MOST COMMON MISTAKES IN MEDIATION

M. Gino Brogdon, Sr.

HENNING MEDIATION

Atlanta, Georgia

MOST COMMON MISTAKES IN MEDIATION

M. Gino Brogdon, Sr.

HENNING MEDIATION

Atlanta, Georgia

Mediation is the most popular dispute resolution tool in civil litigation nationwide. The main reason for such broad appeal is efficiency. Mediation costs a fraction of most jury trials and provides resolution much sooner. Mediation is also more attractive than a trial because it is collaborative in that it allows the parties join forces as the architects of the outcome. While most times, neither architect is happy, both have gotten most of what each wanted.

Unlike the mediation process, a jury trial is adversarial by nature and forces the parties to place their litigation hopes and goals in the hands of twelve strangers. More often than not, jurors are ill equipped to resolve the case in a manner providing more satisfaction to both sides as could be achieved in mediation. Depending on the judge's and the lawyers' skill and experience as well as many other factors affecting the civil docket, juries are often left with too little time to consider too little evidence with insufficient understanding of the legal framework. This worrisome and oft-unavoidable

combination of hurdles greatly compromises the jury's ability to do true justice.

Time constraints and overrun court dockets push time management to the top of many judges' lists of concerns regarding jury trials. The result is that many judges desperately attempt to balance scarce time management against the litigants' rights to a fair, well run, timely trial.

These challenges facing juries and litigants often produce unpredictable verdicts and, at times, simply the wrong result. In recent years, the real chance of an aberrant verdict prompts most litigants to mediate cases in numbers never seen ever before. This migration to mediation highlights the great importance of proper preparation, presentation and negotiation in the mediation process.

While not an exhaustive list by any means, the following is an examination of the some of the most common missteps made by lawyers and litigants in the mediation process. The primary purpose is to continue the mediation conversation and to enhance efforts improve mediation results.

WHILE NOT EVERYTHING, TIMING IS VERY IMPORTANT

"Like a good joke, a well-timed mediation is much more likely to succeed."

There is no magic to when a mediation should happen. There are however natural points in the litigation journey at which

mediation should be considered. These junctures include the following:

1. **Before filing suit.**
2. **After the Answer is filed.**
3. **After written discovery has been exchanged.**
4. **After key fact depositions have occurred.**
5. **After discovery depositions of experts.**
6. **Before and after dispositive motions have been filed.**
7. **After closed of discovery.**
8. **On the eve of a trial date.**

The uncertainty present at the various junctures in litigation prompts parties to consider settlement rather than risk an adverse outcome at trial. While there are no quick and dirty answers to when a case should be mediated, it is certain that counsel should know as much as there is to know about the key components of a case before mediation has commenced. Too often counsel enter the mediation process leaving crucial questions unanswered or, worse yet, decide to save expense and forego depositions, document discovery or other items which leave holes in the case. This drastically affects the value of the case and the settlement leverage in the mediation.

It is imperative that counsel on either side fully discover and understand the pertinent facts and issues in the case. Counsel on either side cannot afford to mediate a case without a solid understanding of the case. This lack of understanding hinders the

parties' decision making strength and compromises the mediator's effectiveness in this process and skews the settlement possibilities and results. It is imperative for all counsel to carefully consider the timing of a mediation so as to avoid waste of time and money and to maximize the chances of settlement. While mediation can be too early, it's never too late.

PREPARATION FOR MEDIATION GENERALLY

"Salvation and Damnation live in the details. If you don't get in there, you are damned. If you do, then you are saved." **Boz (1961)**

Savvy real estate gurus often chant that the three most important factors in their business are location, location and location." Like location in real estate values, understanding of the case and preparation for mediation can determine the outcome. Oddly some lawyers still view extensive preparation for mediation as wasteful and unnecessary. Others approach mediation with skepticism and treat it as simply an opportunity for one party to steal a pretrial peek at his opponents' case.[1] Still others simply submit the case to mediation with the intention to work through the issues during the mediation. All of these approaches compromise the chances of success at mediation.

---

[1] This skepticism is neither fluff nor misplaced. Unfortunately some litigants use the mediation process as a tool to simply obtain additional discovery.

Many will find this final example to be unbelievable. Most will find this example unacceptable. Too often certain lawyers simply take their client's word about life before the incident that is the subject of the lawsuit. In a road wreck case, too often lawyers simply rely on the client to confirm that the client had no prior auto accidents, similar injuries/surgeries, treatments, diagnoses or, criminal history. The lawyer presents medical records from the date of the accident and proclaims his client's pristine history in the opening session. Ordinarily the defense lawyer waits until the caucus and presents the mediator with multiple prior injuries, claims and lawsuits. He also shows certified copies of felony convictions. Embarrassed, the plaintiff's lawyer tucks his trial tail between his legs and settles the case for a fraction of its potential value. If certain pertinent facts were accessible before the mediation, this result is unacceptable.[2]

It is imperative that counsel learn everything there is to know about the client and the case before the mediation. When one side demonstrates to the other a strong grasp of the facts and issues in the case, settlement negotiation strength is maximized.

For most lawyers, preparation for the mediation is a given. These lawyers review the right depositions, documents and other evidence to familiarize themselves with the strengths and weaknesses

---

[2] The vast majority of lawyers never commit these transgressions. The disturbing reality is that some mishandle cases in this fashion. One lawyer guilty in this regard is too many where the client's one bite at the apple hangs in the balance.

of the case. Some however rest satisfied with a general understanding of the case without understanding the details and nuances of the case. These evidentiary and factual nooks and crannies are the essence of the strengths and weaknesses in the case and harbor the keys to success and failure. Counsel must explore these areas and be well prepared to address the good bad and the ugly at the mediation. Ethics require quality preparation and performance and the client deserves the complete commitment of her counsel to achieving maximum value at mediation.

While some parties enter mediation in bad faith, most cherish the opportunity to settle the case and take the process seriously. However seriously the parties and counsel approach this amazing process, the parties have little chance of getting maximum results absent proper preparation of the case before the mediation and effective presentation of the same during the mediation. Failure in this regard greatly reduces the chances of settlement and compromises the settlement amount.

FAILURE TO PREPARE THE CLIENT FOR MEDIATION

"A smart man listens carefully to the sounds that offend his ears."

Boz (1961)

Participation in mediation is a virgin experience for most plaintiffs while and an integral business reality for most defendants and insurance companies. Many plaintiff are unsure as to whether the process will be adversarial, how long it will last, what to wear, what to say or even whether the parties will be in the same room. These unknowns raise avoidable anxiety and likely complicate the plaintiff's initial posture for settlement decisions. Most are more comfortable with more information and thus more likely to make good decisions when they understand the nuts and bolts of the mediation process. These include where people sit in the group opening session, who gets to speak, whether the client will be questioned and the tedious nature of the caucus portion of the mediation. These logistics can and should certainly be explained fully to the plaintiff and any family or friends before the mediation date.

The most glaring gap in client preparation is the lawyer's failure to prime the client for hearing the opponent's critical comments and observations in the case. Skillful mediators often open the mediation by cautioning the parties about hearing critical comments about the case and against taking personal offense to opposing positions taken in the mediation process. This expectation adjustment should be done by counsel for both sides before the client ever sets foot in the mediation room. Rarely should the lawyers leave this for task for the mediator alone.

Without proper pre-mediation preparation, many plaintiffs react very negatively when they hear defenses which blame the plaintiff for her own injuries, accuse her of feigning injury, doctor shopping, exaggerating her case and many other sins. Some plaintiffs choke on their responsive outrage which hinders their ability good business decisions.[3] Counsel should always prepare the client for hearing the worst of facts and positions paraded by the other side. Counsel should also encourage the client to focus on making smart business decisions rather than an emotional one regarding settlement despite the emotional fever prompted by the opposing posture in the mediation. Experienced mediators often urge parties to make business decisions that make sense rather than those that feel good.

Counsel should also prepare the client for posturing by her own lawyer. Integral to the negotiation process, most lawyers make statements regarding case value and strength and take positions calculated to maximize settlement outcomes. These valuations and statements include high initial settlement demands, evaluations of crucial evidence as well as heightened predictions regarding jury verdict range. "The jury will give a ten million dollar verdict!" says the lawyer. This statement is intended to further convince the adjuster about the substantial value of the case. The plaintiff is also listening and is vulnerable to becoming committed to those numbers.

---

[3] Counsel should prepare her client to make settlement decisions which are good business decisions rather than those which feel right or seem fair.

The danger sets in when the plaintiff believes these numbers becomes hardened on her position regarding settlement.

Counsel must prepare the client for the realistic settlement and verdict ranges and prepare the client to not take too seriously statements and maneuvers in mediation to enhance the ultimate settlement amount.

FAILURE TO PREPARE THE MEDIATOR

"The gods cannot answer those who choose not to pray."

Boz (1961)

Mediators are most effective when the mediator has the best understanding of the case. The job of preparing the mediator rests squarely on counsel's shoulders. The most common tools to educate and prepare the mediator include a pre-mediation statement, a pre-mediation conference with the mediator and educating the mediator during the caucus potion of the mediation.

Regardless of the size of the case, counsel should send a pre-mediation statement except in very limited circumstances. This allows the mediator to start the mediation with a grasp of the legal and factual issues in the case as well as an understanding of the parties' settlement history and posture. The mediator undoubtedly will do a better and most cost-effective job in the mediation if she has time to consider and study the case before the mediator begins. This is especially true in cases involving complex legal, medical, business

or construction issues. Understandably many lawyers harbor concerns about cost and forego a pre-mediation statement. However the mediator has less time to learn and understand the nuances in the case when the parties are anxiously waiting for the mediator's attention in their respective rooms. There simply is no downside to preparing the mediator before the mediation commences.

The pre-mediation statement is an effective tool to prepare the mediator. A well done pre-mediation statement addresses every essential element of the claims as well as any viable defenses. An incomplete, inaccurate or misleading pre-mediation statement does more harm to the process than Too often lawyers submit a pre-mediation statement which generally introduces the mediator to the issues but neglects to address important defenses or inadequately addresses disputed areas of the case. Equally troubling, some counsel provide woefully incomplete statements damages or causation evidence in the pre-mediation statement thereby misleading the mediator and ensuring an avoidable hiccup in the settlement negotiation. This same lack of understanding or organization shines through to the opposing side and dilutes any concern that the case would be competently tried. There is no substitute for careful gathering, consideration and organization of the mediation documents and pertinent testimony and presenting an accurate summary of the same before the mediation commences.

The most underutilized opportunity to educate the mediator is the easiest and simplest one. Most mediators welcome a pre-mediation conference in person, via email or by phone. Oddly many litigants hardly ever take advantage of these opportunities. Such a pre-mediation conference is especially important where peculiar or difficult relationships exist between counsel and her client or between the opposing lawyers. Difficult clients, lofty expectations, mistrust between lawyer and client or strained relations between opposing counsel often stall or threaten a mediation before it begins if the mediator has not been adequately warned and prepared to handle the same. Most skilled mediators have strategies and techniques to lessens the impact of these factors on the effort to resolve the case. Ultimately a well-prepared mediator can give the parties the best opportunity to settle the case.

WHETHER TO PRESENT THE CASE AT THE OPENING SESSION

"Show me yours and I'll show you mine."

Many lawyers struggle with whether to make a presentation at the opening session of the mediation. With a few exceptions, it has proven to be a mistake to forego a presentation during the opening session. A presentation of some depth is usually more helpful than harmful in moving the case toward settlement. Many remain concerned that they surrender an advantage by making any

substantive remarks about the case. The risk of compromising trial strength is low.[4] The benefits are much more likely.

More often than not the lawyers understand their opponent's view of the case and have eliminated most surprises. Each side has taken into account the most important facts in the case and the hurdles in the way of victory at trial. Addressing the same in the opening session sheds light on the crux of the litigation disagreement. The opening presentation is often the only opportunity for the lawyers to talk directly with the other side's client outside of a deposition or examination at trial. The collaborative environment of a mediation allows both sides the best opportunity to digest the opposing view of the case. The presentation itself is also helpful to the mediator in focusing on the pressure point in the mediation.

---

[4] Full disclosure has certain risk which includes surrender of trial strategy advantages. A common scenario is where the defense has performed surveillance on the plaintiff who claims to have a debilitating back injury. The surveillance tape shows the plaintiff chopping wood and roller skating. The plaintiff has testified that he never chopped wood or engaged in any other physical activity because of constant pain and the debilitating injury. The defense holds the surveillance tape as work product, anticipating revealing the same when the parties reach an impasse in the mediation. The defense does not mention this tape in the opening mediation statement with hopes of breaking an impasse later. When the negotiations stall later in the mediation, the defense faces a dilemma as to whether to reveal the tape with hopes to shake loose a settlement or to suspend the mediation and impeach the plaintiff with the tape at trial and obtain a defense verdict. These choices are in-the-moment judgment calls with no ready answers.

For the most part, both counsel can least afford to forego making a full presentation at the mediation if settlement is in the best interests of the parties. It is also an important opportunity to correct or address any misstatements or misrepresentations made by opposing counsel regarding the issues and crucial evidence in the case.[1] Ethically counsel is bound to maximize the opportunity if the same serves the client's best interests. This does not mean that either counsel should give the case away or unnecessarily reveal precious trial strategies. However, often times the opposing side has a limited opportunity to hear and appreciate their opponent's view of the case except for a full-bodied presentation of the case at mediation.

The low risk of strategy compromise is greatly outweighed by the likelihood of greater understanding of the strengths and weaknesses of the case by the opponent. Thus counsel should sparingly forego making a statement of some sort during the opening session of the mediation.

FOCUSING ON THE DECISION MAKERS

"He who preaches to the choir suffers when the plate is passed." **Boz (1961)**

In a case with insurance coverage, the plaintiff[5] and the insurance adjuster are the most important people in the room

---

[5] In many mediations, the plaintiff is accompanied by a spouse, an adult child, friend or minister. It is imperative that the mediator and the defense counsel

because each holds the ultimate power to settle the case. Both have heard the case presented only through the skew of their counsel. Both need to hear a less favorable perspective which includes at times a discussion of subjects which are hard to hear. At the end of the day, both need to be convinced that settling the case is the best option. Despite these truths, many lawyers either neglect or completely ignore the plaintiff and insurance adjuster at mediation during the initial presentation.

More than any other cited mediation mistake, lawyers present the case to the opposing counsel or to the mediator rather than to the decision makers. Some lawyers never even make eye contact with the plaintiff or look in the adjuster's direction when addressing the most salient parts of their case. Whether by power point, summary or in dramatic closing argument style, many lawyer spend their attention and energy presenting photos, depositions testimony and other file materials to the mediator. Admittedly habits are hard to break in that lawyers are accustomed to presenting the case to a judge.[6] However it is clear that the mediator has no ultimate power regarding settlement. The focus must be on the decision maker.

For example, the effort to convince must focus on the adjuster where defense counsel's arguably sanitized version of the case led the adjuster to conclude that the case was defensible or not a significant

---

determine who is the real decision maker. The mediator has the best opportunity to determine this through observation during caucus.

[6] This is especially tempting where the mediator is a former judge.

concern for trial. The plaintiff's presentation may be more true to the facts and may change the adjuster's opinion of the case. The onus rests on plaintiff's counsel to convince the adjuster that the case has real merit. This cannot be done if the adjuster is left out of the mediation presentation and begins the settlement conversation as an outsider.[7]

Defense counsel should not assume that plaintiff's counsel has revealed to the plaintiff all of the soft spots in the case. Too often the plaintiff has been coddled or protected regarding the vulnerabilities in the plaintiff's case. As a result, the plaintiff will have confidence that victory is certain at trial. Defense counsel must carefully address the case to the plaintiff with an eye towards readjusting the plaintiff's expectations both for trial and for settlement at mediation.[8] This cannot be done unless the presenting lawyer makes the plaintiff the focus of his presentation. Ultimately the plaintiff and the adjuster must be the audience and the focus of the opening presentations.

THE ELEMENT OF SURPRISE IS OVERRATED

"Most folks can swallow bad news but nearly all choke on surprise." Boz (1961)

---

[7] Sometimes the adjuster is offended when plaintiff's counsel addresses only the defense counsel or the mediator.

[8] At times, the mediator is the best choice to address certain soft spots which could inflame one side or another and push settlement far away. Items such as contributory negligence, value of life, impeachment items, surveillance evidence, punitive damages facts and others must be handled very carefully. Often the mediator is the better choice to handle discussion of these items.

For the most part, mediation is where the parties lay out their cards on the discussion table. Lawyers have discovered the salient facts in the case and have fully evaluated their positions and likelihood of success at trial. Adherence to the discovery rules has all but eliminated the element of surprise.[9] However, surprise raises its thorny head during mediation.

The best example of surprise is medical bills, photos and last minute affidavits presented for the first time at mediation. The insurance company has gone through an evaluation process which takes into account lawyers analysis and the hard evidence which include medical bills and testimonial evidence. In many cases the amount of medical bills or nature of the photos will largely determine the value of the case. Surprise is unsettling to the surprised party and disruptive of the settlement process when either counsel presents at mediation a new set of bills or other evidence which greatly affects the value of the case. This nearly ensures that the case will not settle because evaluative process isn't built for these kinds of surprises. The safest and most successful approach to mediation is to avoid surprises and to present the most complete case at mediation.

---

[9] It is acknowledged that some litigants continue to ignore the discovery rules in litigation which further compromises settlement prospects.

CONCLUSION

"When all has been said and done, there's nothing left to do or say." Shaquille O'Neal

Mediation is the preferred opportunity to resolve most cases in a manner that serves the interests of all parties. All gain certainty. All suffer disappointment. All gain closure. All avoid risk. All rest in the satisfaction of being the architects of the resolution. Counsel should treat this special opportunity with utmost care and appropriate attention. Such attention requires adequate preparation of all participants and will yield maximum settlement results. Mediation is the key and the answer in most civil litigation. There usually is no excuse for giving it a try.

With gratitude,

M.G.B.

Henning Mediation

gino@ginobrogdon.com