

“TRIAL” IS DEFINED AS, “A FAILURE TO SETTLE”

The Mediator’s Perspective

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For the typical case involving insurance defense, mediation should be the time when the insurance company pays the amount that the case appears to be worth. When this doesn’t happen, it is usually because something has gone wrong along the way. By understanding the critical events that lead up to a successful mediation, the plaintiff’s lawyer can greatly increase the chances for success and markedly reduce the chances of failure.

Critical Events

1. Intake – *Be as selective as possible*

Not every case that comes in the door is a winner. If you accept the client before you have done a thorough investigation, make sure that you are only initially committed to conducting the investigation. Look at the basic documents – the police report, medical records (including PAST medical records), medical bills, lost wages, etc. Identify witnesses and have them promptly interviewed. Find out what you can about the case while it is fresh. After appropriately investigating the case, make a conscious decision as to whether you will accept it or reject it. Although not all inclusive, the following is a list some of the most common factors which always make mediation more difficult and can result in a failure to settle:

a. *You do not like the plaintiff* – If you do not like the plaintiff, chances are good that the insurance adjuster will not, and neither will the defense counsel. This intangible is one of the biggest swing factors in mediation. Any offer you get is likely to be near the bottom of the range.

b. *Little or no damage to the vehicles* – This does not preclude injury, but it creates a great deal of cynicism with the insurance company representatives unless there is objective evidence of immediate injury.

c. *Slip and fall outside in the winter* – These are usually difficult cases in New Hampshire. Unless you have clear notice *and* serious injury, most insurance companies will defend the case or seriously discount the offer.

d. *Pre-existing medical condition* – Particularly in soft tissue cases, evidence of a prior condition always makes settlement more difficult and reduces the range of value.

e. *Liability is uncertain* – If the insurance company can seriously dispute liability, there is a good chance that you will not settle – at least not in any range that you and/or your client finds attractive.

f. *Medical injury is minimal* – Insurance companies are more likely to risk trial if the downside is not great.

g. *The defendant is a family member of the plaintiff* – Insurance adjusters know that juries do not usually like these cases.

h. *Nilsson issues* – If there are multiple possible defendants, *Nilsson* increases the chances that settlement will fail, unless you are able to settle with all of the defendants at the same time.

i. *Substantial gap in medical treatment* – If there is a gap of even months, the insurance company representatives are more likely to take the position that the accident injury resolved – particularly in cases where there is evidence of a pre-existing condition.

2. Setting Initial Reserves – *Add Pressure to Get Them As High As Possible*

Every insurance company has a regulatory obligation to set reserves based upon claims made. This is money that the insurance company must remove from more aggressive investments and place into very secure accounts which accordingly bear a low interest rate. This reduces the profit which an insurance company can make. Therefore, an insurance company is not going to reserve \$100,000 on a case which it thinks is only worth \$10,000, “just to be safe”. The reserves are carefully calculated, and set into motion a series of events which can have a great impact on your ability to settle a case. Although reserves can be adjusted during the case, based upon new evidence, it is critical for the plaintiff’s counsel to get the reserves set as high as possible from the beginning. Also, it takes time to change reserves, and insurance companies do not like to do it, because it can result in embarrassing explanations to supervisors and can also have negative regulatory consequences. In order to effectively get the reserves set as high as possible, you need to *promptly* give the insurance company the information it needs to set the maximum value on the case. The following information will drive up the reserves:

a. Clear evidence of liability – Even if you think they already have it, provide all insurance adjusters with the police report (with the interpretation key), a copy of a traffic citation (and disposition, when available) from the local district court where the accident occurred, witness statements, admissions by the defendant, photographs of the scene and of physical evidence, etc. It is up to you to set the tone that this case is very strong and you will carefully prepare it.

b. Clear evidence of injury – Send the insurance adjuster early photographs of your client, crash scene photos from the police or others, pictures of the cars at the junkyard, medical records (including EMS report), videos of your client and the vehicles, newspaper clippings, television reports, medical bills, and initial lost wage information. Again, the goal is to *promptly* inform the insurance company of the strong liability and *serious* injury before it sets initial reserves.

c. Compelling story – Humanize the client. Give the insurance company a preview of your opening. “Hard working mother of two young children, driving to her father’s house to bring him to the doctor, etc.” Give the insurance company more than just data – give it human information to be worried about. Most adjusters will react well to an honest, sympathetic story which is not overplayed.

d. Plaintiff’s lawyer is competent and organized – Some insurance companies keep information on lawyers and actually include background information on the lawyer as part of the case analysis. Lawyers who are competent, reliable and forthright – and who have previously demonstrated their ability to competently try a case if necessary - usually do better than others. From your initial contact with the insurance company, show that you know what you are doing, that you will do it honestly, that you know what they need and that you will provide it to them without delay. As your reputation increases, so will the reserves.

3. Provide Timely Information during the Litigation

An insurance company is a type of bureaucracy. Most of them have a top-down hierarchy, but you generally have to work from the bottom-up. You send information to the adjuster. The adjuster reports to the claims supervisor, who reports to the office manager, who reports to the regional manager, who reports to the area manager, who reports to the second vice-president, etc. Each person up the ladder has a different level of settlement authority, and a different set of reporting concerns. Information goes up the ladder to the level of authority required, and then goes back down the ladder to the claims adjuster. All of this takes time. If you want to succeed at mediation, you cannot expect all of this information transfer to occur the

week before mediation.¹ You need to keep the insurance company informed, and you should make your presentation and demand to the company several weeks before the mediation actually occurs. Your final mediation submission should not provide new information to the insurance carrier, but should simply summarize everything you have already provided weeks earlier. Last minute surprises diminish your chances for success at mediation, because insurance companies are not designed to be quick and agile.

4. Demonstrate That You Can Try the Case

The best mediation results usually come from cases where the plaintiff is all but ready to try the case, if necessary. The insurance company has been provided well in advance with a comprehensive and well organized mediation demand, including photographs, medical illustrations, etc. The insurance representatives see that the case has been fully prepared by the plaintiff's lawyer and that the lawyer knows where the issues are.

5. Make a Reasonable Demand

Insurance adjusters will not offer their top dollar unless they think it will likely settle the case. If the plaintiff's demand is way out of line with the value of the case, the adjuster will not have any reason to feel uncomfortable about failing to settle. On the other hand, if it looks like settlement is possible, the adjuster must evaluate the consequences of failing to settle. You want to get the adjuster and the company to feel vested in the process. Signal that you know the value of your case, and that you will be reasonable.

6. Help Your Client Set Reasonable Expectations

Have frank talks with your client about value throughout the litigation process. Your client should have a reasonable expectation of what will happen at mediation before it begins. You have access to verdicts and settlements through various publications, and many of the Superior Courts keep running logs of verdicts, which are available upon request. Just like you do not want to surprise the insurance company, you do not want to surprise your client. Even if you

¹ In some insurance companies, executive compensation is based in part upon a formula which includes the company's claims paid for a given period of time. Therefore, in large cases involving high levels of authority, the plaintiff's lawyer needs to be particularly sensitive to keeping the company informed and avoiding last minute surprises.

are able to settle, your client's satisfaction with both you and the process will be greatly diminished.

Conclusion

As noted above, much of preparing for successful mediation involves preparing for trial. In that respect, there appears to be no difference. But, there is an irony at work. The less prepared you are for trial at the time of mediation, the more likely it is that you will go to trial, or settle the case for less than you otherwise might have obtained. The more prepared you are to go to trial at the time of mediation, the more likely you are to settle the case for top dollar, thus avoiding for your client the financial and emotional risk of trial. Thus, you should prepare for trial in order to avoid it!

With very few exceptions, insurance companies will settle cases for an amount that is within the range of reason if the plaintiff's lawyer provides the necessary information on a timely basis, as outlined above, and demonstrates a level of preparation which signals that trial will occur if the settlement offer is not sufficient. When insurance defense mediations fail, it is usually because one or more of the factors identified above comes into play. By understanding and accommodating the needs and desires of the insurance company whenever possible, counsel for the plaintiff serves the client and increases the likelihood of a good result.

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