A Three-Legged Stool — Balancing Strategies for Mediation: The ABC's For Successful Mediations

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By Eric Gillett

When I began my litigation practice more than 35 years ago, mediation of tort claims was in its infancy. And because I began my practice in Anchorage, Alaska, it was almost embryonic. Private mediators did not yet exist. Instead, we brought our disputes before the judge who was assigned to try the case. I recall more than a few instances where the judge advised one party or the other that if they did not get "on board" with settlement, they should remember that the same judge would be ruling on their pre-trial motions and the evidence during trial. That felt like a threat, probably was, and sometimes it worked.

We have come a long way in the past 35 years. Settlement conferences with the same judge who is set to try your case are extremely rare. And mediation has become a profession unto itself.

So, what are effective steps to resolve your case at mediation if you don't have the trial judge hanging the sword of Damocles over your opponent's head by a proverbial thread? I will explain a few that have proved effective in cases I have mediated both as an advocate and as a neutral.

A. Know your case. When I was coming up as a young trial lawyer, one of my mentors told me, "He who knows the facts best, wins." Seemed straight forward enough! As we prepared a catastrophic injury case for trial, I watched as he meticulously reviewed documents and depositions, copiously noting both helpful and unhelpful evidence. He prepared his cross examinations carefully so as not to overstate a witness's testimony in case it was necessary to impeach. Documents were organized in a way that they were always ready to be provided to a jury if they became important. In short, he trained me to understand that if I had the facts at my fingertips, the chances that my opponent could surprise me were very small and when we handed it over to the jury we would rest easy knowing we had put on our best case.

The same is true for mediation. If you have a tight grip on the facts of your case, you can arm your mediator with the information they need to discuss the case with the other side. And when the other side sends the mediator into your room with a new fact or an interesting case, you are prepared to meet it with better facts and better case law.

B. Prepare your client. Attorneys, both plaintiffs and defendants, are challenged to divine what a case is worth. Hopefully, that effort starts well before mediation begins. I have found over the years that for most cases I can predict a case's value within 90 days. Plenty can happen to change that evaluation, but I've found it is a good idea to measure any subsequent review against my early evaluation and ask myself why the valuation needs to change.

The advantage to anchoring a valuation early is that you can begin to discuss it with your client. For the defense, that allows your client to plan for that number, whether that is with personal assets or, more likely, insurance.

About insurance companies, it is important to understand that they are required to set reserves based on their conservative evaluation of what amount of money may be at risk. If state insurance regulators determine that insufficient reserves are set aside, penalties can be assessed against the company. So, it is no surprise that early evaluations are helpful to insurance companies. And if the numbers change, it is important that the carrier have that information to consider whether they should increase or decrease the reserve amount. That is why it is a good idea for plaintiff's lawyers to keep the defendant's insurance company well informed about the value of a case.

For plaintiffs, especially those who are not experienced in litigation, it is likewise important to let them know what a case is worth and to keep their expectations in check. How many times have we seen a client lose faith in their attorney when for the first time at mediation their attorney is telling them that the case is worth significantly less than they had discussed previously?

For both sides in mediation, counseling a client with reasonable expectations is a valuable predicate to success. To accomplish that, it is important that you look beyond the case value and consider the settlement value as well. In other words, a case may have a value for mediation that is different than the value if they are successful at trial. For either side, there are costs associated with preparing for trial, not the least of which includes expert fees and additional attorney fees that drive up or down the settlement value. And for either side, there is the risk that the case will not be decided by a jury the way one hoped. In other words, you may lose.

And finally, it is important to understand that regardless of the case value or the settlement value, there may be other factors that change the value. This is often seen in cases where there are liens or where one side or the other has already invested extraordinary amounts to prepare for trial. In those cases, the settlement of a case at mediation requires that these expenses be addressed.

Recognizing these factors, the case value, the settlement value, and extraordinary expenses that stand in the way of an otherwise solid valuation are imperative to a successful mediation. It destroys momentum as well as good will when one side has not addressed these factors before coming to mediation.

C. Be patient and keep an open mind. Years ago, the same judge who I mentioned earlier, told me about the importance of patience at mediation. He said that parties to a lawsuit want to be heard. For some people it is fair to say they want their day in court, and they see mediation taking that away from them.

In that vein, it is important to allow mediation to be a process. A very experienced plaintiff's attorney told me recently that in another case, the mediator retained by the parties successfully brought the parties to an agreement and the case settled. His client, however, was not happy with the mediator. The reason he was upset was because the mediator spent most of the time telling the attorney's client what the case was worth and how much the case should settle for. The mediator's technique ignored an important need of the client.

The client needed the process. The client would have probably loved the mediator if the mediator had allowed the process to reveal the solution instead of the mediator announcing the solution, almost by edict.

Time takes time. Most mediations that I have been involved in need a certain amount of time for the process to work. If you ask a party too early to put up their best number, they are likely to view that as a poor strategy. While it doesn't need to be a simple exchange of numbers that ever narrow the gap, it often requires an acknowledgement of the particular features of the case, a rational give and take that allows each side to express their views and be heard. As I discussed in an earlier article, it is important that each side allow for the possibility that the other side may have a valid point.

The mediator's job is to express those points to each side in a way that is not threatening or divisive. It is the mediator's job to bring the information into a discussion so that each side can evaluate and reevaluate their positions over and over again throughout the day. By keeping an open mind, we allow ourselves to see a path to resolution especially if that resolution looks a little different that the one we envisioned at the beginning of the day.

As a mediator, my job is to help you see and consider these alternatives — and help you navigate your clients to a fair and balanced outcome. If you have prepared your case well, know your facts inside and out, understand the law, educate your clients about the case/settlement value, and let the mediation play out with time, then chances are good that we will settle your case at mediation. Good luck.

Eric Gillett is a founding member and managing partner at Preg, O'Donnell & Gillett. He is licensed in Washington, Oregon, and Alaska. He has tried dozens of cases to verdict. A navigator of resolutions, he is a commercial mediator and can be contacted through his legal assistant, Jasmine Reddy, at 206.287.1775 or jreddy@pregodonnell.com. While in person mediations can be arranged with all participants fully vaccinated, Zoom mediations are also available and encouraged.

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