Make the Most of Your Mediation – The Personal Injury Case

By Hon. Lynn Duryee (Ret.)
November 11, 2015

Doesn't it seem like all PI cases should settle at mediation? Due to the mountain of available data, there is much more predictability with the outcome of PI cases than with other civil cases. Yet it still happens that PI cases that should settle during mediation end with no settlement and a degree of frustration. Here are five simple things participants can do to increase the odds of closing the file at the first session:

Submit your brief a month in advance. What, a month in advance? Yes, you read that right. And if you, as plaintiff's lawyer, can submit it six weeks in advance, so much the better. It is no secret that it takes the defense a long time to evaluate and prepare for settlement. The decision of how much money to place on any case is made by many people sitting in many levels. The more notice defendant has of plaintiff's contentions, the better the carrier can evaluate the claims by circulating plaintiff's (thorough and well-written) brief through the chain of command. Analogously, if a key piece of evidence – say, the treater's diagnosis – won't be ready until the night before the mediation, consider rescheduling the mediation until the evidence can be intelligently considered by all participants.

Lead with a reasonable demand. Yes, you can ask for any number you wish, but is it really in your best interests to start quite so high? There are many problems with starting negotiations at an astronomical number. Chief among them are: (1) The other side won't take you seriously; (2) Neither will they be worried about trying the case against that number; (3) Your client might fall in love with that big, fat number; (4) At some point to settle the case you will need to drop precipitously, and you'll hate doing that; and (5) The parties will spend a lot of time during the precious hours allotted to resolution just getting the parties to a reasonable starting point. Avoid all these problems by leading off with a reasonable demand. There's a market for pricing cases, and if you don't have the retail book, ask an experienced PI lawyer for help.

Prepare your client. Yes, you have attended many mediations, but what about your client? Does she know what will happen during the day? That there will be long periods of time just spent waiting to hear what the other side has to say? That numbers will be exchanged that may seem disappointing and offensive? That she might be asked questions? Does she know what she's supposed

This article was originally published by LAW.COM and is reprinted with their permission

to wear? The more prepared your client is for the experience, the more likely she will be able to participate in it fully. Even though joint sessions are joining the ranks of endangered species, it is still true that one of the most powerful moments in a mediation can be the joint session where the plaintiff is permitted to explain her losses. Prepare her for that by practicing in advance.

Help the mediator help you. One of the ways that mediation works is that parties come to trust and engage in the process. Lawyers sometimes inadvertently prevent their client from doing so. For example, when the first offer is conveyed from the defense, the wise lawyer will say to his client, "This is a solid start. We started high, they started low. Now we can talk about how to get to a real number." This is so much more reassuring to the client than the lawyer who reacts with, "Outrageous! Bad faith! We're outta here."

Similarly, there will come a point when the neutral will talk to your client – either plaintiff or adjuster – about the value of the offer or demand and the risks of not settling. Many lawyers feel obligated to jump in and argue. Because your client trusts you, she may think that she should distrust the neutral's thoughts. Instead, help your client trust the process by permitting the neutral to explain her concerns. If possible, agree with the neutral on some of the risks. You are not abandoning your role as an advocate by doing so – you are helping your client understand the process and make the best decision for herself.

Decide the case for yourself. Perhaps the main area where the defense is most vulnerable is in its risk of "groupthink" – that is, evaluating a case a certain way and then deciding and reaffirming the defense decision without fully considering fresh arguments from the plaintiff. Sure, most PI cases fall into broad and predictable categories, but sometimes plaintiffs come up with something new. How might a defendant driver be liable when plaintiff was passing illegally? It's easy to reflexively reject a novel claim, especially when everyone on your team is only too eager to agree with that conclusion. To avoid this mistake, think of what we instruct jurors: "Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury…Do not give up your honest beliefs just because the others think differently." You don't want to be hearing a convincing argument for the first time in trial.

So, to your repertoire of tools, add an extra measure of preparation and thoughtfulness. Will we now be able settle all PI cases? Let's find out. ●

Hon. Lynn Duryee (Ret.) is a San Francisco JAMS neutral who joined after serving on the Marin County Superior Court for more than 20 years. She presided over and settled thousands of commercial, contract, and negligence cases, along with every other type of civil case filed. She can be reached at lduryee@jamsadr.com.

This article was originally published by LAW.COM and is reprinted with their permission