

BEST PRACTICES IN MEDIATING DAMAGES

by James L. Ryan

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The world of litigation has changed dramatically over the last decade. As jury trials have decreased, the number of mediations has steadily been on the rise. Going forward trial attorneys will participate in more mediations than jury trials, so their mediation advocacy skills will prove paramount to their overall success.

This conclusion is augmented by the results coming out of mediations. The vast majority of privately mediated cases settle at the table or shortly after the mediation. (Since 1995 the thousands of cases handled by the mediators in The McCammon Group have settled at a rate in excess of 85 percent.) Thus, mediation is a primary driver of the resolution of the cases handled by trial attorneys.

Yet, we know that trial attorneys put much more emphasis and time in honing their trial advocacy skills than their mediation advocacy skills. The same is true regarding preparation. Many lawyers who would not dream of appearing in court unprepared just wing it in mediation.

This article provides my thoughts on some of the pointers that can help attorneys develop better mediation advocacy skills and can assist them in preparing to resolve their cases in mediation.

In sharing these thoughts, I have attempted to address some basic pointers with an emphasis on damages.

Rule #1: Prepare as rigorously for mediation as you would for trial

Preparing for mediation is quite different from preparing for trial, but no less important. Here are the basic steps:

A. Analyze the case

The critical questions to consider are:

- What are the best possible outcomes in court?
- What is the likelihood of achieving each of these possible outcomes?
- How much would it cost to try this case (in addition to what has already been spent)?

Use this information to determine what you think a reasonable settlement range would be.

B. Discuss this analysis with your client

Reaching agreement with a client on what to settle for can be one of the most daunting tasks a litigator faces. To convince a client that \$200,000 would be a favorable outcome on a "million dollar case" requires time, patience, and candor. Few clients easily apprehend the downside of trying a case: the risk of a jury awarding nothing at all even though they suffered significant damage; the full economic cost of litigation; the opportunity cost of lost time; and the emotional toll of trial.

Far too often plaintiffs do not begin to confront these issues head on until well into the mediation. When the

demand and offer are miles apart, the mediator then tries to salvage the process by administering a reality check to both parties. The process will run more smoothly, and the plaintiff will react much more favorably, if the plaintiff enters the process with realistic expectations.

C. Convey relevant information to the defense promptly

Insurance adjusters need time to assess and process information relevant to the appropriate amount of damages. The sooner you convey this information to them, the better prepared they will be to put a realistic number on the table in mediation. The element of surprise creates no advantage in mediation because both sides are able to delay responding without adverse consequences. Surprises just slow down the process.

D. Develop a plan for achieving your goal

The objective in mediation is to present information and analysis that allows the other side to consider its risks and, consequently, to agree to settle on terms acceptable to your client. The more comprehensive, respectful, and skillful this presentation is, the more likely it is to prompt the defense to shift its position into an acceptable range.

In addition, strategize with your client regarding his or her role in the process. While lawyers and insurance adjusters pride themselves on being cool-headed, rational thinkers, we are all influenced by emotions. Thus, when the time comes to justify your claim for damages, there may be a distinct advantage to allowing your client to explain to the defense what happened and what is needed to be made whole.

Audio and visual aids can be very helpful. PowerPoint presentations make it easy to convey information fully and effectively.

Consider the possible impact of video-recorded first-hand statements from physicians, family members, or others who may have information relevant to damages. They do not need to be physically present to have an impact.

Rule #2: Establish the Negotiation Framework

A. Don't be afraid to start!

Parties often waste a great deal of time wrangling over which side is going to convey the first serious proposal. Many lawyers take it as a matter of faith that putting a number on the table before the other side does is a mistake. This is true only when your opponent has superior information about where the case should settle. If your understanding of the appropriate range is as good, or better, than defense counsel's, you bear very little risk of starting out by asking for too little. And there is a significant upside to going first. You can take control by anchoring the debate around a number you deem favorable.

Experienced negotiators may think they are immune to such anchoring, but the data show otherwise. The first serious number put on the table for damages is highly influential.¹ So take command from the start.

A serious offer is one for which you can provide a clear rationale. If your analysis shows your best possible outcome in court is \$175,000, starting at \$500,000 or \$2 million is only going to irritate the other side and prod them to respond in kind (i.e., by making a ridiculously low offer). No purpose is served by a demand that both you and the other side know is outside the bounds of what a jury might award.

B. Have a plan and stick to it

The key to success in mediation (and unassisted negotiations) is to imitate and respond, not react. That means thoughtfully planning each step along the way rather than simply reacting to what the other side does. As J. Anderson Little points out in *Making Money Talk* (highly recommended reading),² offers contain both a text (the explicit message) and a subtext (an implied message about where the offeror is headed). You want both the text and subtext to lead toward your objective.

For example, assume the best you can do in court is \$300,000 and a reasonable settlement, in light of the liability issues and the high cost of medical experts to prove damages, would be \$150,000. You justify your initial demand of \$300,000 with medical evidence (X-rays and excerpts from medical reports) and your client's personal account of the impact of the injury on her work and family life. Defense counsel responds with an offer of \$10,000, justified only by the assertion: "that's all I'm authorized to put on the table."

If you let your emotions rule your actions, you are likely to either: (a) threaten to walk out of the mediation, or (b) counter aggressively with a number such as \$299,500. The subtext of an offer that is nearly as high or even higher than your initial demand, which you know is at the very high end of reasonable, is "Okay tough guy, two can play this game." Such a message may be emotionally satisfying, but it will only take you further away from your \$150,000 goal. A far better approach is to calmly and coolly note that the defense has failed to justify its number with either facts or law and that the number is unreasonably low. Then put a number on the table—say \$280,000 or \$275,000—that shows you are willing to move toward a realistic settlement.

Will defense counsel respond with a productive move? If they are serious about settling, yes. If they remain at an unrealistic level despite your good faith move, it will be readily apparent that they are not serious about trying to resolve the case. There will always be time to leave later if you wish. Give the process a chance to succeed.

C. Use the mediator

A key component of mediation advocacy is knowing

how to use the mediator to advance your goals. The mediator's job is to help you and defense counsel achieve a satisfactory settlement. Part of the job description of a mediator is to act as a go-between, conveying offers and counter-offers. But there is much more a mediator can do, particularly when an impasse develops.

How effective the mediator will be in assisting defense counsel to put a number on the table depends to a significant extent on what information you give the mediator to work with. As you prepare for the session, think carefully about what information you want to share with the mediator in confidence; what information you want to authorize the mediator to share with the other side; and whether you want to condition the release of information by the mediator on particular developments.

If an impasse occurs, consider whether it may be helpful for the mediator to provide a case evaluation or analyze alternative settlement scenarios. Parties should make every effort to negotiate an agreement without the mediator having to weigh in, but if all else fails, these services often help to bridge a gap.

Rule #3: Learn from experience

Every time they appear in court, the best trial lawyers carefully note what worked and what did not work. Mediations deserve the same rigorous analysis. Did you achieve a favorable settlement for your client? If so, what techniques and strategies seemed to move the process forward? What approaches, if any, seemed unhelpful or dysfunctional? What could you do differently next time?

Mediation advocacy is just as much an art as trying a case in front of a jury. The more time and energy you put into mastering the craft, the more effective you will be in negotiating damages for your clients. These skills become more important every day.

1 D. Orr & C. Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 *Ohio State Journal on Dispute Resolution* Vol. 3, pp. 597-628 (2006).

2 American Bar Association (2007).

ABOUT THE AUTHOR

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He served as an Associate Judge on the Montgomery County Circuit Court from 1991-2006 and on the Montgomery County District Court from 1987-1991. He was a Domestic Relations Master on the Circuit Court from 1982-1987.

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