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ON MEDIATION: Using the full strength of your case in mediation

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Mediation is often portrayed as a rational and logical choice that saves money and time. Well, it is that. But let's face it, it's also usually required by the court and something that you might not do if it weren't. That means there's a risk that it becomes perfunctory.

That can make it difficult to put in an amount of energy that is commensurate with the effects that mediation has. Because most of your cases settle at or shortly after mediation, mediation is usually more important than going to trial, because there will be no trial.

You should use the strength of your case to full effect in mediation. The arguments that you use and the presentations that you make to persuade the other party to recognize the strength of your case should be as strong and as well supported as they would be for trial.

Prepare a detailed mediation submission that lays out your position as strongly as you can. Aim it at the other side, not just the mediator. Ultimately, it's the other side who decides whether its offer will be greater or its demand will be reduced. The other side needs to recognize the strength of your case and to realize that you're not afraid to put it out there.

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After you have laid that out, don't just send it to the mediator; send it to the other side.

Some might say this could be counterproductive, creating an impasse before mediation even starts. I disagree. Attorneys take their cases very seriously and recognize that their opponents do as well. A well-supported claim or defense is exactly what attorneys expect both from themselves and their opponents. Showing the strength of your case in an exchanged mediation submission tells the other side to take your case seriously.

Don't be afraid to put your opening demand or offer in the mediation submission. From a brain science standpoint, offers act as anchors. Offers paired with supporting information are stronger still. So showing the strength of your case right from the outset sets the tone that you want for the mediation.

From the plaintiff's standpoint, it is important to let the insurance company know the top end of the settlement range ahead of time. Settlement authority is typically layered, requiring review from different persons for higher amounts. Discovering the necessity for higher authority for the first time at mediation can leave the insurance rep hamstrung by corporate policies. Providing your demand and the support for it should get the right people involved from the start.

From the defense standpoint, there are typically issues, either factually or legally, that play an inordinate role in a case. Those points need to be emphasized to show, for instance, that liability doesn't align with insurance coverage or that there is a particular reason that high damages don't mean there will be a high potential award.

At the mediation itself, being able to use the strength of your case means being willing to present significant aspects of your case directly to the other side.

When you go to trial, you talk directly to the jury or judge because that's who decides the case. In mediation, you want the other side to decide that your case warrants a higher offer or a lower demand. Why then wouldn't you take the opportunity to make your presentation directly to the other side?

Plan an opening statement. This may even take the form of a closing argument. Prepare your client to present significant testimony on a critical issue. Demonstrate your client's authenticity and credibility by allowing active participation in the mediation. Take the opportunity to talk directly to the other party – not just the attorney – and identify evidence that cannot be changed and that affects how a jury might decide a case.

The other side needs to know that you are prepared and confident about the strength of your case and are unafraid to present it even to the most skeptical audience. Indeed, the other attorney should recognize that impartial jurors will be more receptive.

Holding a joint session for the mediation of litigated matters is becoming rare. To that extent, this may all seem like a radical idea. There's no doubt that it takes more effort and preparation for the parties involved than sitting in separate rooms and passing numbers back and forth. And it can present a more contentious atmosphere to mediators. But mediators are trained – or should be – to handle difficult conversations and facilitate negotiations even among parties with strongly held positions. Don't worry about the mediator if you want to put your strongest case forward. Even the best mediator knows less about your case than you do.

Is there some risk in this? Of course, there is. If the case doesn't get settled you may end up going to trial. But you have that risk whether you presented your strongest case or not. And the risk of going to trial is just as much related to your failing to recognize the strength of the other side's case. So why wouldn't you want to hear that at mediation?

Ultimately, it comes down to this: If your strongest case hasn't been presented to the other side at mediation, what are the chances that you got the best settlement? Don't be afraid to treat mediation like a trial, albeit a truncated one. In most cases it will be as close to trial as you will get. And in the long run, you – and your clients – will be far better off using the full strength of your case and recognizing the strength of the case on the other side as well.

See you at mediation.

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