# PRACTICE POINTERS FOR A SUCCESSFUL MEDIATION

*BY SHULI GREEN*

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Do not underestimate the benefits of mediation. Many litigants believe that a jury trial is their chance to finally "tell their story" in front of an emphatic and understanding group of peers. As attorneys, we know that is not always the case. The jury may not view the case the way your client views it. Litigants who do not get the result they expect at trial end up feeling frustrated and misunderstood. Why doesn't the jury understand what they have been through?

Mediation is an opportunity for your client to have his or her "day in court" without all the costs and uncertainty associated with a jury trial. Litigants do not always get to tell their story the way they want to at a trial. They are subject to stressful cross-examination by opposing counsel and adverse evidentiary rulings by a trial judge. They may wind up feeling confused about why they were not allowed to present certain evidence to the jury. Plaintiffs often end up feeling like they are the ones on trial rather than the person or entity that caused their injury.

Typically, jury trials boil down to a few hot button issues. Mediation allows parties to discuss the issues that are really important to them. Mediation is less expensive than going to trial. Parties should consider not only the cost of trial, including expert depositions, witness and court reporter fees, etc., but also the time they will have to take off from work to prepare. Mediation can save these costs and increase the bottom line for your client.

Mediation also presents an opportunity to learn about the opposing side's case and what the opposing side perceives to be the strengths and weaknesses of your client's case. It gives each side an opportunity to show that they are ready, willing and able to go to trial if necessary. A strong opening statement or powerpoint presentation can go a long way in convincing an insurance adjuster that he or she has undervalued your client's case. Likewise, a strong opening for the defense may convince a plaintiff that he or she has overvalued the case.

**When is the Best Time to Mediate?**

Choosing the best time to mediate can have a big impact on the chances of settling your case and is fact driven. For most cases preparation is key. If your client is seeking a significant settlement the adjuster will take your demand more seriously if you develop your case thoroughly through discovery, key witness testimony and expert depositions prior to mediation. It demonstrates to the other side not only that you can back up your demand, but that you are prepared to try the case if it does not settle.

In some circumstances, it is better to mediate early. If you know there are problems with your client's case that the opposing side will likely discover, propose an early mediation. If there is a dispositive motion or an appeal pending, parties may be more motivated to settle at mediation to avoid a potential adverse ruling.

**What Should You Look for When Choosing a Mediator?**

Choose a mediator who has some general knowledge or experience in the area of law in which you are litigating. An experienced mediator can help pinpoint some of the strengths and weaknesses in your client's case. The mediator may point out things you have not considered. There is tremendous value in having an experienced mediator put a fresh set of eyes on a case you may have lived with for long time.

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Some mediators take a facilitative approach where the mediator assists the parties toward a resolution but does not provide predictions, recommendations or opinions. Others may take an evaluative approach where the mediator points out the strengths and weaknesses of the case and/or provides an opinion on the law, the likely outcome of a case at trial or the settlement value. A good mediator should not be fixed in his or her approach. Some attorneys already feel confident about the settlement value of their client's case and the likelihood of success at trial. They just want the mediator to facilitate the settlement process. Other attorneys may be less certain as to whether they have properly valued their client's case and may appreciate the input of an experienced mediator.

Your client may have unrealistic expectations regarding the value of his or her case. It is always helpful to let the mediator know in advance if there are "client control" issues that may impede settlement.

The more information you can provide the mediator about your client's case prior to mediation the better. The mediator should identify motivating factors that can facilitate the settlement process. Not everyone is motivated solely by money. Some litigants are angry and just want to be heard. They want to make the opposing side understand what they have been through. Sometimes the injury is an emotional injury that is hard to quantify in dollars. A good mediator should identify and understand these motivating factors, effectively communicate those factors to the other side and come up with solutions to address these issues during the settlement process.

A good mediator is persistent and finds creative solutions to resolving disputes. If a case does not settle during mediation, the mediator should follow-up with the attorneys. Often a case will settle within a week or two following mediation after defense counsel has had a chance to speak with the adjuster. If the plaintiff's attorney presented a strong case or offered additional evidence at mediation, the adjuster may agree to increase the settlement offer.

**Tips for Mediation**

Be prepared. If you represent the plaintiff, provide back up for your client's damages claim to the opposing side prior to mediation. Opposing counsel may have limited authority that does not cover additional expenses. If you have documents that support a claim or defense, have them ready and available. If your client will have to reimburse medical providers and case expenses, have those numbers available. Your client cannot make an informed decision about a settlement offer unless he or she knows what they will net after deduction of fees and expenses.
Listen to your client's story and decide in advance whether you will have your client speak. Attorneys are often nervous about clients speaking freely in front of the mediator or the opposing side. Your client may inadvertently reveal a weakness in your case. Also, although a mediation is a confidential proceeding, information revealed during the mediation may later become the subject of a deposition or discovery request. On the other hand, if you are dealing with a client who has suffered a significant physical or emotional injury, the client's personal account of the injury and how it has impacted his or her life can be particularly compelling.

Take time to explain the process to your client beforehand. If your client is not comfortable with the process he or she will not be willing to

compromise. An experienced trial lawyer once told me that he had a mediation that completely broke down because he spoke with the mediator privately. His client thought they were "colluding" against her and got up and left. It is always best to educate your client regarding the mediation process so they know what to expect.

Have faith in the process. Do not get frustrated if the initial offer or demand is too low or too high. A low first offer is often just a response to an unrealistically high demand and vice versa.

Prepare a mediation statement. In lieu of a mediation statement, provide the mediator with copies of demand letters, complaints, dispositive motions, etc. that will facilitate the mediator's knowledge and understanding of the case.

Present your case like a mini-trial, use an effective opening, and where possible, demonstrative evidence. Videos and powerpoint presentations can be very effective. This not only demonstrates that you are prepared to try the case if it doesn't settle, it gives the other side an understanding of how a jury is likely to view your case.

Be patient. Dispute resolution is a process and often transitions through various stages before resolution is achieved.

Be open-minded. Lawyers and their clients often lose objectivity after being immersed in a case for a length of time. Be willing to challenge your own perception of the strengths and weaknesses of your case.

Finally, know what your case is about. Most cases boil down to a few sticking points. Identify these sticking points and be prepared to address them.


**SHULI L. GREEN**
Neutral
sgreen@milesmediation.com

Office Location: Atlanta
Phone: 678-320-9118