How to Deal with Your Worst Nightmares in Negotiations and Mediation

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We’ve all been there. You’ve convinced your client that mediation is the way to go, and now the day has arrived. You look forward to negotiating a great settlement for your client, then facing the dilemma of where to go to celebrate. But, not far into the mediation session, problems begin to arise.

Certain familiar barriers to settlement seem to surface time and again. Below are a list of some of the most common barriers, followed by thoughts about how to deal with them while attending a mediation session.

In a case defended by an insurance carrier, the defendant (insured) does not show up at the mediation.

This is a common complaint among plaintiffs’ lawyers. Apparently, many plaintiffs’ lawyers expect that, if the defendant/insured were to appear at mediation, he or she would put pressure on the carrier (adjuster) to settle. The defendant/insured’s mediation position might be expected to go something like this: “I paid your company a lot of money in premiums to protect me from claims such as this, and I insist that you do whatever is necessary—and pay whatever is necessary—to settle this case and protect me.”

However, experience reveals that defendants usually take the opposite position. Whenever possible, they deny liability. When liability is clear, then they tend to ridicule the plaintiff’s settlement demands and, correspondingly, encourage the carrier to offer as little as possible. From the defendant/insured’s denials of liability and/or insistence that little be paid to plaintiff, claims handling notes come into existence, reflecting, in essence, that the insured does not want to settle and wants to take the case to trial.

Bottom line: Having the defendant/insured present at the mediation rarely benefits the plaintiff because, contrary to expectations, the defendant/insured usually distains settlement altogether or, at best, settlement for any significant amount of money.

In a case defended by an insurance carrier, the adjuster does not attend the mediation; instead, “appears via telephone.”

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Regardless of whether rules require an adjuster “with authority” to appear at the mediation, the adjuster assigned to the case is almost always limited in the amount that he/she can offer to settle the case; and such is true whether the adjuster is sitting in the mediation of “appearing” via telephone. Too many plaintiff’s lawyer think that adjusters have unfettered discretion to pay whatever they think appropriate to settle cases. A very, very few adjusters actually do have that discretion; but just a very, very few. Cases are reviewed with managers, with the managers of managers, and, sometimes, with committees. Prior to the mediation, the handling adjuster is given settlement authority. As a practical matter, the adjuster has little or no discretion beyond that authority. Therefore, it is of questionable necessity that the adjuster actually attend the mediation because the authority is going to be the same, whether the adjuster is at mediation or not.

The actual value of an adjuster attending mediation arises from what happens in negotiations after a mediation that does not result in settlement. If the adjuster is present at the mediation, one may reasonably hope that the adjuster is getting fresh perspectives from the mediator and, if there is a joint session, then from plaintiff’s counsel and from plaintiff. Those fresh perspectives will not change the authority the adjuster has at the mediation, but, after the mediation fails to achieve settlement, the adjuster should be expected to deliver those fresh perspectives to the manager in the claims office; and the carrier may then revisit the authority it is willing to put on the case.

So, most of the time, an adjuster present at mediation (as opposed to on the phone) will not materially change the end-of-the-day offer from the carrier. However, if there is no settlement, the adjuster can become the messenger to the claims office with information learned at mediation from the mediator, plaintiff’s counsel, and plaintiff.

In an emotional case, the spouse (or parent) of one of the parties (whether your client or the other party) shows up at the mediation.

Spouses, significant others, and parents usually come in one of two categories. Some have witnessed how the litigation process has taken a dire toll on the plaintiff, and, as people close to the plaintiff, they are present at mediation to counsel settlement. In the view of this category of loved one, resolution—regardless of the amount—is of greater value than the money involved in achieving settlement. This category of loved one is very welcome to the process.

The second category of loved one has the agenda of a crusader. “The other party has done great harm to my loved one, and, by cracky, the other side is going to pay!!!” Very noble. Another kind of crusader might have a more self-serving objective: “My loved one has been significantly damaged, and we’re going to get a LOT of money out of this.” Regardless of the motivations, this kind of loved one is not helpful at mediation.

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However, even as to the second category of loved one who attends mediation, there might be benefit to the loved one attending rather than being at home. If the crusader loved one dominates the plaintiff and has made it clear that the case cannot settle for less than $X, the plaintiff will not agree to settlement for less than $X in the absence of the crusader loved one at mediation. It is not a matter of the amount of money. It is a matter of having to go home and face the person who had earlier given strict orders not to settle for less than a given amount. Better the mediator have a chance to work with the crusader loved one during the mediation and acquire “permission” to settle for an amount demanded pre-mediation.

Your client possesses unrealistic settlement expectations

This kind of situation is one of the reasons they build mediators. If you, the lawyer, try to correct your plaintiff or defendant client's evaluation of his/her case, you must be very diplomatic and minimize risk that you are going to lose the confidence of your client. You run the risk of hearing from your client, “You sound like the other side!! Whose side are you on??!!” However, one of the mediator's responsibilities is to be the “bad cop” whenever necessary. Do not hesitate to have a private conversation with the mediator and ask him/her to tell the client exactly what risks or problems may exist in the case. If the mediator has “presence” and credibility, there is a good chance that the mediator's words will be taken into serious consideration by the client. In a worse case, the client will reject all that the mediator says about problems with the case, but, if there is a later undesirable trial outcome, the client will not be able to say, “Gee, I had no idea I had any problems with the case because no one told me.”

Plaintiff’s opening demand falls into the “insult” category, and, correspondingly, defendant's opening offer is ridiculously low.

Being concerned about such a thing is typical of unsophisticated clients, but do not allow yourself to be upset by “bad faith” demands and offers. The goal of any mediation should be to attract the absolute best settlement opportunity possible for one's client. Polarized beginnings to the negotiations is not supportive of that agenda. However, extreme opening demands and offers are more the rule than the exception, and they just mean that a bit more work will be required to arrive at the genuine final positions. Often, polarized opening proposals are intended merely to test the other side's position. They are not real. Stay on course with your pre-mediation strategy, and do not be lured into an emotional reaction to an insulting settlement proposal.

Much to your surprise, the mediator, during private caucus, takes a firm position that your side is going to lose the suit, and that your client and you should be grateful to settle the matter for the other side’s best offer/demand.
As with the scenario immediately above, do not become emotionally affected by the mediator’s opinions. Rather, try to figure out where those adverse opinions are coming from. Are they part of a mediator strategy to get your side to move significantly in the negotiations? Or are they a true reflection of the mediator’s view of relative equities in the case? If it is the latter, the get reasons for why the mediator predicts doom for your case. If necessary, get those mediator opinions in private and away from your client because the opinions might have something to do with how your client presents.

Being told by a mediator that you are going to lose is not a happy thing. However, if it happens, give presumptive credibility to the mediator’s negative opinions and request detail in support of those opinions. There is value in hearing a perspective that is not necessarily supportive of your position. A different perspective from a disinterested party will help challenge you to reevaluate your case.

**During the mediation process, you slowly come to realize that, most probably, your client has provided you with bad information and/or has not provided you with all the facts.**

The best practice for dealing with this development involves two steps. First, do not embarrass your client. In private, confront your client with the information that is inconsistent with what your client had earlier reported to you (and, perhaps, testified to through written interrogatories and/or deposition). Become satisfied that your client is now telling you the truth—and, at that, the whole truth. If you cannot be satisfied that your client is being truthful, speak in private to the mediator, using the mediation confidentiality privilege to your advantage. Do not violate your duties with respect to the attorney-client privilege. However, do inform the mediator, privately, that you are hearing conflicting information for the first time at the mediation. Use the mediator’s assistance in getting as much more information from the other side as possible. Be candid with the mediator and the other side that the information the other side is providing is at odds with what you and your client understand, and express a great (and genuine) interest getting the other side’s perspective.

So, if you sense that your client has been untruthful with you and/or has failed to tell you everything, use the mediation as a place that you can get the other side’s contrary perspective. The case may settle when your client is confronted with the other side’s information. But, even if the case does not settle, the fruits of the mediation process will probably set the forces in motion for later resolution.

**The other side threatens to leave the mediation session unless you “negotiate against yourself” by changing (improving) your last demand/offer.**

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As mentioned above, your goal in every mediation should be to get for your client the best possible opportunity to settle. Your pride should not get in the way of that goal. If you end up refusing “to negotiate against yourself,” base that refusal on a plan to ultimate achieve the best settlement opportunity for your client. Conversely, consider whether “negotiating against yourself” might be in your client’s best interests. Perhaps the other side is correct, and your position is too extreme.

In the right situation, consider accommodating the other side’s request for a new demand or offer, but condition that second proposal on the other side responding with a particular proposal. Example: Plaintiff has demanded $100,000 and is now proposing to reduce that demand to $97,250. The mediator returns to plaintiff’s room to report that the defense does not want to respond such a small move. Plaintiff then agrees to drop his/her demand from $100,000 to $85,000, but only on condition that the defense responds at $50,000.

You begin to feel as if you cannot trust the mediator and what he/she is telling you in private caucus.

The best approach to dealing with this concern is to request a meeting with the other lawyer. The mediator may or may not be invited to this meeting. By meeting with the other side—and essentially by-passing the mediator—you can have a conversation that will clarify whether the mediator’s messages have been accurate.

Someone (party or lawyer) on the other side has a high conflict personality (meaning that he/she suffers from a personality disorder). What do you do?

The answer to this one is simple: Use the mediator to full advantage. If the other side has a personality disorder, it is doubtful that direct interaction with such a person will be productive. If there is any hope for a successful mediation, it will be that the mediator is able to appeal directly to that person in the other room who is NOT high conflict; then use that person to control the high conflict person.

Your client is becoming emotionally exhausted by the process, and you become concerned for his/her well-being.

Whereas one of the most important features of the mediation process is that parties participate fully, there is an exception to almost every rule. The exception to full participation by a party is when that party is being damaged by the participation. In extreme cases of emotional overload, it may be best for the lawyer to deal with the mediator (and, perhaps, opposing lawyer and party) out of the hearing of the emotional party.