



Don't walk out

A GUIDE TO GETTING THE MOST VALUE FROM A MEDIATION, EVEN IF THE CASE WON'T SETTLE

Most plaintiffs' attorneys have had the frustrating experience of appearing for mediation and discovering quickly that the opposing party has no intention of settling – or, at least, no intention of settling reasonably. Maybe the defendant, defense counsel, and/or the carrier have an incorrect or unjustified view of the case and have made an unrealistically low valuation. Maybe it is an early mediation and the defense is taking a shot to see if you and your client will go away cheaply. Maybe it is a court-ordered mediation, and the defense is only showing up because they must.

What if there is no realistic possibility of settlement? Is it still worth participating in the mediation? The answer is a clear “Yes.”

If you have already paid for the mediation (or you are committed to doing so), you will not get your money back by leaving or giving up. If it is a pro bono mediation, it is not costing you any money. The only issue is your time, and there are many ways your time can be put to good use; take advantage of opportunities to advance your case that only mediation provides.

Gather valuable intel on your opponent's case – from your opponent

The mediator is speaking directly to defense counsel, the defendant or the defendant's corporate representative, the carrier's representative, and/or key witnesses, in a setting where they are more likely to be honest than they will be with you or the court. The defense is going to reveal facts, legal theories, and strategies, much of which you may not be aware of. Defense counsel may also reveal how much he or she really believes in these facts, theories, and strategies, which in turn, reveals how the defense is likely to litigate. This is valuable information you want.

The defense may also give the mediator information that is less apparent and that you would be less likely to learn from other sources. Defense counsel might admit he or she thinks your client is a very good witness. Defense counsel

might discuss a key piece of evidence you were not aware of or admit such evidence is missing. That third-party witness who moved out of state? Defense counsel might tell the mediator whether the defense knows where that person is, whether the defense is likely to call that witness, or whether or not that witness is likely to show up at trial. Defense counsel might even tell the mediator that the defendant or the carrier never settles the kind of case you are litigating, or almost always settles, or what triggers the defendant or the carrier to settle.

The mediator is not going to relay this information to you without authority to do so. You would be amazed, though, what information the defense will authorize the mediator to pass along, and even how often the defense *wants* the mediator to pass this information along.

Take advantage of your mediator's opinions

Most mediators are experienced litigators with substantive expertise in the area of law at issue. People have paid a lot of money for their legal opinions over the years, and you and your client may have paid a lot of money to have them mediate your case. Get your money's worth.

There is no other setting but mediation where you will have the opportunity to get such honest and educated opinions and feedback from an experienced and knowledgeable practitioner. Your co-counsel is biased in your favor and may not want to risk upsetting you. Your colleagues and friends know very little about your case, nothing other than what you tell them. Your judge has to maintain neutrality and is ethically constrained as to what he or she can say. Your opposing counsel is biased against you and is spinning the case in the defendant's favor.

The mediator is much more likely to tell it like it is and is happy to talk. Listen to what your mediator has to say about the other side's case and about your case. Ask specific questions. What does the mediator think the chances are of a summary judgment being granted? What

does the mediator think about your legal theories? Does the mediator think the defendant is a good witness? Does the mediator think the defense is seriously willing to try the case? What does the mediator know about your judge? You are unlikely to get this information anywhere else.

Get to know your client – and his or her case

Opportunities to spend time with your client are rare. There is the intake process, where you do not really know your client or the case. There is the deposition process, where you are focused on narrow goals and the situation is highly stressful. Maybe you were not the attorney who did the intake or defended your client's deposition.

During mediation, you and your client will be together, in person or virtually, for hours, just talking. Much of this time will be spent with just the two of you. Mediation may be the one chance you get to really know your client as a person, and really get to know your client's case.

Mediation is a chance to learn new facts, evaluate the facts, and determine what kind of a witness your client will make. Mediation may be your best chance to figure out whether it is in your client's best interest to go to trial.

Mediation probably is your best chance to bond with your client and get on the same page as to how to proceed. Whatever direction you go – settlement or trial – and how you get there, you need to make sure your client is on board, and mediation can be your best opportunity to ensure that happens.

Find your opponent's bottom line

A key goal at mediation should be to find out how much the opposing party is willing to pay (or accept), so you can make an informed decision on whether to settle. Finding each side's bottom line is something every mediator is trying to do, and it is information you absolutely want. Not only will the defendant's “best offer” tell you whether you can settle on the day

