

Alternative Dispute Resolution

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‘And I’d Like Your Firstborn’: Handling Hardball Tactics

LEE WALLACE

THE LAWYER ON the other side has been impossible to deal with throughout the litigation. You had hoped mediation would put an end to the ordeal, but so far the other side is taking such outrageous positions that you are wondering whether you should pack up and head home.

Don’t give up! You can successfully mediate with a hardball negotiator, but you are going to have to toss the rulebook you normally use. Try these methods to get your settlement discussions back on track.

1. Set goals before mediation starts.

Before mediation begins, think through the reasons you want to settle the case and

consider your alternatives. If the other side becomes unreasonable, you need an unshakable focus on where you are headed and why, so you can avoid being sidetracked.

2. Avoid an emotional response.

Sure, you’re tempted to react emotionally, cram your papers in your briefcase and slam the door on the way out. But if you avoid the emotional response, you can stay focused on the real task: getting the case settled. A crazy demand is just a demand—it’s not a fact unless you choose to agree to it.

When you reach peak frustration levels, go back to that original goal, the one you

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Making the Case for Presuit and Early Mediation

GREGORY J. PARENT

WHERE RESOLUTION SHOULD always be the ultimate goal, early or presuit mediation may serve a vital role as a vehicle for exploring settlement in high stakes cases such as medical malpractice and nursing home litigation, where protracted costs can be avoided by all parties.

Regardless of when a case is mediated, even jaded skeptics should come to the negotiation table with a plan and pathway toward resolution, especially when such an outcome seems unlikely. Often the process of mediation causes shifts in strategy by one or more parties. When

those parties, who never contemplated seeing things differently, do not have a plan to move forward, mediations stall out. Fortunately, even in those situations, the mediation process usually provides a strong foundation of trust which may allow the neutral to capitalize on continued settlement negotiations further down the road.

While the individual methodologies may be as unique as the personalities involved, there are three basic tenets on which one can build a successful platform to explore resolution at an early mediation. They can be summarized as follows: *Evaluate, Elucidate, and Elevate.*

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SPECIAL REPORT—ALTERNATIVE DISPUTE RESOLUTION

MEDIATION

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Evaluate Your Case And Benefits to Quiet Discretion Thoroughly

Early mediation does not mean less preparation. In fact, your work may be as hard or harder than preparing a case already on a trial calendar. The most effective presentations at mediation are the ones which show a thoughtful and thorough attention to detail. Especially in a presuit posture, one needs to demonstrate having a command of the law, facts, medicine, experts and venue.

Even before the advent of the internet, when gossip was just spread by word of mouth, keeping unflattering news private had a certain intrinsic value for those who might otherwise appear negatively. With hindsight, most people come to the realization that they should have talked directly to the person with whom they had a beef instead of blasting scathing opinions against their perceived foes on social media.

Similarly, with increasingly sophisticated commercial defense clients, there is often interest in keeping litigation out of the public record. Cases utilizing presuit mediation may benefit from the privacy afforded parties in that forum by way of incentives which translate into larger settlement offers. Therefore, it is important to evaluate when keeping things private adds case value.

Sometimes all the relevant facts and issues about a case are known before the expiration of the statute of limitations. Consequently, it may be a great opportunity to explore early mediation. Having most facts alone is not enough, however, as the manner with which you proceed can have tremendous effect on how your case is valued from all sides.

Elucidate Your Opponents and Elevate Yourself

What does a presuit mediation need to look like? If you're dealing with high stakes litigation, more often than not you are dealing with a decedent. A common refrain heard in these big cases is the mantra, "I don't want to show my hand and let them cure whatever holes I point out." This is a valid and honest concern, but the reply is to show one's opponent the things that cannot change and enlighten all sides as to their true exposure so the defense can evaluate a case properly. In other words, you have to give up information in order to get what you ultimately want.

High stakes cases, from a defense perspective, bring the following important people into play: named partners, senior associates, seasoned claims professionals or in-house general counsel and corporate executives from the C-suite. When one's case draws talented and sophisticated defense counsel and claims professionals, it is necessary for the plaintiff to educate everyone as to a case's strengths. The defense also benefits from seeing and hearing the plaintiff's side speak.


That subtle reveal of counsel's charisma or a plaintiff's appealable personality may make a defendant rethink their trial strategy.

The same is true from the defense perspective. If defense counsel displays confidence and being well-versed on the issues and ready to challenge the allegations, one may give the plaintiff's team some pause. Additionally, early mediation provides a "taste" of the adversarial nature of protracted litigation. It is invaluable for plaintiff's counsel to learn her client lacks the resolve for trial. Similarly, when tried and true defenses are aired for peer review, by way of the mediator, defense counsel may learn that some arguments may not be as potent in front of a jury as perceived in the war room.

For plaintiffs, consider a presentation to show the "value" of that person's life with family photos, testimonials and with some family members present to tell a decedent's story. Done correctly, these can be powerful aids in telling one's story. Additionally, provide recent verdict and settlement data in the jurisdiction where suit will be filed. Note any outliers about specific counties.

In one high stakes mediation I handled, the national claims counsel scoffed at my suggestion the plaintiff's case had greater value in DeKalb County, Georgia. She opined that it could not be as liberal a venue as a borough in New York. Having never practiced in the Big Apple, I simply shrugged my shoulders and gently urged her to check with her vast network. When I returned to her caucus room, she

exclaimed that her colleagues confirmed my information. That new discovery led to the case getting resolved at mediation.

The moral of the story is that one has to sometimes adopt the old adage, "help me help you," by narrowing and clarifying the issues in a clear and concise manner. This becomes even more paramount when one's case involves decision makers who are flying to Atlanta from other cities. The more sophisticated the defense client, the more sophisticated your presuit presentation may need to be to reveal both one's legal acumen and one's showmanship before a jury. Additionally, early mediation provides a forum for the defense to demonstrate their abilities such that it allows a plaintiff's attorney to better estimate her client's resolve. 

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