

Baseball Tips for a Successful Mediation

By Hon. David Wall (Ret.)

Baseball player and author Jim Bouton once wrote, “A ballplayer spends a good piece of his life griping a baseball, and in the end it turns out that it was the other way around all along.” With baseball season now in full swing, it’s a perfect time to use America’s pastime to illustrate ways to maximize your chances for settlement at mediation.

Preparation is always important

Successful teams analyze their own players’ strengths and weaknesses so as to put them in position to succeed.

Don’t just focus on the best parts of your case. All too often, I read mediation briefs extolling the virtues of the case from that party’s perspective without ever mentioning the significant weaknesses that the other side will seek to exploit. It’s not as though the mediator isn’t going to find out about that admission of liability or those serious pre-existing conditions. It’ll be what we spend most of the session discussing. So, address it up front with the mediator and also with the client. Recognize that those issues necessarily drive opinions about settlement value and try to get the client to understand that as well. Give the mediator a realistic portrayal of the chief issues, including the evidence that hurts your case and the evidence and arguments available to you to try to ameliorate the damage.



Plan ahead

Hitting coaches tell batters to have a plan at the plate. If you know the pitcher likes to work you with fastballs on the outer half,

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you might plan on hitting to the opposite field instead of trying to pull the ball.

Before mediation, it’s important to consider reasonable goals for resolution. In many cases, counsel can pretty accurately gauge a likely settlement range. Anticipate that range and use it to manage client expectations. Too often, I see parties that have only been told about their best result at trial, and they see the mediation as simply a tool to get the other side to capitulate to the client’s “best day.” Those unfamiliar with the mediation process need to understand that resolution involves give and take. Mediation involves understanding the risks of going forward with litigation and eliminating those risks through compromise.

Mediate with control and reason

Pitching coaches will say that throwing 93 miles per hour with control usually leads to better results than throwing 98 miles per hour and wild.

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It's important to have rational expectations at mediation. The settlement range you anticipate should have a reasonably positive result for your client at trial at one end, and a reasonably positive result for your adversary on the other end (factoring in the fees and costs necessary to get there). The case is likely to resolve somewhere in that range.

No one expects your opening offer or demand to be at the poles of that ultimate settlement range, but at least have an eye on that range. For instance, a personal injury case might have a settlement range of \$400,000 to \$1 million, given liability in Plaintiff's favor, but with issues of pre-existing conditions affecting a significant portion of the damages. An opening demand of \$22 million will likely elicit an opening offer of \$1,000, and vice versa. It will result in polarizing the negotiations, and more than half of the session will be used just to get the parties within sight of the settlement range that both sides (and the mediator) probably anticipated before we started. It's fine to choose an opening number outside of the settlement range, but your chances of creating meaningful negotiations improve if you don't start the discussion at a level that will immediately cre-

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ate animosity. I often suggest starting with your realistic best result at trial, taking into consideration the costs of getting that result. Then negotiate from there, recognizing and eliminating the risks.

Make the best use of your mediator

Hopefully you've chosen a mediator whose opinion you trust on some of the issues you face. He isn't your coach, as he has a duty to assist both sides. But in the right case, it can be helpful to talk to the mediator in the days preceding the session to address issues likely to arise and to formulate a game plan for dealing with them. In most cases, you share a common goal of a reasonable resolution. **■**