

PREPARING YOUR CASE FOR MEDIATION

By Janet Rubin Fields

I. Tips, Techniques and Strategies for Effective Negotiation

1. Professionalism – Welcome the Process, Relationship Building
2. Preparation – Are you motivated?
3. Persuasion – Be Prepared and Know Your Case
4. Win Over the Mediator – Bring the Ammunition
5. Be Open Minded – Have the proper mindset when you walk in the door
6. Trust and listen to the Mediator (or at least pretend to)

II. Pre-Mediation Mediator Selection

1. Mediators Where Many Hats
 - a. Lawyer, judge, therapist, friend, foe?
2. Is Your Mediator Effective?
 - a. Do they show respect, compassion and patience for the process?
 - b. Grasp the issues and use the evidence as ammunition versus merely push numbers?
 - c. Are they energetic, tenacious, a closer who doesn't look at the clock dedicated to the process?
 - d. Is the mediator someone you and your client will relate to? Gender, maturity, life's experiences
 - e. Ability to read people, body language, eye contact

III. Pre-Mediation Preparation

1. Risk Analysis
 - a. Predictable versus the unpredictable
 - b. Court room climate: venue, judge, jury pool
 - c. Your client's ability to withstand trial – how will their testimony compared to other witness testimony affect the outcome of the case

2. Financial Analysis

- a. Cost versus case value and exposure
- b. Status of the litigation and future costs:
Pre-litigation, litigation pending, trial date

3. Preparing the Client

- a. Are the adjuster and claims management on board?
- b. Will the decision maker be present?
 1. Availability by phone– "Crunch Time"
 2. Commit the claims representative to consider obtaining more authority in advance
 3. Express confidence in your neutral (so the client follows your lead)

4. The Briefs – How Important Are They?

- a. Educating the Mediator
 1. We want to help you look great for your client
 2. We want to let you know we understand the issues
- b. Timing: deliver the mediation brief to the mediator in advance
- c. Confidentiality versus sharing with the other side
- d. Articulate the facts, issues, law and evidence
- e. Provide procedural background and trial date
- f. Attach Exhibits
- g. Convey pre-mediation settlement discussions and any stumbling blocks

IV. Presenting Your Case in the Mediation

1. Bring Your Ammunition "Show and Tell"
 - a. Ammunition he can persuasively used to achieve compromise and persuade the other side to get realistic within your goals
 - b. Expert Witness Reports, Photos, Graphs, Exemplars, Models, Videos, Tape Records, Power Points, Posters
 - c. Deposition Transcripts and Declarations

- d. Live Witnesses: Experts, Family, Friends
- e. Pre-trial Motions: MSJ's, Motions in Limine
- f. The Law and Key Jury Instructions

2. Can You Sell It To Me With a Straight Face?

- a. Corroboration and Credibility Are Everything
 - 1. The Mediator is the Trier of Fact
- b. Embellishing or understating damages
- c. Over playing the challenges in your opponent's case
- d. Over selling the strengths of your case

3. The Learning Curve

- a. What will your client learn from the other side?
 - 1. The adversary's arguments and the evidence they have to support them
 - 2. New facts and possible further discovery
 - 3. Impeachment
- b. How do you evaluate the parties?
 - 1. It's all about a perception
 - 2. Shining star or lacking luster
 - 3. It's not all about the facts and the law, it's who's in the room

4. Have Your Client Involved

- a. Allow the mediator work directly with the claims representative
- b. Give the claims representative an opportunity to meet opposing counsel and/or the Plaintiff
- c. Let the mediator help improve the lawyer-client communication
- d. Have the claims representative become the cheerleader to sufficient settlement authority through the mediator
- e. Is there a difference in opinion about value between lawyer and the insurance company?

5. Use the Mediation Venue for Closing Argument

- a. The dress rehearsal for closing argument outside of the briefs

V. Compromise: It's not "weakness" or backing down

1. Plaintiff's counsel is obligated to communicate to their client the top dollar offered by the defense so an informed decision can be made on whether to settle or go to trial
2. Motivate and encourage the insurance company to offer their maximum dollars available
3. Allow the Mediator to convey to the Plaintiff guaranteed money along with a time line on when they can get a check is empowering and effective

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