, complete the following Checklist with your client to get to the nuts and bolts of the mediation process itself. Put it on your own stationery and use it in every case.

A CHECKLIST FOR ATTORNEYS TO ASSIST IN PREPARING A CLIENT FOR MEDIATION[4]

By Brian McDonald

Your mediation can be successful the great majority of the time with sufficient preparation

Mediation takes on several forms to deal with different types of cases. This checklist is directed to the personal injury and commercial mediation.

Once you decide it is the right time to submit your matter to mediation (generally the earlier the better), your advocacy concerns typically turn to assembling information in a brief; scheduling, anticipating, speculating, planning, etc. When you go to trial, you will have had several client meetings reviewing testimony and preparing for cross examination, and, when appropriate, videotaping and playback. If you were accompanying your client to their deposition, you would not consider going without adequate preparation.

The goal of all parties to a mediation should be to reach a final, binding, life-long resolution of your client's case on the day of the mediation. You need to have your client as fully and completely prepared as if for deposition or trial.

The following outline checklist can be copied and sent to your client a few weeks or days before the scheduled mediation. Thereafter, your review of these points together with your client at a pre-mediation meeting will make the client more comfortable, and allow them to understand the pace and process of their mediation. Your client particularly needs to understand the different roles of the mediator, counsel and the parties, as outlined in this Checklist. Your client will be of more assistance to you, and this preparation will mean the chances of resolution are greater.

You must consider the extent to which your client's active participation will assist or hinder your case. If your client can articulate their position in an effective manner, it will greatly assist their case as the opposition will be evaluating your client's effectiveness with an ultimate trier of fact.

While some of the principles set forth in the attached may appear basic, it is always helpful to review them prior to each mediation, whether it is your first, fifth or five hundredth mediation. After all, it may be your client's first and last mediation session.

Any comments, corrections or suggestions regarding the attached checklist will be appreciated. (Facsimile: 415/981-4434; e-mail: Brian@brianmediator.com)

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[4] The author acknowledges that the concept and content of the checklist for mediation is from Mediation: A Texas Practice Guide, Eric Galton. Esq., published by American Lawyer, L.P. The format has been adopted so that you can send the checklist to your client to review prior to mediation.

CLIENT CHECKLIST FOR MEDIATION

THE MEDIATOR

- Who is the mediator? Brian McDonald
  A copy of the mediator's resume is attached detailing the mediator's training and experience.

WHO ELSE WILL BE PRESENT AND WHY

- We will discuss additional people we may want at your mediation or on telephone standby -- Critical expert witness? Spouse? Significant other? Supervisor with "ultimate" authority?

LOGISTICS -- LOCATION AND DURATION

- Date: March 6, 2001
- •Place: Spolter, McDonald & Mannion

  Pier 9, San Francisco, CA 94111
- Time: 9:30 a.m.
- How long will the mediation last? It is impossible to estimate. While it may take less than a day, be prepared to work past 5:00 p.m. Do not make any evening plans.

OUTLINE OF STANDARD MEDIATION

1. The initial meeting-- Mediator, Parties, Attorneys, Adjusters.

   * The mediator will introduce everyone and go over the ground rules.
   * The lawyers will often make an opening statement to outline their important points.
   * I will address certain important issues in your case at this time. The mediator may ask you to speak. You need to be as precise and correct as possible.
   * We will discuss areas that we do not want to discuss at the joint initial meeting so that you and I will be in agreement on them. We can hold certain information until later in the mediation.

2. The first separate "caucus" (private meeting) when we meet with the mediator and the other side is no longer present.

3. Subsequent private caucuses. (The mediator may go back and forth several times.)

4. Lawyer caucuses. It may be that the mediator will ask the lawyers to meet separately. Do not fear! Nothing will be decided without your full and complete understanding and specific approval.

5. Later joint sessions are possible.

6. Settlement Agreement: When we reach agreement, a written agreement will be prepared, approved, and signed by everyone, including you and me. In order for the Agreement to be enforceable pursuant to Code of Civil Procedure §664.6, you must sign it personally.

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WHAT IS THE ROLE OF THE MEDIATOR

- The mediator is a neutral and will remain neutral. The mediator is therefore impartial, has no decision-making authority and will maintain confidences.
- The mediator is not a judge or a jury and will not make a decision.
- Our job is to convince the other side, not the mediator.
- The mediator is present to facilitate discussions and to assist the parties to reach lasting resolution.
- Do not be afraid! Mediation is non-binding. Only if you agree and sign an agreement, will it be binding. If no agreement is reached, we will continue with the lawsuit and may ultimately go to trial and appeal, if necessary. There is no penalty if we do not reach agreement at mediation. We merely pay our share of the cost of the mediator for the time devoted by the mediator to review each side's position papers and at the mediation itself.
- The mediation is confidential under the California Evidence Code. We must sign a written agreement (called a stipulation) at the beginning of the mediation which will insure confidentiality. This means that nothing you say during the mediation, nor any concessions you may make toward settlement, can be used against you later if the case does not settle at the mediation.
- The mediator can never be a witness later in the case.
- The mediator may play devil's advocate in the separate private meetings with you and me, and will help both sides identify the strengths and weaknesses of their case. The other side will be present in the beginning meeting, but not at the later private meetings.
- **Please remember the mediator does not make any decisions, only the parties make decisions. We need to influence the other side and we will use the mediator to help us do this.**

MY ROLE AS YOUR LAWYER AT THE MEDIATION

- My role is different at this mediation than it would be at trial. Due to the nature of the mediation my role will be much more conciliatory at the mediation.
- I will present an opening statement that is aimed at getting a favorable resolution for you at the mediation.
- I will not object to evidence.
- I may not reveal all of your case. I may withhold matters at the beginning.
- I will be present at all caucuses and will go over the strengths and weaknesses of our case with the mediator. I will talk openly and cordially to the mediator in the private caucus. If I agree there is a weakness in our case, it is for a good reason, and may help us get our case settled.
- I want you to participate, and I want you to observe. If I do not want you to answer a question from the mediator, I will interrupt. Please do not be offended if this happens. Remember, I am there to help you get the best resolution possible.
- I want you to listen closely to what is said in the private meetings (caucus(es)). After the mediator leaves and goes to speak privately with the other side and we are alone, we may re-evaluate our position based on the information we receive.
- If you and I have not discussed it, I request that you not disclose any new information at the mediation -- either in joint session or private caucus with the mediator -- without first discussing it privately with me.
- My approach will be very different if we do not reach a resolution at mediation and decide to go to trial.
- I may express understanding vr empathy with the other side at the mediation to achieve a positive resolution. This does not mean that I agree with the other side, and does not mean I am selling out your case.
- I may avoid certain issues at the mediation if I feel they will hurt the chances of resolution or adversely affect our position.
- At all times I will be respectful of the mediator, the mediation process, you, and your goals.

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YOUR ROLE AT THE MEDIATION

- I understand the dispute is yours. I will ask you to make the final decisions subject to my advice and counsel.
- Concentrate on listening to the points raised by the other side at the joint session and the mediator at the joint and private sessions as they will pinpoint what they perceive to be the strengths and weaknesses of your case.
- Mediation is your opportunity to evaluate and re-evaluate your case in light of the information provided to you by me and the other side.
- I want you to participate in the negotiations and discussions when we are in private caucus. However, try not to lose your temper, or you will lose your point and our focus.
- Since you may be asked some questions by the mediator in the initial 'aoint session, we will discuss beforehand the remarks you should make and the feelings you want to express. Remember this must be done in a constructive manner. I want you to talk in an accurate, believable and consistent manner. Do not whine or complain. When you come across genuine, you will be most helpful to your case.
- Unless we decide otherwise -- and remember to alert me in private as to any new information of which I am not aware --at the separate caucuses and because of the confidentiality of the process, you may speak freely and openly to the mediator. If you ever have a doubt about what to say, always tell the truth.
- This mediation will hopefully allow us to have a neutral, objective review and analysis of your case. Since the mediator will be repeating what the other side is telling her/him to a great extent, this is what we can expect to hear at trial. Expect the mediator to play devil's advocate in the private caucus. Do not conclude that this means that the mediator is agreeing with the other side.
- If an agreement is reached, it will be put in writing. I will review it with you and, if it is acceptable, f will ask you to Sign it,
- Remember we are trying to walk away with a lasting agreement, not win an argument. Be patient with yourself, this may be a new experience. Enter the mediation with an open mind and allow the process a chance to work.

