TIPS FOR YOUNG LAWYERS: MEDIATION

Young lawyers will gradually develop enough experience to be permitted to handle mediations on their own. Mediation appears straightforward and fairly simple. To do it right, however, requires effort and planning.

Sometimes, the most important part of a mediation is what happens before it starts. Here are three classic mistakes that young lawyers make before mediation.

The first mistake is going to mediation before some pivotal discovery event has occurred, causing each side to evaluate the case dramatically differently. For example, the key question might be whether a back injury is related to an accident. If the medical records do not answer the question, and the doctor has not been deposed, neither side can fully evaluate the case. If each side is adamant that the doctor ultimately will give the opinion favorable to that side, the mediation will fail.

The second mistake is having enough information to evaluate the case, but failing to prepare an evaluation, send it to the client, and discuss it with the client. It is too late at the mediation to give the client (or the adjuster, etc.) your opinion. The client or settlement decision-maker needs an opportunity before mediation to process your evaluation, perhaps ask for elaboration, and otherwise digest the information. On the defense side, your adjuster or lower level client contact might need to involve his or her superior in the decision on settlement authority.

The third classic mistake is having enough information to evaluate the case, taking the time to evaluate it, but giving an evaluation that is unrealistic. There are two principal causes of this. One is being afraid to deliver bad news to the client, and therefore glossing-over or ignoring damaging evidence and instead giving the evaluation that you think the client wants to receive. The second cause is falling in love with your good facts, and forgetting about your bad ones. Young lawyers are enthusiastic, and that is good. If that enthusiasm produces an imbalanced, erroneous assessment of the case, however, then it works to the disadvantage of the client.

Avoiding mistakes is important, but creating opportunities to succeed is also important. Young lawyers are reluctant to do something before mediation that almost always would help them succeed at mediation: Call the other lawyer and discuss the value of the case. It is amazing what can be accomplished with a simple exchange of information. You or the other lawyer might be completely off base on some important point. Your brief discussion before mediation could make you aware of it. Your discussion might alert you that although the other lawyer evaluates the lawsuit roughly the same as you do, the other lawyer's client is difficult and has unrealistic expectations.

The defense lawyer might tell the plaintiff's lawyer that the defendant needs certain documentation to justify a settlement payment, and the plaintiff's lawyer will have time to obtain it and deliver it to the defense lawyer before the mediation. The plaintiff's lawyer might give the defense lawyer new information on the plaintiff's employment status, physical condition, social situation (a widow in a wrongful death case remarrying, or re-employment of an injured plaintiff), or provide some other news that would cause the defense lawyer to increase her evaluation or cause her to choose a different mediation strategy. If the conversation is such that the defense lawyer decides she needs to ask for more authority, she will have time to do it before the mediation.

One more thing about pre-mediation activities. Sometimes, you will be in a case where there are multiple defendants. Whether you represent the plaintiff or the defendant, there are times when the chance for a successful mediation will be improved if, before the mediation, the defendants get together and decide whether they will pool their money in the negotiations, and if so in what way and on what basis. These issues can be thorny. If the defendants do not resolve them before the mediation, the mediation stands little chance of succeeding. Nothing brings out the competitive impulse of an Alpha adjuster like the presence of another Alpha adjuster. When adjusters or client representatives get distracted trying to out-negotiate each other, the mediation collapses. There are therefore times when a pre-mediation mediation, among just the defendants, is necessary. Think ahead.

A few other things to consider before mediation:

1. If your letter to the mediator is not sensitive or truly confidential, send it to the other side. It will make the other lawyer confront your strengths, and might produce a more reasonable attitude by your opponent about settlement. Even better, the other lawyer should show your letter to his client.

2. Are there any liens involved in the case? If you represent the defendant, find out if the plaintiff has a deal with the lienholder, or at least is in communication with the lienholder. Regardless of who you represent, consider asking the mediator or a judge to require the lienholder to attend the mediation in person, or be available by phone during the mediation. By all means, know the exact amount of any liens. Think through whether a Medicare set-aside is required, and if so, how to deal with it.

3. Make sure you have someone with you at the mediation who has real settlement authority. This is a particularly troublesome issue on the defense side. If your client or insurance representative has limited authority and might need to call his boss at some point to get more, make sure the boss is available, and doesn't leave early, get on a conference call, or disappear just when you need to reach

her.

Now, the mediation itself. Remember that most clients are not used to the process. Some clients will be tense and defensive just by being sequestered in a conference room with unfamiliar faces, including someone (you) who is perceived by the other lawyer's client to be the enemy. Your opening remarks might be the first time the other client has heard anything critical of his or her case. Both clients might consider the somewhat clinical, detached discussion of their case by the lawyers and the mediator – and the negotiations that follow – as insensitive and insulting. Be aware of this and acknowledge the personal effect of the case on the parties if you give an opening. Speaking of openings, tailor your opening to the case. Do not wing it, or give canned, recycled remarks. Be sincere, be courteous, and be straightforward. Emphasize that you are there to reach a reasonable agreement, not to argue. Don't make threats or belittle the other side's case. Encourage the other side that you are there to try to resolve the case and will try hard if that effort is reciprocated.

In terms of the actual negotiating, there are many approaches. Remember that the goal is to find a way to agree, not to grab every opportunity to disagree.

Be polite. Rude behavior in mediation is the result of a lack of discipline, arrogance or insecurity. Keep your eye on the ball, which is trying to find common ground and settle. The parties have the rest of the case to fight.

Do not pretend that a settlement is beneath you, or a sign of weakness. Compromise sometimes is the best option for the client. Be persistent. Put the same energy into succeeding at mediation as you would at a deposition, hearing or trial. If you give-up at the mediation, you definitely will fail. If you are determined and it is possible to succeed, you will succeed. If the negotiations stall, and the mediation is about to break-up, before leaving you might search-out the other lawyer and have a heart-to-heart talk about the negotiations. Frequently, this will break an impasse. Again, be careful. Plan what you will say before you start talking. It is easy to let your guard down and say too much to the other lawyer. It is a good time to be candid, but don't be more candid than you should be.

Be positive. If you talk and act like you are committed to a reasonable compromise, you are more likely to reach one. Mediation is a time-out from the fight. Convert from combat mode to problem-solver mode. A good attitude helps.

Be patient. There is a rhythm to most negotiations. Don't rush it, and don't impede progress. Never insist that the other lawyer bid against himself. Keep your good humor and resist the temptation to feel offended by settlement positions you feel are unreasonable. Be patient, and counsel your client to be patient. If the client wants to make a settlement move that you believe would be counterproductive, tell the client that, suggest an alternative response, and explain why the alternative is more likely to keep the negotiations moving forward. Do not characterize the opponent or the

opponent's settlement moves in a negative way. Explain to your client, who might misunderstand what a particular move by the other side means, what you know is actually going on in the other room based on your much greater experience in mediation.

Be careful. Avoid sending signals you do not intend to send. By all means, do not indicate to the opposing lawyer that you can go to a number, unless you know you can. Discuss numbers with your client first, *then* with the other lawyer. If you reverse this order, trouble often follows. If you propose a bracket, the other side almost always will interpret your bracket as a commitment that you will pay the midpoint. If you are not willing to go to the midpoint, it probably is not a good idea to suggest the bracket in the first place. If the bracket is going to be discussed anyway, make sure the other side knows, before the bracket is communicated, that you are *not* willing to go to the midpoint.

Do not make a "final offer" unless it is really your last offer. You must maintain your credibility, not only for that particular negotiation, but also for future negotiations in other cases.

Everyone wants a great deal. It is fine to shoot for that, but don't forget that it is whether the deal is fair, not wonderful, that is the real test. A fair deal will not necessarily make you or the client happy. You will recognize it, however, because it will be an alternative that is better than trial. If trial is better, don't settle.

What should you do if compromise is hopeless? If it becomes apparent that the other side will not settle for the amount of your authority, you have a decision to make. Should you go to the final amount of your authority, or stop negotiating before you have reached your end point? If you have a judge who tends to revisit settlement right before trial, and put pressure on the parties to reach a deal at that time, you might want to hold back some money for later, meaning not show your real bottom line number to the other side. Sometimes, however, your goal should be to offer all of your authority before the mediation ends, even if the other side rejects it. If that is the situation, don't obsess too much about whether the other side will agree to your final number. Just do your best and if you fail, you fail. If you go to trial and lose, it is better if you and your client can look back and know that you gave your best settlement number at mediation. The conversation with your client after the disappointing verdict will include *"Tell me again how much did we offer/were we offered before trial?"* You will not want to have to explain why you never tested your client's bottom line number with the other side when you had the chance. The client will wonder whether the case could have settled, and the trial catastrophe been avoided, if you had at least given the client's final number a shot. Although at the mediation your client was happy to storm out before you got to your final number, a bad result impairs memory. After the trial, your client might suddenly become unhappy about your failure at mediation at least to make that final offer/demand.

One final suggestion. If you are the defense lawyer and intend to put into the release any provision that is outside of the standard language, such as a liquidated damage provision as part of a confidentiality clause, make sure the provision is discussed with the other side at the mediation *before* the deal is struck. In fact, don't unleash *any* post-agreement surprises on the other side and the mediator. You do not want a settlement to be contested, or be embarrassed in front of your client, by failing to iron-out in advance potential disagreements about the form of the release, the timing of the payment of money, whether the settlement is confidential, etc.

There is much more to the art of mediation. In general, though, if you do your job, you and your client will benefit from the process.