

KEYS AND IMPEDIMENTS TO SUCCESSFUL MEDIATIONS

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I. PRE-MEDIATION

A. TIMING OF MEDIATION

- pre-suit
- pre-discovery
- pre-disclosure of experts/reports
- post-discovery
- pending MSJ
- trial imminent

B. POSITION STATEMENTS

- concise and informative
- candid and forthright assessment of case strengths/weaknesses
- supporting materials
 - medical summaries
 - experts' reports
 - key testimony
 - photos
 - medical expenses/lien information
 - damages projections, i.e. past and future income loss, future medical expenses
- how much is too much?
 - medical records dump
 - largely irrelevant deposition testimony
- share with opposing counsel? . . . depends on nature and content

C. PRE-MEDIATION COMMUNICATION WITH MEDIATOR

- purpose?
 - candid, unfiltered discussion without client involvement
 - certain dynamics better left unwritten, i.e. client issues
 - can be very helpful to process
 - not simply a head start on mediation
 - ethical? Yes...all or most of mediation process is ex parte

D. PREPARATION

- manage client's expectations
- discuss case strengths/weaknesses and realistic settlement possibilities
- doing so for first time during the course of mediation may be too late and diminish credibility with client
- consider starting settlement position and approach to negotiation v. negotiating totally "on the fly"
- starting position and subsequent moves will likely be related in part to opponent's starting position and subsequent moves, but do not be wholly reactive vs. proactive
- negotiating at your own pace, not your opponent's pace, increases your overall negotiating credibility and may well pay dividends in the end

E. LIENS

- compile up to date figures re medical charges, payments and liens
- engage lienholders (medical and work comp) regarding upcoming mediation and potential waiver or compromise of liens
- ideally, lienholders will be accessible during mediation (especially work comp carrier), but sometimes difficult to accomplish
- "We cannot commit to a waiver or compromise of our lien without knowing the settlement amount."
- "We cannot identify a specific settlement amount without knowing the extent of your lien compromise."
- sort of works itself out

F. ZOOM v. IN PERSON

- generally no difference in effectiveness
- sometimes counsel are in best position to know if the circumstances warrant in person for some reason
- with Zoom, more effective when plaintiff and counsel are together
- attendance/active participation by claim rep
 - with in person, personal attendance by claim rep is ideal, but regrettably, becoming less common
 - with Zoom, active, on-screen participation by claim rep is preferred, but regrettably, becoming less common
 - ongoing, active communication with counsel and claim rep much more effective than all or most communication being filtered through counsel
 - insulating decision maker from mediator diminishes effectiveness and efficiency of mediation process
 - tremendously helpful for ultimate decision maker to be accessible during or at least toward end of mediation, but not always possible

II. MEDIATION PROCESS

A. JOINT CAUCUS

- mostly a thing of the past
- can set productive a productive tone, but can also be polarizing
- currently infrequent, except for purpose of introductions

B. ATTITUDE OF COUNSEL

- "smartest person in the room" syndrome
- genuine interest in settlement v. impressing opponent or mediator
with your confidence and resolve
- bullying tactics, personal attacks or threats are never appropriate
and wholly counterproductive
- mediator and opposing counsel can usually sense a good faith
interest in settlement and proceed accordingly

C. IMPEDIMENTS TO SUCCESSFUL MEDIATION

- superficial, overstated declarations of supreme confidence in desired outcome
- unwillingness to acknowledge strengths/weaknesses of respective positions/arguments (even to mediator)
- diminishes credibility with mediator and opponent
- unnecessarily holding back supportive facts/arguments for use at trial
- probably going to come out at some point prior to trial anyway
- if genuinely interested in settlement, present best case for best outcome v. "feeling out" through mediation process
- prematurely staking out settlement parameters/ultimatums
- "You might as well tell them right up front that we do not regard this to be a 6-figure case, and if they do, we may as well go home..."
- "If their next move is not under \$500,000, we are wasting our time and may pack up..."
- "I can tell you right now if their opening offer is anything under \$1M, they are not negotiating in good faith and we will not make a response..."

[I COULD GO ON AND ON . . .]

C. IMPEDIMENTS TO SUCCESSFUL MEDIATION (continued)

- such pronouncements usually prove to be unrealistic and superficial
- stifling effect upon negotiations
- counterproductive
- diminish credibility with opponent and mediator
- often produce similar, counterproductive tactics in response
- excessive and prolonged "tit-for-tat" moves or staying ridiculously low or high
- at best, a waste of time
- at worst, counterproductive
- diminish credibility with opponent and mediator

D. COMMUNICATION WITH MEDIATOR

- remember that the mediator is working for, not against, any party
- don't feel like you need to posture or "negotiate" with the mediator as if an adversary
- trust the process and the mediator
- be forthright with the mediator so that he or she can guide the process accordingly along a path to settlement
- not saying you should necessarily share your top or bottom dollar with the mediator early on, but at the appropriate time, it is helpful for the mediator to know what you are really looking for in terms of a final settlement
- there comes a time in many mediations, typically later in the process, when it is very helpful for counsel and the mediator to speak privately and candidly

E. POST-MEDIATION ACTIVITY WHEN CASE NOT SETTLED

- ideally, mediation should exhaust settlement discussions, with each party knowing what it walked away from, but that is not always the case
- "That is all we are going to pay today."
- mediators hate to hear that, as it provocatively implies that there will be more money at a later date, making it difficult to settle the case at the mediation
- using mediation as a "feeling out" process by either party is a disservice to the process and settlement momentum may be lost in the aftermath, but there are circumstances when post-mediation efforts are necessary for final resolution, i.e. need for additional medical information or an expert's report, a request for additional settlement authority from a person or committee not immediately accessible or a pending question regarding a requested compromise of a lien
- mediator stays involved v. direct communication between counsel
- up to counsel, but usually works best for mediator to stay involved; clumsy when some of both
- sometimes easier and more efficient to resume mediation, particularly when Zoom
- sooner is better than later, as things tend to drift over time

THANKS FOR LISTENING
(OR PRETENDING TO)

QUESTIONS?