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Taking the Right Approach: Common Mediation Strategies and Tactics

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One of the more common approaches in mediation is for one or both sides to start with what everyone recognizes as an extreme opening position. This often happens in cases that are clearly one-dimensional, such as where the issue is simply how much the carrier is going to pay on a claim and there is no other possible accommodation between the parties. In such cases, it is not uncommon for both parties to take extreme opening positions; for example, a $1-million demand against a $1,000 offer. This signals a hardline posture and usually portends a long day with the mediator.

In such cases, each side often privately tells the mediator that "we'd be more flexible if the other side showed they'd be reasonable." If that is the kind of negotiation you think you are headed toward, you need to plan on how the deadlock will eventually be broken if each side makes only "micro-moves." The usual way to break the logjam is for one side or the other or the mediator to propose a "bracket." You need to consider when to raise that or if you want the mediator to do it. In either case, you need to plan ahead for what your bracket might be and not wait until it arises in the mediation. You also need to consider in advance what to do if the other side or the mediator initiates the bracket and your move is responsive.

With a bracket proposal, you are committed to the low end only if you are the defendant and the high end if you are the plaintiff—with some willingness to move if the other side responds appropriately. Be aware that many negotiators may read a proposed bracket as a willingness to settle at the midpoint. While you can expressly disclaim that, understand that it may be read that way, so choose your bracket accordingly to avoid any such inference.

Also, be aware that the mediator is watching the process to try to divine where each party's bottom line is. Parties often recognize this and try to choose their brackets, and even shape their discussion in

front of the mediator, with this in mind. This is especially true if they expect the mediation to end with a mediator's proposal. If that is the expectation, then fairly soon the offers, counters and other moves will be made not to reach a deal, but rather to influence the mediator's ultimate proposal. Understand that if the mediator perceives that is your tactic, it may be counterproductive.

Occasionally, clients/counsel eschew the above posturing and go to the other extreme. They truthfully tell the mediator, for example, what their bottom line is. They explain quite candidly how they reached that number and then turn

to the mediator and ask, "How are you going to get us there?" If after a few rounds, the mediator says that he or she cannot get there, the party with this approach often walks. If this approach is attractive to your client, you must have solid legal reasons supporting it that you can articulate to the mediator so he or she can press the point to the other side. If this is your approach, you may never learn what the other side would have been willing to accept. On the other hand, while the case may not settle in such mediation, it can set expectations that may lead to more fruitful negotiations later.

Another approach by participants in some mediations—especially early ones—is to use the process for "informal discovery." In such cases, the party trying to use the process for that purpose is looking for the mediator to press the other side for the details supporting their position. For this approach to be successful, though, one needs to be willing to share information as well. Otherwise, if the other side senses your goal is simply "free discovery," you may learn less than if your effort is part of an honest effort to settle the case. While "free discovery" may be a benefit of early mediation, it is rarely successful if not part of an honest effort to settle the case. If more information must be exchanged before the mediation can be successful, the first session can be fruitful if the gaps in critical knowledge can be identified and a process to close them can be crafted.

A critical tactical choice in any mediation is what you want your client to do or say in the presence of the mediator. If you have a strong client who you believe will be an effective witness, let him or her engage the mediator in ways that will lead the mediator to share that perspective with the other side. On the other hand, if you have a client who may not present well or is "too eager" to settle, you may not want your client to engage with the mediator, so you might shield him or her from the mediator. If you do, understand that the mediator will likely attribute your shielding your client to one of those reasons. In either case, you should either prepare your client to engage with the mediator productively or minimize such interactions. In short, whatever your mediation strategy, your client needs to understand the approach and be on board with it.

A mediation statement is a valuable tool that is too often used ineffectively. The most common approach is to write it like an appellate brief to convince the mediator that you will "win." The more successful approach is to write for an entirely different audience: the decision-maker on the other side. Know who that is and whether he or she is a lawyer or lay person and, if the latter, a businessperson or not. Write your statement in terms that person is likely to understand, and pitch it in a way that signals a willingness to explore a wider range of options than simply a dollar amount. Good advocates can do this without suggesting a lack of confidence in their case. If done well, such a mediation statement can go a long way toward avoiding a mediation that starts with extreme positions that need to be overcome before serious negotiations can begin.

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