MEDIATION .... A DIFFERENT VIEW

By Bill Vines

I have been honored that many lawyers have asked that I attempt to mediate cases and the following are my suggestions regarding issues that frequently arise. I acknowledge that my views are not shared by all mediators and extend them for the consideration you feel merited.

Do Make an Opening Statement

Some lawyers feel they should not make an opening for fear they will antagonize the other party or unnecessarily reveal their facts or theories. In fact, the opening may antagonize the other side. However, the failure to make a statement is often read by lay parties as suggesting you had no good response.

With modern discovery, essential facts and theories are almost always known. The mediation process has a high chance of success but only if there is meaningful participation by both parties. Both sides need to understand the theories of the other party and especially need to understand the risks of not settling.

Make a statement.

Do Use Demonstrative Evidence

In a high percentage of cases, mediation has replaced the trial of cases. In order to achieve the best result for your client, present your opening in the most convincing way. Use exhibits, PowerPoint, video depositions or even live witnesses. The mediation is the first opportunity for lay parties or even insurance representatives to see the opposite party's case presented. You want them to leave the room thinking "I don't want to see that again".

Make the Presentation Reasonable in Length

The presentation should be done politely, with low key argument, and in summary fashion. As above, it is convincing to use exhibits or testimony. However, it is always best to use only the most dramatic exhibits and use video or sound "bites" rather than lengthy testimony. It is not necessary to introduce the witness on your PowerPoint/video presentation or to get background information. Show the witness on the video with his/her name and positions/title underneath. Have them state only the important fact, e.g. "There is no causal relationship" or "I saw the car run the red light."

Try to specifically address the essential fact which is important to the mediation. It is not unusual that one party will claim "That doctor is not going to support that position". It is rather difficult to make that argument when you've just heard the doctor say that very thing. While it may cost you the price of a deposition, to get a short video from an expert is probably worthwhile.

Twenty minutes is probably enough for an opening. A skillful attorney can package even the most complex case in 20 to 30 minutes. Longer and you lose impact.

The Time for Handouts

A well-constructed "settlement brochure" handout is a good idea and can be taken by each party to their separate rooms and reviewed later. However, if you are going to do a video or PowerPoint presentation, and you give that brochure prior to your presentation, all heads will be down looking at the brochure during your presentation. Pass it out after your presentation.

Show Sympathy

Most parties genuinely feel they have a legitimate position to advocate. In some cases, they are highly persuaded to consider a more reasonable position if the opposite party evidences some consideration for their position.

Do Not Negotiate …. (beforehand)

While it seems self serving for a mediator to say, and counterintuitive to the process, my own experience is that where you expect to meaningfully participate in mediation, the negotiation should be all done within the mediation. Sometimes we hear that one party has suggested that an attempt be made to negotiate "as close as we can get" and then mediate the rest. My experience is that the parties become entrenched, and may have gotten themselves and their clients in a position where meaningful negotiation cannot take place.

Do Not Have a Bottom Line

Do not come to the mediation with an absolute bottom line. Certainly have a good discussion with your client or the real party in interest before the mediation. If possible, avoid an agreement that locks in an absolute final number or position. No one is smart enough to know an exact number which is "right". The process works because the parties have some flexibility to consider each other's position. The plaintiff attorney would be better served to suggest a reasonable opening demand and explain every subsequent offer will be fully discussed with the client. For the defense, if possible, ranges should be discussed while maintaining the ability to seek additional authorization if felt proper by those at the mediation.

Do Send a Short Summary of the Case

Most experienced attorneys who act as mediators only need a summary to do an effective job. Most mediators do not want to receive a box with a cover letter "Attached are all pleadings and depositions taken in this case". Delivering such a "care package" increases the cost of the mediation to the parties and may not help to direct the mediator to the essential points which may be determinative of the success of the mediation. Further, doing a short two or three page summary may help the handling attorney to focus on the real issues in the case and to see the forest as well as the trees.

Advise your Client that Private Attorney Conferences are Proper

Private conversations with the mediator and/or counsel for the parties are often helpful. Advise your client before the mediation that such conversations may take place and ask their permission for those to occur. Explain they are not unusual and meant only to see if there is a way to work through a perceived problem.

Be Reluctant to Make "Bracket" Offers

Be cautious in making "bracket" offers. An example of a bracket is "We will offer $100,000 if plaintiffs agree to reduce to $400,000". In my experience it is rare that a bracket is ever accepted. When you make a bracket, you have communicated to the other side the area where you would expect settlement must occur. At the time you make this suggestion, that range may be wholly unacceptable to the other party. After patient consideration of the case, the bracket range might then be accepted. An early bracket often discourages further discussion. Usually it is better to simply make a responsive offer rather than bracket.

Take it or Leave it

Be further cautions with a "take it or leave it" offer. Such an offer works only if you are very close to settlement.

Listen to the Mediator

If the mediator makes "suggestions" or asks if you have "considered" a particular solution, there is almost always a reason for that statement. The mediator knows more about the atmosphere in both rooms than you do and the mediator's only interest is to try to bring the parties together.

A Written Agreement

If there is a settlement, do not leave without a written agreement. Take the time and get it signed. You take a chance if you do not.

Be Patient

Mediation is the biggest change I have seen in 40 years of law practice and is a win-win situation for both parties. It requires consideration of life changing and emotional issues all to be worked through and considered in a relatively small amount of time. The mediation may require a party to compactly focus on the events which have transpired over many months or years. Time and time again I have seen patience result in a reasonable conclusion. Don't give up.