



By Eugene C. Moscovitch

What goes on in the other room? Breaking down stereotypes and stimulating new thoughts at mediation: an opportunity for both sides.

Ever wish you could see and hear exactly what is going on “in the other room” at a mediation? One of the many wonderful things about being a professional mediator is that you get to do exactly that, while also helping to shape the outcome. Imagine yourself mediating approximately 150 cases per year for close to 10 years. What would you have learned by now in general terms that you could pass on to counsel for both sides without violating confidentiality or unfairly tipping the scales of neutrality? What myths, misconceptions and half-truths seem all too prevalent in both rooms and how might their general disclosure yield an improved and more productive settlement atmosphere on a going-forward basis?

From a plaintiff’s perspective, the first thing to recognize, understand and account for to the extent possible, is the highly cynical and negative ways that certain plaintiffs and plaintiffs’ counsel are sometimes perceived in the other room. It is not just that your client’s injuries are generally minimized or that their future difficulties are consistently discounted; what is even more significant is the process by which this seems to occur. Plaintiffs and their counsel often underestimate, or choose to ignore, the extent to which their own credibility and motives are being questioned in the other room. In doing so, they often fail to see how this can affect the likelihood of a negotiated settlement. Without the intervention of a skilled mediator sometime early in the day, the process is unlikely to proceed beyond this point.

A recipe for success

Most mediators quickly learn that the psychic need to vent before serious settlement negotiations can commence is not the exclusive province of the plaintiff’s room. Many defendants feel victimized as well, extorted into paying high settlements after being exposed to the reality of defense costs, the inflexibility of attorney-

fees statutes, and the general unpredictability of the jury system itself. If credibility is sacrificed at an early stage, whether it be that of counsel or that of the mediator, the parties may never come to find out that their ultimate, final numbers would not have been particularly far apart. A certain amount of compassion and empathy must therefore be served up by the mediator in both rooms, seasoned with an early exchange of mutual respect, if the day is to progress towards a satisfactory conclusion. Always give the mediator the necessary time to develop this core or base from which the settlement can and will grow.

How does one get off to this necessary “good start” within a traditional mediation format? If a joint session is held, it should be non-confrontational and presented respectfully. If the parties go directly to private caucuses with the mediator, time should be taken to analyze both the strengths and the weaknesses of each position. Grossly inflated opening offers, followed by insulting low responses, and crowned with each side declaring that “it does not wish to bid against itself,” generally lead nowhere if not swiftly ignored or circumvented. For this reason, it often is a good idea to attempt to establish new levels of trust and understanding between the sides before any numbers are exchanged, even if that means just discussing the issues at first and putting off the exchange of numbers for some time. Alternatively, even at an early juncture, both sides can be encouraged to make conditional moves via bracketing (“I’ll do this if you do that”) in order to build trust and limit negative reactions.

To do otherwise, is to risk that you, as counsel, will be perceived as either unduly opportunistic, unethical, or both, and constitutionally incapable of seeking a result that is fair and just for all concerned. Without the trust-building intervention of the mediator at the commencement of the day, the plaintiff is likely to be misperceived – regardless of

the severity of his or her economic or personal loss – as undeserving and only seeking to selfishly win the lottery regardless of what impact that might have upon others. The reaction of the other side to such stimuli is predictable: hard damages will be dismissed as being merely soft tissue; recent injuries will be characterized as pre-existing; and unwanted periods of unemployment will be seen as intentional failures to mitigate – all in the name of the plaintiff never wanting to work again.

Against the backdrop of these easily triggered stereotypes, valid pain and suffering can become synonymous with greed; consequential damages can be labeled as pure speculation; and punitive damages are often considered to be not even worthy of discussion. Perhaps most tragically, real emotional distress will often be perceived as feigned, non-existent or attorney-inspired, so that the diligent efforts of plaintiff’s counsel to develop a sound legal theory and assemble detailed factual data are often placed under the demeaning umbrella of bill padding or fraud. Regrettably, this is sometimes the soil in which your early settlement demand must be planted, unless of course you have acted in some way prior to, or at the commencement of, the mediation to temper such misperceptions.

How can you demonstrate to the other side that you are seriously willing and able to engage in an honest and productive mediation? One way to do so is to show that you have checked your own biases and stereotypes at the door or, better yet, not allowed them to flourish during pre-mediation discussions. The way to demonstrate to the other side that you are willing and able to be part of a credible negotiation is, simply stated, to show in all of your dealings with the parties and opposing counsel that you have evolved past a biased and overly simplistic view of their role and purpose and are

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prepared to deal with the case in a straight-forward manner.

If you are of the view that it would be unfair for defense counsel to cling to some of the generalizations and negative views discussed above, and that doing so would inevitably cloud and distort the settlement process, shouldn't you, as plaintiff's counsel, be equally receptive to examining whether you and your client might similarly be harboring some parallel misconceptions regarding the defense? If some of their generalizations are painfully inaccurate when applied to all of your cases and clients resulting in a bar to both sides arriving at a fair settlement, might you also have some that, while accurate on occasion, only serve to undermine the settlement process when unthinkingly applied in each instance?

When preparing for and engaging in mediation, examine what myths, misconceptions and half-truths offered by the defense might your side be susceptible to believing. Moreover, consider how a less generalized view of the defense could assist you in achieving more satisfying results in your cases.

I submit that the following list of assumptions, to the extent they may be operative at a mediation, can constitute the mirror image of the defense's own recurring and frequently inaccurate beliefs (e.g., that your clients are unhurt, undamaged, untruthful and unworthy of compensation). It is the central thesis of this article that, just as they do themselves and their clients a disservice by clinging to such a one-dimensional analysis, so too does the plaintiffs' bar in not critically examining its own rarely challenged assumptions. What follows is a suggested reconsideration of some of the closely held beliefs of some plaintiffs and their counsel which, in fact, may not always be in play.

MYTH #1: The defense is a monolith and there are no potential points of agreement which are likely to resonate in, or emanate from, the other room.

The first point of inaccuracy is that "the defense" speaks with but "one voice." Nothing could be further from the truth.

Often, many complex and differing interests and views exist within the defense room itself. Indeed, there can be an on-going mixture of interests and a continual shifting of alliances between defendants and co-defendants, insurance carriers and their insured's claims representatives and their supervisors, attorneys and their clients, and sometimes even among lawyers within the same firm. Whether these potential points of departure align or divide along lines of principle, pragmatism or self-interest, they are molded by subjective factors, such as individual personality, personal stature and the client expectations, none of which are static or 100 percent predictable. Only by understanding all of the varied forces at play can you fashion a truly satisfactory approach to the defense which allows the other side to experience a feeling of shared success necessary to any good settlement.

First and foremost, you always need to have an understanding of "whose ox is being gored" in the other room so that you and the mediator can fashion a theory or approach which either bypasses or takes advantage of these potential factors. The first critical question at the beginning of the day must always be who is, and who is not, in the other room. If it is the same defense attorney whose errant advice led to the litigation in the first place; a percipient and vulnerable HR executive who failed to recognize the need for legal input until it was too late; or a middle manager who ignored safety warnings or harassment complaints at any early stage, a different approach will need to be taken in each instance.

Likewise, if the defense room is notable for who is absent and no longer part of the defense team, such as a prior insurance representative who set the initial reserves in the case too low or a since discredited prior law firm that placed too many eggs in its summary judgment basket, your presentation through the mediator must be tailored to fit the individual circumstances of, not only the individual case, but the unique moment in time that now makes settlement possible.

The key frankly, for both sides, is to avoid a one-size-fits-all approach to each case. Much as a mediator is challenged

not to do this if he or she wishes to be effective on a consistent basis, so, too, must counsel on both sides be forever diligent in recognizing the nuances and idiosyncrasies of each case and the unique promise presented by a particular mediation opportunity.

MYTH #2: Defense lawyers don't really want to settle; they just want to keep billing the file for as long as they can.

More than ever, defense firms realize that their ability to keep their clients from switching firms in a competitive economy ultimately turns on maintaining cost-favorable results in relation to their client's overall litigation expense. Regardless of whether this objective is directly traceable to a defendant's conscience, concern over negative publicity or professional embarrassment, fear of jury reprisals, or direct loss of an institutional client, a rough justice can and usually does emerge from the other room when they are offered a fair opportunity to compromise. In the event that they are not so motivated, however, nothing makes their task of avoiding settlement easier than your own seemingly unfounded accusations or unjustified personal attacks. Regardless of their own biases or self-interest, you and your client can do much to shape the agenda by putting forth a realistic position that takes into account the defendant's own circumstances and wider concerns.

In pre-mediation discussions, when you choose to denigrate opposing counsel with the attitude that they are more interested in serving their own interests than that of their client's, you convey exactly the same insult which they do in assuming that you only see the present litigation in terms of your own recovery. Like you, many of them become quite close to their clients, identify with their interests and needs, and hold social and political beliefs that are parallel to those of their constituents. Never assume that the defense counsel believes in its own position any less than you do or that they feel that fighting for their client's interest is any less necessary or important than the challenges to which

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you have been drawn. Your conduct during discovery and during the mediation itself can go a long way towards determining whether or not this can or will present an opportunity for them to conserve resources and end the dispute in a more economical way. Implying that "they just want to bill their file" is probably the surest way to alienate them, make them defensive, and create the long tirade of litigation that you are trying, for your client's sake, to avoid at all costs.

MYTH #3: Insurance companies are only interested in the bottom line and this always acts to the detriment of plaintiff and their counsel.

While true to a considerable extent, this may not be as detrimental as one might suppose. Put another way, since an insurance company's inherent interest is in the bottom line, and that bottom line very much includes how a jury might react to a case and the extent to which a given case might make "bad law" in related industries or give rise to similar claims from other insureds, a purely mercenary concern on the part of the insurance carrier may not be such a bad thing for the plaintiff. But there are other factors to consider here as well.

They, like you and your client, want to feel that they have been treated fairly and not abused or demonized. At the end of the day, like all of us, the insurance carrier and defense counsel want to feel good about what they have accomplished and respected for what they do. Most good plaintiffs' lawyers know that this is better achieved by appealing to their heightened business judgment rather than belittling their tactics or philosophy.

It is also wrong to assume without thorough investigation and inquiry that they have no sympathy for your client's plight. While insurance companies can indeed be perceived as unfeeling corporate institutions, the persons who work for them, and particularly their newer members, may not be. More importantly, to the extent that their own natural sympathies may be jaded by years spent skeptically reviewing claims of questionable merit, they nevertheless remain extremely sensitive to the potential for juries to be

manipulated (or enlightened) by skilled plaintiff's counsel and are often even more knowledgeable than you are about the most recent, substantial or cutting edge verdicts. If it translates into an acceptable settlement for your client, it really does not matter that their concern is rooted in their own survival within the insurance bureaucracy, rather than in compassion for your client. They do not have to share your philosophy to want or need a common result, and you need to clear a path for them to do so which does not imply surrender, lack of moral conviction, or a shortage of courage. In short, let them be who they are so long as it works for your client.

MYTH #4: The defense has unlimited funds and so it really doesn't matter that much what the case settles for at the end of the day.

Generalizations and misperceptions like this tend to obfuscate the offer-and-demand dialogue during the mediation and undermine the process greatly. Whether it is a large municipality, an insurance conglomerate, a Fortune 500 company, or a publicly-traded entity, budgets do exist in the defense world and ignoring or surpassing them can have real career consequences on the individuals involved. There truly is a point beyond which they will not go. As a consequence, particularly in the case of smaller, non-insured defendants where collectability is an issue, your mediation (subject to strict standards of verification) may sometimes need to take on the character of a cooperative endeavor, with all sides working collectively to allow the defendant to continue to exist, while also seeing that the plaintiff is reasonably compensated over time.

Also, it should be noted that the "defense position" at mediations often has an important history within the defense camp which must be taken into consideration by any settling plaintiff. The extent to which the case has previously been "round-tabled," the evaluations previously made by counsel in its status reports, and the reserves that have been set, all have great bearing on the settlement process. Since

this is what ultimately sets the apparent outside parameters of any plausible settlement, such factors should be closely considered and investigated fully to the extent possible. Blanket assumptions that the claims representative or risk manager has unfettered access to unlimited sources of funds and is failing to make them available to you only out of personal stubbornness, reflect a naïve and superficial understanding of the insurance process and make it that much more difficult to accomplish their possible reconsideration.

MYTH #5: What really matters is what happens at the mediation itself. Since most cases settle, their ultimate value is not directly tied to how extensively they are worked up prior to the mediation itself or the existing relationship between counsel that has or has not been developed.

It is almost always necessary for plaintiff's counsel to begin to sell its case to the other side at an early stage. The initial evaluations of your facts for trial and your own potential competence as trial counsel figure prominently into the presumptive settlement value that any mediator can achieve for you in a given case. The relationship of respect and credibility that you create with opposing counsel long before the case is even set for mediation will bear directly upon this upper range as well. To simply "leave it all to the mediator" is not a particularly effective strategy.

While some mediators and some approaches at mediation can, no doubt, achieve greater results for your client, the mediator is still ultimately building upon the facts that you have established through discovery, the demonstrated likability of your client at deposition, and your own perceived willingness and ability to proceed to trial if not adequately deterred by a fair settlement offer at mediation. As such, every case should be approached as if it were going to go to trial (even if it is not) in order to have the best possible chance that it will not need to do so. Your trial calendar and past verdicts need to be understood, respected

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and appreciated by the other side, and your client and you must reflect the appropriate level of emotional and financial resolve, particularly during the mediation itself.

Just like you can sometimes tell when a defendant truly has to settle a case and would not hesitate to use that to your advantage (e.g., in order to allow an upcoming sale or merger to go through), so too can the defense sense or smell when you really are not in a position to try your client's case. The failure to take, complete or compel discovery; neglecting to hire or designate experts; not bothering to interview or set out-of-state depositions for key witnesses, all send a strong message that you will need to take whatever is offered by the defense at the end of the day. It is your ability to demonstrate the existence of another option and your own willingness to risk trying the case in order to get a more satisfactory result, which creates measurable strength and power in mediation. (Note, however, that this must be a function of your own credibility and preparedness, rather than mere bluster and hyperbole).

MYTH #6: The timing of the mediation and the choice of the mediator don't matter all that much.

Nothing could be further from the truth. The defense often leverages its choice of a mediation date around upcoming expert designations and depositions,

required federal filings, potentially dispositive motions and other future litigation burdens, and you should not hesitate to do so as well. Such tactical planning by both sides encourages a collaborative effort aimed at highlighting the relative likelihood and reasonableness of settlement for each side. Both parties need to be aware that the timing of the mediation can have a direct bearing on its results.

Further, rather than a passive approach of "if it's meant to settle, it will settle," both counsel need to take a proactive position as to the anticipated mediation, including where it will be held, who will be present, how much time is to be allotted, what fee split is appropriate under the circumstances, and, perhaps most importantly, which mediator will have credibility and persuasive influence in both rooms.

The cavalier attitude that specific mediators are fungible and that the mediation process itself can be repeated over and over if not initially successful, is an extremely dangerous and counter-productive one. It is essential that you put maximum thought into which mediator is right for which case and that you not make the error of assuming that doing a "dry run" with a less experienced mediator might not carry with it certain ultimate consequences. Cost considerations or posturing often need to take a secondary role to the credibility and effectiveness of the mediation process itself.

Building upon a previously failed mediation can be an ominous undertaking. While certainly not insurmountable, it is rarely worth the minor savings incurred through earlier experimentation. If you are going to do it, do it right.

Conclusion

Hopefully all of these important choices and decisions will be made on the basis of real information gathered by both sides and without giving undue weight to the kinds of myths and stereotypes which have been explored in this article. Focusing upon "over-reaching plaintiff's counsel" and "heartless defense lawyers" will not make your task any easier. A realistic, credible and also individualistic approach to case evaluation, however, can only yield better results in the settlement process. Giving the other side the benefit of the doubt on occasion and encouraging them to push past their own misperceptions about you and your client in a given case, elevates the practice and the role that we all play within it.

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