FROM THE MEDIATOR'S LENS: THREE MEDIATORS OFFER WISDOM

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There are a number of circumstances that either make resolution more difficult or prolong mediation. While there are logistical hurdles to achieving resolution, there are also other important factors that determine not only the outcome, but how the parties will feel about the settlement. With that in mind, here is my not entirely conventional Top 10 list of how to ensure a successful mediation. Get ready to strike the pose and succeed!

10. Work with the Mediator Before Mediation

Even if you haven't yet written your mediation statement, there is tremendous value in speaking to the mediator well in advance of the mediation. The discussion may help solidify your approach and guide you in preparing your statement and addressing the factual and legal issues more effectively. You may also realize that either you or the defense need additional information, and the mediator may be able to facilitate that. Use the pre-mediation conference to decide whether and how a joint session will be most effective and to discuss barriers to settlement, and trust the mediator to construct the process she believes will be most efficient and successful.

9. Be Open to a Joint Session

Increasingly in California, both sides are resistant to a joint

session, which I believe is a missed opportunity. While having attorneys speak in a joint session often serves only to make everyone angry, don't shy away from a joint session for that reason. Unless there is a reason that the parties simply cannot be in the same room, there is immense value in even a short joint "meet and greet" gathering during which the mediator explains the process. If the defense attorney or defendant has not met your client, don't pass up the opportunity to have the defense meet and hear from the plaintiff as it will make it more difficult to vilify her. Likewise, don't pass up the chance to have the plaintiff meet the defense as it may make her more open to hearing the defense position. If nothing else, the parties will have looked one another in the eye and acknowledged one another as human beings. Physically coming together initially also signals an emotional willingness to come together in resolution.

8. Use the Joint Session to Overcome Hurdles

If there are issues that you know will be barriers to settlement and you can do something about them at the outset, do it at the joint session. For example, if the plaintiff is angry about the incident, the way the claim was handled pre-litigation, or how long the process took, have the mediator determine if the defense can address that upfront in a genuine way. A joint session can help diffuse intense emotions early on. Again, work with the mediator in advance so all parties have a clear sense of how a joint session might either help diffuse issues or potentially make things worse. (Beware the fake apology!) Trust the mediator to craft the joint session to promote a sense of hope and vision about resolution.

7. Don't Waste Mediation Time

Doing the work prior to mediation will prevent you from wasting costly mediation time. Keep in mind that defense attorneys and adjustors need to document their files and justify the authority requested. Make their job easy. Get final lien information if possible and at least start lien negotiations before mediation and get agreement regarding Howell numbers. Make sure the defense has the documentation of other damages such as wage loss so that the defendant/carrier comes to mediation with authority that can settle the case. Use the mediator to assist with damage issues ahead of time during the pre-mediation call, as she can find out from defense what it will take to move the needle. On the other hand, when issues do arise at mediation that could not have been avoided and preclude resolution that day, the mediation can still be successful. The mediator can determine what information is needed and the effect it is likely to have, and get agreement on a timetable for providing it to the other side and reopening negotiation either with another in-person session or by telephone.

6. Prepare Your Client

I both want and expect to talk to the parties about the law, risks and expenses of trial, and 998 Offers at mediation. This is what I refer to as "The Ghost of Litigation Future" visited upon the parties at mediation so that they "wake up," fling open the figurative window, ask "What day is this?" and realize that it's not too late to resolve the case before the future nightmare comes to pass. However, clients are often hearing about the burden of proof hurdles, costs, and risks for the first time. Unless there is a reason you want the client to hear this first from the mediator, realize that it takes a lot of time to educate and revise unreasonable expectations. If a client comes to the mediation with a good sense of the issues involved, what she needs to prove, and defendant's anticipated position, she will feel more in control and have more realistic expectations, and the resolution will take less time.

5. Give Up Control – Well at Least a Bit

Nothing makes attorneys crazier than not being in total control all the time! You have chosen a mediator you trust. A good mediator will quickly establish that trust with your client as well, and once that occurs, be mindful and trust the process. Be flexible enough to allow the mediation to take a course you might not have expected, and focus on issues that you might not have realized were important – often those are the real impediments to settlement. The parties may need to work through conflict and emotions. Trust the mediator to keep control of the mediation and protect the parties, even if conflict makes you uncomfortable. Allow the mediation to take the course it needs to take. Mediators and attorneys both need to know "when to get out of the way" and allow the case to resolve.

4. Don't Forget That Defendants Are People Too

If your client is going to be hearing things that are difficult to hear, don't lose the opportunity to have the defense describe the process by which they evaluated the case, explain what information was considered (plaintiff's deposition, medical records, review of other cases involving similar injuries, etc.) and communicate to the plaintiff that a lot of thought and, hopefully, respect went into the decision. The defense can make important concessions, for example, that the plaintiff's credibility is not an issue or that the injury was significant, and shift the focus on the issues that are really in dispute, such as liability. A plaintiff who believes that her case has been thoughtfully and respectfully evaluated will be far more open to hearing numbers with which she disagrees, and will be less likely to have a negative emotional reaction to hearing defendant's position.

3. Take Time to Envision a Good Resolution and State Your Intention

Before you even write your brief or speak to the mediator, seriously think about what a good resolution means for your client. Is it only money? If so, what does paying or receiving the money represent to your client? Is it repairing a relationship, your client being able to continue to work with the other party in the future, repairing reputations, repairing trust? Examine what needs to be accomplished and why, what your client's needs and interests are, and what is actually necessary, not just desirable, to resolve the case. State your intention out loud to yourself. Keep your intention firmly in mind when making your initial demand and consider whether it is consistent with both your intention and your vision of the mediation. If you cannot state your intention clearly, then you probably need to clarify with your client. You will be amazed at the power of forming and stating your intention ahead of time. Then carry your intention throughout the mediation, and ask if what you are doing is moving your client toward that result.

2. Strike the Superman/Superwoman Pose

Don't lose sight of the fact that for most clients, this process is intimidating and scary, or at least stressful. Before heading into the mediation, remind your client that the purpose of the mediation is for her to understand the issues, risks, and benefits of settling so she can make the best decision. The client should be proud that she chose to come together with the other side to make every effort to resolve the case. Remind your client that it took courage for her to go to mediation and that she is in control. Have her strike a power pose, maybe with arms outstretched like Superwoman, at least figuratively. Your client should feel empowered and hopeful before she goes into the media-tion. Okay, attorneys, you try it too. Strike that pose and see what happens.

And the No. 1 tip for successful mediation....

1. Don't Check Your Humanity at the Door

Regardless of whether the other party is a personal injury plaintiff or a CEO, she is, first and foremost, a human being with vulnerabilities, fears, and hopes all informed by experience. I am often amazed by the strength of a person with seemingly no power or the vulnerability of an apparently powerful, sophisticated business person. I have mediated with a senior vice president who, when I dug down, was at his core embarrassed and fearful about the dispute, and framing the resolution to address those issues was critical. It is also remarkable to me the large number of people who have suffered some type of major trauma in their lives, whether physical, emotional, or financial, and I learned quickly not to make assumptions about a person's experiences or what is motivating her actions. Regardless of how you feel about the other party or her position, try to acknowledge her humanity. Understand that you cannot, in fact, walk in someone else's shoes. The same holds true for opposing counsel. Always be respectful and kind. Don't be afraid to be friendly and even funny, when appropriate. Listen and respond respectfully and the case will settle itself. Ultimately, we are put on the earth to take care of one another, and we need to make that happen.

Lauren Tate Ms. Tate has served as a mediator in all types of civil cases since 2012. She is particularly skilled at maintaining control of negotiations and reaching settlements in emotionally charged cases