

## **MEDIATION PRESENTATIONS: KNOW YOUR AUDIENCE**

**By: Blair A. Jones**

Mediation is becoming more and more prevalent in litigation, with many, if not most, jurisdictions now requiring some form of Alternative Dispute Resolution (ADR) for civil cases. Although this can mean arbitration or early neutral case evaluation, it usually takes the form of mediation. The mediation is normally conducted by a neutral attorney or judge, frequently one chosen by agreement between the parties. Even if it is not required, many parties are voluntarily engaging in mediation in an effort to settle their case before trial. In order to give your client the best opportunity to settle the case favorably at mediation, you must set the stage appropriately, and then, develop a presentation tailored to give your client the maximum return on the mediation investment.

### **KNOW YOUR AUDIENCE**

In any situation where you are planning to make a presentation, it is essential that you know your audience. The frame of reference of the audience will affect how they will respond to your message, and, therefore, it affects the way you choose to send your message. This is true whether you are preparing for an oral argument to the Court, a jury trial, or any other presentation.

Planning an effective mediation requires you to consider your audience, as well. You will likely have at least two audiences in a basic, two party case; the mediator and the opposing party. You may have even more audiences if it is a multi-party case. There may be multiple plaintiffs, multiple defendants, or both. You may be adverse to only the plaintiff or plaintiffs, or you may have cross-claims against co-defendants. Even if you

have no cross claims against co-defendants, you may be trying to shift blame to the other defendant(s). These factors will affect how you design your approach, and should be carefully considered when developing your theme.

### **Plaintiffs**

It is imperative, if you are truly interested in settling your case as favorably as possible, that you understand who the plaintiff is and what her goals are in the suit. Convincing someone to accept a settlement is only partly about making them believe there is too much risk of loss to turn down an offer. Certainly, this is an important factor. We are all governed, to some extent, by fear. If we are afraid enough of something, we will avoid it. Therefore, your presentation should be designed to engender a real appreciation by the plaintiff of the risks involved in jury trials, and with her case, in particular. She should be made to understand that no one can predict, with certainty, what a jury will do, and there is a good possibility that she could lose her case at trial, and recover nothing. A reminder that, although her attorney may feel strongly about their chances at trial, you feel just as strongly about the defensibility of the case. The reality will probably be somewhere in between. Going to trial is like going to “Vegas, baby. Vegas.”

Notwithstanding the important role fear of risk plays in settlement negotiations, in mediation, it should not be the sole focus of the presentation. If you spend your time arguing to the plaintiff about what a lousy case she has, or how your defense will destroy her case at trial, you will likely instill defensiveness and animosity toward you and your client. Consider that the plaintiff’s counsel has likely discussed the relative strengths and weaknesses in the case with his client, and that the mediator, if he or she is good at

his/her job, will also spend time talking about risk and the relative merits of the case. Encourage them to talk about the risks. The plaintiff will be far more receptive to them telling her about the risks than she will be to you.

Instead, consider focusing on finding a way to meet the goals of the plaintiff in a reasonable manner, if that is possible. Develop an atmosphere of cooperation in the mediation. Encourage the plaintiff to think of this as an opportunity to work together to solve her problem, as well as resolve the risks faced by your own client. If plaintiff believes you are genuinely trying to find a way to resolve the problems for both parties, she is more likely to be open to suggestions for compromise, in a spirit of cooperation.

You cannot hope to find a way to satisfy the plaintiff's needs enough to convince her to settle if you do not know exactly what they are. It may be that you make a generous offer, monetarily, but that it still does not satisfy the plaintiff because it does nothing to change the underlying problem that caused the accident. For example, if a plaintiff believes that a trucking company provides inadequate training for its drivers that caused the accident that injured her, she might be determined to influence the company to change its training program. These crusader plaintiffs often cannot be satisfied by money, alone. The plaintiff may want proof of some remedial measures to prevent future accidents. Sometimes, a plaintiff will want to hear something as simple as an apology, or an acknowledgement of fault, in addition to whatever other compensation that may be involved.

Frequently, the plaintiff will have long term care needs that must be met for a settlement to occur. Your client may not be willing to pay the large lump sum demand of the plaintiff, but would be willing to entertain a structured settlement that, although it

offers less money than plaintiff demands, will be sufficient to meet her needs. Often, you can, for example, find ways to demonstrate to the plaintiff that her needs can be met with less money than she thinks with an effective presentation and careful evaluation of available services and their costs. You should be prepared to address those issues when you sit across the table from the plaintiff.

Many plaintiffs are often very hostile toward the Defendant(s), and (mistakenly) believe, that the Defendants are callous, cold-hearted people who are intent on looking out for their own interests, regardless of who gets hurt along the way. The plaintiff may feel that she is just someone who got in the way and that the Defendants feel the plaintiff is just costing them money. The plaintiff may think that the Defendants do not even care that plaintiff got hurt.

A successful mediation or settlement negotiation will address this issue, and you should take steps to humanize your client. Let plaintiff know that the company consists of individuals (some of whom should be with you, of course) who all have their own human emotions, desires and concerns. Convince the plaintiff that the Defendants are not cold hearted and unsympathetic. Demonstrate that your clients are people, too, who feel very badly that they were involved in injuring anyone, regardless of who is “legally” at fault.

Changing the plaintiff’s perception of your clients in this way can do a great deal to change the tenor of the mediation. Go further by explaining to the plaintiff that the point of the mediation is to work together, for the only time in the litigation, for a resolution that will help the plaintiff address her needs, and the atmosphere can become more cooperative, and less hostile.

Preparing for mediation cannot simply be about how much money you can put on the table. The money is important, of course, and the plaintiff should be reminded that the money being offered at the mediation is real money, with no risks. In order to be effective, however, you have to understand the people involved, and learn to find creative ways to meet their needs in order to convince them to accept a settlement.

### **The Mediator**

You will have a great deal of influence over who you use for a mediator in most jurisdictions. Most areas require that both parties agree on the mediator. This choice should be given careful deliberation. Your choice will be affected by a number of things, including what kind of case you have, the basis of your defense, the strength of your defense, the reputation and style of opposing counsel, the reasonableness and/or sophistication of the plaintiff and the personality of your own client or representative, to name a few.

Knowing the plaintiff can be very helpful in your decision about who your mediator should be. Is the plaintiff someone who is relatively reasonable, and just needs to be guided to the right settlement? Does plaintiff's counsel seem to have good control over her? Is plaintiff completely unreasonable, with unrealistic expectations about the value of her claim? These are a few of the considerations that may steer you toward a mediator who might appear more like a grandmother, who can make everyone comfortable and offer reasoned guidance, or toward a no nonsense, stern, perhaps even somewhat overbearing type who will disabuse plaintiff of her unrealistic expectations in a hurry.

The opposing attorney may influence your choice of a mediator. Is the other attorney experienced? If not, you may want a strong personality to help guide him or her in a proper evaluation of the case. If so, you may want someone with a great deal of experience that you can be sure the other attorney will respect and not ignore. You certainly want someone that will have effective communication with opposing counsel, and who may be able to influence their position, if appropriate.

Consider the strengths and weaknesses of your case. Do you have strong liability defenses? Is there no liability defense, and the issues will all be about damages? You will want to find a mediator you think will be receptive to the arguments you will be making, and the themes you want to advance. The goal is to make the mediator an advocate for your positions to the greatest extent possible.

Make sure you find a mediator who is strong enough to push the negotiations forward. It does no one any good, and simply wastes time and money to have a mediator that simply goes from one party to the other with the latest offer or demand without giving meaningful in-put to the negotiations. Choose someone who will spend enough time preparing to have a knowledgeable impression of the case, and can offer realistic evaluations of the respective positions of the parties.

Once you have chosen your mediator, you can begin tailoring your presentation to appeal to him or her. Again, your goal should be to bring the mediator to a point of view that makes them an advocate for your positions. Develop your presentation to highlight the strengths and weaknesses of your case in a way that will appeal to the mediator. Keep in mind that your presentation for the mediator may be before or after you have

already made a presentation to the plaintiff, and without the plaintiff present, so it can be different, with a different focus.

You should be prepared to make a presentation to the mediator outside the presence of the plaintiff. In this presentation, you need not worry about alienating the plaintiff, so you can speak frankly about the strengths and weaknesses of your respective cases. You should present a very strong case, if you can, to the mediator, for why you will be successful at trial. It is important, too, to address perceived weaknesses in your case. You must explain why they will not be as significant as the plaintiff believes, or hopes. Your goal should be to have the mediator become your advocate, and argue for you to the plaintiff that the risk to her is very high, and that the offer being made by your client is reasonable, under the circumstances. Remember to try to identify the mediator's frame of reference in devising your arguments. If you know of particular biases the mediator has, you should address those, and use them if they are helpful, or neutralize them if they are not. Armed with sufficient information, the mediator can become a formidable ally in the settlement process.

### **Conclusion**

As with any good presentation, it is imperative that you identify your audience in order to craft an effective mediation presentation. You should assess the needs and desires of the plaintiff, and seek to appeal to them, rather than try to impose your perspective on her. You should evaluate your mediator, and devise arguments that will appeal to her and bring her into your camp, so that her efforts work in concert with yours. Understanding who will be listening to you will give you the best chance of putting together an effective mediation presentation.

