

# **WINNING MEDIATION STRATEGIES**

Presented By: Hon. Thomas Prebil

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1. **Timing.** I view mediation as a process that not infrequently takes time to complete. Obviously, thorough preparation is necessary, but mediation should not be too close to trial. There should be enough time to resolve issues that cannot be resolved at mediation. Remember that plaintiffs often have a substantial emotional component in the case that just needs a little time to resolve. If the process does continue the mediator should remain actively involved with the parties to finish the job.

2. **Selection of Mediator and Who Attends.** As a mediator it's frustrating not to have the people in attendance who can resolve the case. This criticism is really directed to the defense. Obviously plaintiffs and their counsel will be there and can settle the case. Perhaps in a complicated business dispute the plaintiff's side may not fully be present, but in most of the cases, plaintiffs will be present and available to mediate. It is frustrating not to have the appropriate (money) person present for the defense. The defense will have evaluated the case for reserves purposes, and set a value that they may not be prepared to exceed. Cases are often reviewed by a committee that meets at a regular time and they simply will not settle the case on the day of mediation.

In regard to who should attend, I believe that fewer people is best. In a typical personal injury case, the plaintiff and a spouse is appropriate, but additional parties are not helpful. In a wrongful death case with multiple survivors each has the right to be there, but settlement becomes difficult with multiple opinions of value and terms. The parties can become impossible to control. Counsel should anticipate this situation and be prepared to deal with it.

3. **Prepare Client for Mediation.** I believe it is necessary for the mediator to discuss these issues at the beginning of the mediation. Typically, the plaintiff is the only person participating who has no experience with the process. Spending with plaintiff will be time well spent, reinforcing what his counsel has told him, reaching a comfort level, and gaining confidence with the mediator and the process.

4. **Prepared to Talk Final Numbers.** This vital to reaching a settlement. Plaintiff has to have a pretty good idea what he/she will realize from the claim.

5. **Pre-Mediation Letter.** Such a letter is necessary in every case to provide the mediator with relevant information that will assist the mediator in understanding the issues and problems with the case. It will also save considerable time at mediation.

6. **Value Your Case.** This is imperative to the settlement of the case. As a judge I felt that some lawyers had inflated the value of the case to help secure the business. This certainly seems to have been so in many discussions of settlement. Clients on their own will likely have a number in mind that they may not have shared ... conferring with their brother-in-law, a girl friend, or golf buddy. If a plaintiff has a wildly exaggerated value it is likely to be a real impediment to settlement.

7. **Presentations.** This show and tell can be effective, but ask yourself who it is that I am trying to impress. Everybody likes to be entertained but will it accomplish anything. In a case significant enough to justify the effort of producing a presentation, the defense will likely have experienced adjustors present who will likely not be persuaded to run for their checkbook. Yet it could demonstrate your preparation, attention to detail, and confidence in your case. Will the production cause your client to become inflexible regarding settlement? A well-presented oral presentation of your case may be just as effective. Use good judgment.

8. **Meditation Tactics.** To have a joint meeting or not? When I mediated cases in practice this was the norm, but now not so much. Personally, I'm not opposed to it and the joint session can still be effective. In a recent case of medical practice where negligence was conceded, defense counsel wanted a joint meeting. He did so to make a very sincere apology to the family on behalf of his client. I thought this was a very effective beginning to the mediation: it helped defuse the resentment and anger plaintiffs had to the defendant, put a sympathetic face on "the wrongdoer", and allowed the process to proceed more freely to settlement on the merits.

A variety of tactics may be employed depending on the nature of the case. Choosing the proper approach may make the difference of settling or not.

The need to prepare the plaintiff for the process cannot be overstated. They believe they have been wronged and do not understand why the defendant does not want to make it right. Even a reasonable person directly affected can be difficult to deal with in litigation. As a mediator, I think is advisable, necessary really, to spend time with the plaintiff to re-explain the process to them. As much as a plaintiff tells his/her lawyer they understand, it is vital that they hear it from the mediator. It's time well spent.

It's also necessary for plaintiff's counsel to have the issue of liens addressed before mediation. It is not possible to settle with an incomplete determination of what the client will realize in settlement and could cause real headaches for counsel with a disgruntled client.

9. **Uneven Bargaining Power.** The disparity is a real factor to consider. Insurance companies view the mediation process as a business transaction while plaintiffs have an emotional and financial interest. The mediator can assist and try to level the field. If plaintiff's counsel is prepared with documentation about the case, this will certainly help.

10. **Settling the Case.** Remember that negotiations can continue throughout the settlement process, including for example the cost of mediation, confidentiality, and the like. If settlement is reached, a memorandum of the basic terms is necessary to be sure that all parties in fact agree to the basic terms.