Timing is (almost) everything

Optimizing results at mediation: The plaintiff's perspective

By Ray Artiano

Every lawyer who enters into a mediation has the goal of optimizing the results for the client. The aim of this article is to identify strategies, from the plaintiff's perspective, to accomplish this goal. The discussion will include suggestions as to the most advantageous time to mediate, and offer approaches to pre-mediation planning and techniques to employ at mediation to position your client to obtain the desired results.

When to mediate

Determining when the mediation should occur is important. The answer will often depend on whether you represent the plaintiff or the defendant. As a general principle, in the more complex cases, a mediation that occurs very early on (where very limited discovery has taken place) will only benefit the defendant. Plaintiff's counsel will ordinarily have limited information at the early stages of the litigation. This information will include the plaintiff's version of the facts, documents available to the plaintiff and perhaps information from witnesses who can be accessed by the plaintiff.

There are only two circumstances where an early mediation may be a benefit to plaintiff. The first is when there are no important factual issues in dispute and the only controversy relates to damages. The second is on a low-damages case where you have a need for a resolution as soon as possible because your case has very serious problems. (If this is true, you probably should not have accepted the matter to begin with.)

The defense has a clear advantage when it comes to assessing the merits of the case at the early stages. Usually, most of the key witnesses, with the exception of the plaintiff, are available to the defendant. The defense counsel has the opportunity to evaluate the credibility of witnesses, weigh anticipated testimony, and examine documentary evidence in making an initial assessment of the substance of the plaintiff's claims, at least as it relates to liability. From the point of view of the defense, the driving force behind asking for an early mediation is generally one of two considerations. The first has to do with the containment of fees and costs, especially in those instances where statutory or contractual attorney fees are recoverable. The second is when defendants know that discovery will reveal significant weaknesses in their case. Counsel for plaintiff should be wary of overtures for an early mediation.

Preparing the mediator and the opposition for the mediation

In the typical case, both plaintiff and defendant will have enough information before the mediation to enable them to form substantive opinions on the merits and value range. Both sides will have discussed best and worst scenarios should the case proceed to trial. Each will set goals for the mediation. (While there may be monetary and non-monetary goals, the focus here will be on the former.) The plaintiff should have a figure in mind that represents what is believed to be the best that can reasonably be achieved at mediation (the "target"), and an amount which represents the lowest conceivable amount it would take to settle (the "reserve"). Similarly, the defense will have established an amount at which it would like to settle (target) and the maximum amount it would consider paying (reserve). The mediation process requires the lawyers to "bridge the gap" between each party's reserve and target numbers. The starting point for this occurs before the mediation itself, through the mediation brief.

The importance of a good mediation brief cannot be overstated. If there is a desire to keep certain information confidential, that can be done separately, either through a brief, letter, or personal contact with the mediator, but a well-considered brief sent to the mediator and the opposing party is essential.

First, it is important for the mediator to have a clear understanding of the salient facts, the law that is involved (especially if the mediator may not be fully conversant with the legal issues at hand) and, if applicable, any settlement discussions to date. Including key documents with the brief is helpful as well. More important in some cases, however, is that this is your opportunity to speak directly not only to the defense lawyer, but to the lawyer's client as well. (Defense counsel almost always shares the plaintiff's mediation brief with the client.)

There are times when the client or the carrier's representative are not fully cognizant of key liability issues or potential case value. They are only aware of the facts and opinions provided to them by the defense lawyer. By virtue of the information contained in your brief, you may be able to bring to light to the true decisionmaker legal or factual issues that have not been considered but that seriously affect the assessment on the merits or value of the case. Where attorney fees are involved, plaintiff's counsel can also show how large the attorney fees are and will grow should the case proceed to trial.

Make sure that the brief is transmitted to your opposition at least three or four days before the mediation so that its contents can be reviewed and taken into consideration by the defense in determining target and reserve values before you actually mediate.

A joint session?

A decision which plaintiff's counsel must make at mediation is whether the plaintiff should at some point be in the

same room as the defendant and defendant's representatives, sharing his or her story. If your client makes a good and likeable witness, don't miss the opportunity to do so. This is particularly important in an era where it is atypical for all parties to be placed in the same room at mediation. In cases that may be driven by emotion, an opportunity for the plaintiff to tell his or her story may be important in achieving a settlement.

On the other hand, if you know that your client makes a poor witness, ensure that no unnecessary contact takes place. If plaintiff's counsel represents multiple plaintiffs, be very careful to comply with California Rule of Professional Conduct 3-310, the rule concerning the representation of joint clients. (The discussion here will not delve into the specifics of this very important rule – suffice it to say that if you do represent multiple plaintiffs that you cross all t's and dot all i's in addition to being able to respond to a "global offer.")

The decision maker

Once at the mediation there are a few things you should recognize. First, the ultimate decisionmaker is not the defense lawyer. While the lawyer may have significant input as to views on liability and value, in most instances the decisionmaker is a representative of the insurance carrier or a risk manager. Not only have reserve amounts and target amounts been set prior to mediation, but where insurance is involved, the representative has usually played an integral part in setting actual reserves – an amount of money that the carrier is required by law to set aside in order to cover pending claims. The insurance representative has superiors, and will look foolish to them if the settlement amount offered at mediation far exceeds the reserve amount. (This is often the reason a second mediation is needed –to enable the carrier to go back and readjust the reserve.) It is up to you to provide the reasoning behind the numbers.

Second, remember also that in assessing the potential value of the case, the decisionmaker is usually focused on special damages, especially in cases of smaller value. I have found an inverse relationship between the potential case value and the importance of special damages. You should be prepared at mediation to blackboard the highest amount of special damages, past and future, possible. In mediation, unlike at trial, you need not be concerned about pitching an extremely large special damages number, even in a matter of questionable liability.

The same holds true with respect to discussion of general damages. While it is true that at most mediations plaintiffs will not go into specifics on the breakdown of their demand, seasoned defense lawyers will often request such information and you should be prepared to provide it.

The first demand

The typical mediation involves a series of ongoing monetary demands and offers. I am often asked where the plaintiff's first demand should be. Should it be in the "ballpark" of where you believe the case should settle?

My response to this is an unequivocal no. It is my opinion that plaintiff's initial demand should be an amount which assumes a win at trial with an award that "rings the bell." This is a figure that exceeds the target goal. Your demand can always be justified as being reasonable because it is based upon your view of a case where everything goes perfectly.

It is rare that the gap between the demand and offer is small, especially in the larger matters.

Bridging the monetary settlement gap can be achieved in two ways: by changing defendant's view of the target or reserve amount or by utilizing pressure points. We have already discussed changing views on liability and value in connection with the preparation of the mediation brief. These points should be emphasized at mediation.

Pressure points

Using pressure points can also help bridge the gap. Plaintiff has a number of pressure points to exploit. From plaintiff's vantage point, if punitive damages are in issue, the defendant runs the risk of potentially paying enormous damages (but in California, insurers cannot pay punitive damages, so that can complicate the analysis).

Do not underestimate the impact this can have on the defendant. If insurance is involved, be aware of the policy limits, the amount of any self-insured retention, and how this affects the dynamics of the settlement process. The presence of multiple defendants may place defendants and their carrier in a precarious situation. Take advantage of this. The potential for adverse publicity and disruption to business operations even were defendant to prevail at trial, must be recognized. While a negotiated settlement at mediation may be protected by a confidentiality agreement, if the case goes to trial and plaintiff prevails, the publicity, the feared precedential effect, and the possibility of encouraging more lawsuits may be significant.

Where to end negotiations

If the case is not going to settle at mediation, be cautious about where you end the negotiations. Be careful about signaling a bottom-value number to the defendant, as this will almost ensure that you will never be offered more. Recognize that once you have committed to any demand, the offer from the defendant will never exceed that amount at any point, barring the discovery of new information or a significant change of circumstances.

It is rarely helpful to make a "take it or leave it" demand. By doing so, you are basically saying to your opposition: "You will accept this or else." Forcing your opposition into a corner like this may feel satisfying but is rarely productive. If this is actually your position, follow it up with a statutory offer.

One final note about settlement discussions during mediation. At times, defendant will have a summary judgment pending and will discount their offer accordingly. In most instances the pending motion should not affect your view on case value as you should have already factored in your analysis the chances of losing the case. But in the unlikely event that you believe the motion will be successful, and a reasonable offer has been made, it needs to be seriously considered by the client.

Conclusion

The majority of cases that settle at mediation resolve at a number falling between your target and reserve amount. It is rare that either side leaves a mediation having achieved their target, but proper preparation and use of bridging-the-gap techniques will optimize your chances of a successful outcome. At the very least, it should make the possibility of a future resolution more likely.

Artiano

Ray Artiano is a mediator/trial consultant based in San Diego. Prior to becoming a mediator in 2018, he spent four decades as a litigator on behalf of plaintiffs and defendants.