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ALAN SALER MEDIATION SERVICES

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15 keys to resolving your case at mediation

A VETERAN MEDIATOR'S PRACTICAL TIPS ON HOW TO ACHIEVE THE BEST POSSIBLE SETTLEMENT OUTCOME

1. Contact the mediator before the session

Contrary to what many lawyers believe, talking to a mediator before a session is not an ex parte communication. Take the initiative by telephoning the mediator. Especially if you have not worked with that mediator before. First impressions matter. A good mediator will welcome the opportunity to discuss your case with you ahead of time. Failing to speak to the mediator beforehand may be a missed opportunity to prevent a roadblock on your path to an otherwise successful mediation.

2. Ask the mediator to determine who will be attending the mediation session

How often have you attended a mediation only to discover that a necessary decision-maker is absent? Seek to confirm that the authorized decision-maker will appear or has at least arranged to participate. If you are unsure, consider enlisting the mediator's assistance. A mediator cannot compel a decision-maker to attend. The mediator sometimes can, however, increase the likelihood that the decision-maker will appear. Or the mediator may determine there is a reasonable explanation for the decision-maker not appearing in person. One of the advantages of Zoom is that it has increased the personal participation of decision-makers, even from afar.

If the insurance company has reserved its rights to contest coverage, it is useful to know whether the insurer has retained coverage counsel. If so, will that attorney be attending and actively participating? Coverage rather than defense counsel may be directing the negotiations. Similarly, does the insured have private counsel? Do they plan to attend? For strategic reasons, the defense may choose not to reveal this information. These are questions however, that the mediator can sometimes get answers to before the mediation session commences. It is much better to know in advance so you can prepare accordingly rather than be surprised during the mediation session.

3. Make a settlement demand

One of the surest ways to torpedo a mediation is failing to make a settlement demand or communicating it too close in time to the session. You may harbor the view that it is up to the defense to determine how much authority to bring. Clinging to this belief may greatly prolong the process and thereby undermine your ability to obtain the most efficient outcome. Your goal is to substantially increase the probability that the decision-maker will appear with sufficient authority to settle your case. Or have the ability to obtain it, ideally during the session. Failing to lay the proper foundation significantly increases the likelihood that the session will not bear fruit.

Do not rely on the demand letter you sent before or shortly after the lawsuit was filed. This is especially true if you made a blind policy-limit demand. Set the table by providing a well-

thought-out, written settlement demand. If you want to facilitate meaningful negotiations, you must give the defense sufficient time. Obtaining settlement authority typically requires defense counsel and the claims representative to prepare pre-mediation reports. Generally, these are due at least thirty days before the session. The claims adjuster likely also has to meet with their supervisor or manager or participate in a roundtable. Communicate your settlement demand as early as possible. At least thirty days before the mediation session is a good rule of thumb. Keep in mind, however, that the higher the value of your case, the more levels of authority must be climbed and that process takes longer. Adjust your timing accordingly.

Everyone invariably seeks the mediator's assistance in negotiating during the session. Why not begin this collaboration ahead of time? Before you make a settlement demand, consider consulting the mediator to discuss the amount you are contemplating demanding. Brainstorming with the mediator may enhance your chance of communicating a settlement demand that is well received by the defense while protecting your negotiating position.

4. Do not surprise the defense

There is almost nothing that frustrates defense counsel and claims representatives more than learning shortly before or during a mediation session that your client has seen a previously undisclosed medical provider, had or scheduled surgery, or incurred significant additional medical expense. If at all possible, never wait until a mediation session or even a few days before to disclose this information. Call defense counsel ahead of time to make certain they have everything they need to obtain settlement authority and otherwise prepare for the session. This is a means by which you can build trust with the other side. Defense counsel is your adversary, but like the mediator, they can sometimes be your advocate in the other room. Unnecessarily holding back important information is the surest way to erode that trust and ultimately hurt your client.

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5. Make the mediation brief count

A mediation brief is the vehicle that provides the crucial evidence and arguments the mediator needs to help settle your case. Make sure the mediator receives your brief at least one week before the mediation session.

Carefully consider what to include. You are writing your brief for a mediator, not a court, so dispense with legal formalities. Eliminate the preamble. Unless there are numerous parties and counsel, there is no need to begin your brief by identifying who they are. Include the trial date on the caption page and identify the trial judge if one has been assigned. If a summary judgment or other potentially dispositive motion is before the Court, mention it and include the hearing date.

Do not waste valuable space addressing liability if it is undisputed or otherwise clearly in your client's favor. Similarly, do not spend time citing Hornbook law. Focus your attention on the evidence and the arguments that matter.

Do not end your brief with a meaningless adage, such as "we will negotiate in good faith." This gratuitous statement implies otherwise, and it serves no purpose. Instead, use the last paragraph to mention any settlement demands or offers that have been made, and discuss the status of any negotiations that have taken place.

6. Provide verdict summaries

To highlight the value of your case, it is sometimes helpful to provide the mediator with settlement or verdict summaries. Generally, three will suffice. Do not overstate the value of your case by merely presenting summaries of large settlements or verdicts. The settlement amount or jury verdict will not be persuasive if the case is not truly comparable.

7. Open the mediator's eyes

Grab the mediator's attention. Use photographs to make a strong first impression. A picture is worth a thousand words. If the collision was significant, rather than describe it with words, include color photographs depicting the vehicle damage. Place one or two in the body of the mediation brief rather than as an attached exhibit. Do the same if you have color photographs depicting eye-popping injuries. If there is a videotape of an accident or incident, include it in a format that is easy for the mediator to access.

8. Make it easy for the mediator to digest your client's injuries and medical treatment

Before describing your client's injuries and medical treatment, make sure to include their date of birth and life expectancy. Do not merely regurgitate what is in the medical records. Focus on the highlights of your client's treatment. For example, if the plaintiff has had a cervical fusion, why provide a detailed summary of a chiropractor's or physical therapist's records? Attach the MRI scan and operative reports as exhibits for the mediator to review. If you decide to provide a lengthy physician's or surgeon's report, highlight the parts you want the mediator to focus upon. In serious injury cases, describe the ordeal that the client has endured throughout their extensive medical treatment. Discuss the impact their injuries have had on their ability to perform routine tasks and meaningful activities of daily living.

9. Adjusted medical expenses and negotiating liens

Provide a table identifying your client's medical providers and their charges. When applicable, itemize the adjusted amount, not the billed amount.

Lienholders are often reluctant to negotiate their lien ahead of time. They typically want to know the settlement amount. Contact the treater or facility beforehand to arrange for an authorized representative to be available by telephone during the mediation session. If you are not making headway with the lienholder, consider asking the mediator to intercede. Because the mediator is neutral and knows your case's weaknesses, the mediator can sometimes more persuasively explain to the lienholder the need to compromise. Also, allowing the mediator to serve in this role protects your relationship with a physician or surgeon lienholder whose testimony may be needed if the case does not settle.

10. Provide defense counsel with a copy of your mediation brief

Most mediators strongly encourage counsel to exchange mediation briefs. You may be rightfully concerned about disclosing work product. Or you elect to withhold impeachment evidence to avoid jeopardizing a tactical advantage. If you must, redact that information from the copy of the brief that you provide to the other side. The more you withhold information, however, the likelihood decreases that those with settlement authority will offer full value for your case.

Sometimes defense counsel, their client, or the insurance carrier will not agree to an exchange. Even if the defense chooses not to share its brief, provide yours to defense counsel anyway. You are asking a defendant or their insurance carrier to compensate your client, oftentimes handsomely, for their injuries and damages. It is imperative that you marshal the evidence and provide concise and persuasive reasons explaining why it is in the other side's best interest to pay.

11. Make clear to the mediator what in the brief is confidential

If you choose not to share your brief with the other side, do not leave it up to the mediator to determine what is confidential. This is an especially frustrating exercise when your brief is lengthy or the confidential information is not readily apparent. Point the mediator to the specific information or documentation you do not want the mediator to disclose to the other side. Before marking your brief confidential,

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fully review your submission. You may realize confidentiality is not a concern.

12. Prepare your client for the mediation session

Just as you carefully prepare a client for their deposition, it is crucial that you do the same for a mediation session. Meet with the client beforehand. Put their mind at ease. Explain the mediation process and the mediator's role. Remind them of the importance of being appropriately attired, particularly if they are going to appear on Zoom. To avoid unpleasant surprises, it may be best to arrange for them to appear by video at your office rather than from their home.

It is critical that you manage your client's expectations. Many do not understand the negotiation process. Involving your client in the process can be very confusing and often counterproductive. You want to avoid their feeling disrespected by initial offers that are substantially less than their expectation, or to fixate upon initial demands that often far exceed the settlement value of the case. Get a sense ahead of time of the ballpark in which the client is willing to accept a settlement so that you can wait to approach them until the numbers are within range.

Tell your client there will be times when you will need to meet privately with the mediator. Explain the reasons, so the client does not feel they are being excluded when this happens. If you do not want the mediator to discuss settlement figures in your client's presence, inform the mediator at the outset.

13. Let the mediator get to know your client

Consider the type of interaction you want the mediator to have with your client. Assume the client is personable and likely to favorably impress a jury. Afford the mediator an opportunity to converse with your client to see if the mediator forms the same impression. The mediator is in the best position to convey to the other side how well your client is likely to perform on the witness stand. While defense counsel may have already reached a favorable conclusion, it seldom hurts for the claims representative to hear it from an experienced neutral. Reinforcement can be a powerful and persuasive technique.

Tell the mediator in advance if you believe you have a client control issue. In these instances, it is especially important for the mediator to develop rapport with your client and gain their trust. Good mediators are adept at dealing with difficult clients and personalities. Collaborating with the mediator early on to address these situations increases the likelihood that the mediator will persuade your client to follow your advice.

14. Bracketing and mediator's proposals

Sometimes negotiations stall because one or both sides are making insignificant moves and the gap between the parties seems miles apart. In this instance, the mediator may suggest bracketing. A bracket is no more than a conditional offer. For example, one side proposes to significantly increase their offer if the other side in return offers to significantly lower their demand. Movement by one side is conditioned upon movement by the other. If embraced, the initially proposed bracket typically results in the other side responding with a counter bracket. Each bracket has a midpoint and it is these midpoints that drive the negotiations forward. While bracketing can be an effective technique for breaching an impasse, it is important not to circumvent the process by introducing it too soon.

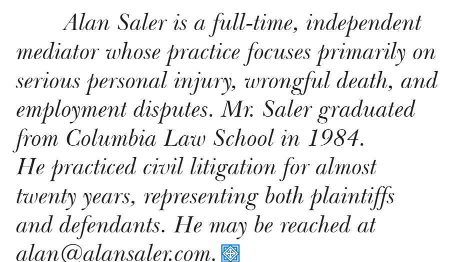
Another technique for settling a case is the mediator's proposal. This is a settlement proposal, usually in writing, that the mediator communicates to both sides. Neither side knows what the other decided unless both sides accept the proposal. This feature is important because it allows a party to accept the proposal without compromising its negotiating position if the other side rejects it. The number that the mediator selects should be one they strongly believe both sides *will accept*. This figure, however, is often misperceived as the amount the mediator believes the case *is worth*. If the proposal is unsuccessful, it becomes difficult for the mediator to continue to effectively pursue a settlement. Once again timing is crucial. The mediator's proposal is best used as a last resort. Do not encourage a proposal too early in the process. Also, it should not be employed unless all parties have consented.

15. Document the settlement before the session ends

If a settlement is reached, do not leave the mediator's office without a signed settlement agreement or at least a memorandum of settlement. Even if the necessary signatories are not physically present, today's technology makes it relatively easy to obtain their written consent during the session. A client is far less likely to develop buyer's remorse if they have signed a settlement document. Defense counsel may insist upon preparing a more comprehensive agreement following the session. Documenting the material terms and conditions in writing before the session ends decreases the possibility that a dispute will arise over the more formal agreement.

Conclusion

The plaintiff's counsel and the mediator have their respective parts to play. The likelihood that you will obtain a favorable settlement increases, sometimes significantly, if you take full advantage of the mediator's skills, experience and role in communicating with the other side.



Alan Saler is a full-time, independent mediator whose practice focuses primarily on serious personal injury, wrongful death, and employment disputes. Mr. Saler graduated from Columbia Law School in 1984. He practiced civil litigation for almost twenty years, representing both plaintiffs and defendants. He may be reached at alan@alansaler.com.