An old mediator's thoughts for the young lawyer

BY MYRON "MIKE" A. WALKER JR.

I came out of law school (many, many years ago) fully subscribed to the image of "lawyer-as-gunslinger." Compromise was not part of the picture.

Mellowed by the passage of time, dents in my ego, weariness, senility, and hopefully some wisdom, I have come to see that for the person who really matters, the client, litigation is simply not a happy first alternative.

When mediation first came on the scene (I know. I was there. I'm old.), it was met with pretty widespread skepticism by the legal profession. It is now universally accepted as being eminently preferable to litigation in the vast majority of cases. Insurers like it because it closes files and avoids claim expense. Plaintiffs like it because they get their money sooner. Lawyers like it because they get to watch widescreen television and let the mediator do their dirty work. (Mike Rowe soon to do a "Dirty Jobs" TV show on this).

So as a new lawyer, all primed for litigation and with a belly full of fire, what can you do to get into the mode of compromise? Herewith are a few pointers that will hopefully help your mediations proceed smoothly:

Pre-mediation

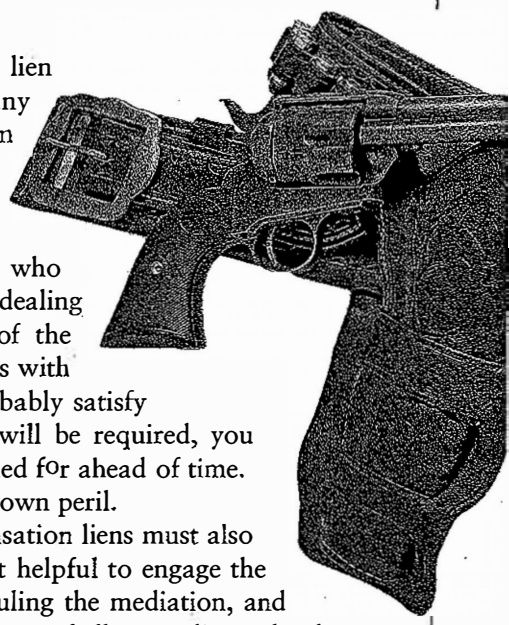
A. Know your case – if you have problems, discuss them objectively with your client. Expectations in mediation should not include "hitting the lottery."

B. Communication among lawyers – nothing is more difficult than trying to mediate among parties who cannot even agree on what the case is about. You should be on the same page with the attorneys in the case if you are going to mediate. If not, you should make every effort to get there.

C. Housekeeping – the lawyers in the case should all agree ahead of time on the mediator, the duration of the mediation, where it will be, who will be there (particularly adjusters) and how the cost of mediation is to be handled.

D. Evidence – with the exception of impeachment material, it is crucial that all sides share their entire universe of evidence. Additional items (like another MRI or surgery) first made known at the mediation almost inevitably prevent settlement.

E. Liens – perhaps the most vexing problem faced by parties and mediators today. In the case of Medicare or Medicaid, you should communicate very early in the case with the relevant lien holder. It often takes many months for Medicare, in particular, to provide a figure for its lien claim. There are a number of companies who now specialize in dealing with Medicare ahead of the mediation to arm parties with a figure that would probably satisfy the lien. If a set-aside will be required, you should have that provided for ahead of time. Ignore this step at your own peril.



F. Workers' compensation liens must also be dealt with. It is most helpful to engage the comp adjuster in scheduling the mediation, and to have a complete printout of all expenditures by the compensation carrier, both as to indemnity and medical, and to see that arrangements are made for Medicare set aside, if one is called for. Be aware, however, that recent experience has shown that some carriers will be very difficult to deal with no matter what you do, and often will be the biggest stumbling block in achieving a mediated settlement. Talking to them ahead of time may prevent unpleasant surprises at the mediation.

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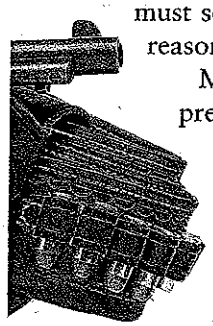
G. Position papers — preferably, these should be no more than four to five pages, identifying issues, strengths, weaknesses, "hot buttons" (like an extremely angry insurance adjuster, or a client with a very checkered background) and imminent trial or motion dates. Bear in mind that you do not need to try the case to the mediator. That tactic is of minimal effectiveness. More useful to the mediator is information that may cause for concern or optimism if the case goes to trial, or external factors that may drive the negotiations.

H. Pre-Mediation Negotiation – exchanging demands by all involved can be very helpful in "jump starting" the mediation. Arriving on the day of the mediation to find that the plaintiff is at $2,000,000, the defendant

is at $2,000, and the comp lien is not negotiable at $380,000 is a sure recipe for failure. It is essential that the attorneys shed their adversarial roles and become collaborative in endeavoring to position the case so as to have a reasonable chance of success at mediation. This does not mean surrendering your strongly held positions, but requires mutual agreement that neither side can guarantee the result it hopes to achieve at trial. It has been my experience that the plaintiff's and defendant's versions must somewhat overlap in order for the case to have a reasonable prospect for settlement.



My partner, Scott Love, has a very good article on preparing your client for mediation, which can be found in the June 2008 issue of *Around the Bar.* If you need it, Scott or I can provide a copy or you can obtain one from Lisa Scalise at Perry Dampf Dispute Solutions — 225-389-9899.

At the mediation

A. The Cast - The lawyers, adjusters and mediator will all be very comfortable. Your lay client, however, will feel like he or she is being waterboarded. A certain amount of acclimatization, therefore, is in order, which many mediators will handle by directing their opening remarks to the lay persons in the room. After the openings, though, you as the attorney should collaborate with the mediator in caucus, in an attempt to position the mediation to a point at which it will be difficult for the client to walk out on the negotiations at the end of the day. It is of paramount importance, though, that clients always know that the decision to settle, or not to settle, is theirs and theirs alone.

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B. Your mindset – many lawyers simply treat mediation as they would a trial. In my experience, those attorneys who are most successful at mediating realize that mediation is an art and discipline unto itself, wholly separate from trial. These lawyers come to the mediation to openly and objectively explore possibilities for compromise. They recognize, wisely, that they can "put the gloves back on" if their clients cannot reach a settlement. They also recognize that in order to mediate effectively, one must act collaboratively for the day. Adversarial approaches are not conducive to successful mediations. Leave the chest-pounding at home.

C. Mediation Calisthenics – Be prepared, whether plaintiff or defendant, to discuss practical considerations with your client. Here you must be brutally objective about your case (this will be strictly confidential) and take off your "advocate" hat. In addition to exposures that may be faced at trial (for plaintiff or defendant) some of these are: (1) best and worst possible trial outcomes; (2) median (6 out of 10) verdict range; (3) expense of going to trial; (4) time remaining from mediation to trial; (5) highest/lowest verdicts court of appeal will not disturb (assuming an otherwise clean record); (6) plaintiff: lowest verdict you would sustain without recommending an appeal to your client; defendant: highest verdict you would sustain without recommending an appeal to your client, solely on quantum basis, assuming otherwise clean record; (7) cost on appeal; (8) time to completion of appeal and ability to collect/pay judgment (in some circuits this is two years or more); (9) cost and time if either party applies to the Supreme Court.

There are other factors of course, but the foregoing helps the non-lawyer understand the very real distinction between settlement value and "what the case is worth." I recently mediated a case in which plaintiff's counsel stated that $125,000 would be in the low end of the verdict range, but still in the median verdict range. Defendant had offered $125,000, but the client wanted $180,000. The defendant was packing up to leave the mediation. I asked plaintiff's counsel to assume that he went to trial, got a verdict of $125,000 (the amount on the table), and the case was appealed and then collected. I then asked the plaintiff attorney to do his disbursement sheet based upon this hypothetical verdict. That analysis yielded a net of $75,000 to the plaintiff, but 18 months into the future, after adding interest and deducting expenses of trial, appeal and attorney's fees. I then asked the plaintiff's attorney to do a hypothetical disbursal of the same amount, assuming it had been accepted at settlement and was received within 30 days. This analysis yielded $72,500 if the case settled with the money being disbursed within 30 days. The client exclaimed, "Eighteen months for $2,500? Take the money!" While the client characterized the decision as a "no brainer," the foregoing "mediation calisthenics" had to be discussed thoroughly before he arrived at that epiphany.

What are we here for?

As a young lawyer, it helps to keep in mind that mediation is not about "winning." On the plaintiff's side, it is about arriving at an acceptable (if not perfect) solution, closure and removal of stress from one's life. For an insurer, it is closing the file at an acceptable (if not perfect) figure. For both, it is about avoidance of significant stress, delay, expense and a bad result at trial. Unpredictability of juries is, and ought to be, a significant factor in the decision to settle.

Finally, a word about the power of humanness, humility

and forgiveness. I recently mediated a tragic case in which an attractive, single, 29-year-old kindergarten teacher had been injured by a piece of falling gym equipment. The gym owner had failed to bolt the equipment to the floor. Her injuries included the following (not a complete list):

- Loss of right eye – there was a hole in her head where the eye had been;
- LeFort III Maxillary Fracture – complete detachment of the bony structure of the face from the skull; The surgeon is able to manually pick up the face and move it around on the skull;
- Loss of sphenoid wings bilaterally (the sphenoid wing is a complex, roughly butterfly-shaped bone that goes from one temporal bone of the cranium to the other, articulating in between with the ethmoidal spine, the olfactory lobe, the frontal bone of the cranium, the occipital bone of the cranium, many of the 12 major cranial nerves, the palate and roof of the mouth, the sense of taste, smell, and the dental structures of the cranium);
- Blowout fractures: orbital rim, right eye; roof of mouth into nasal floor; maxillary sinus into anterior cranial fossa;
- Over 50 plates and screws in her face and skull;
- Nose completely crushed;
- Numerous reconstructive and plastic surgeries ahead of her.

The young woman's anger, and that of her parents, completely precluded any attempt at commercial discussions. They literally wanted a pound (or more) of flesh from the defendant gym owner.

It being obvious that we could not mediate the case without dealing with this issue, we decided to call the gym owner, a young man who until the accident had been a personal friend of the plaintiff. He agreed to come to the mediation, whereupon all gathered in the same room. After much venting by the plaintiff and her parents and much heartfelt apology and regret by the gym owner, the young lady and the owner ended by embracing.

There was not a dry eye in the room.

Amazingly, the hostile energy was thereby taken out of the equation, and the case went on to settle. But I will never forget the lesson it taught me, which I believe is one from which all of us can benefit in mediation (or law practice or life, for that matter):

At bottom, we are not about impressing others with our lawyerly skill and sophistication. Rather, our highest and best calling is to represent our clients competently and well, while yet exercising our humanity and humility to enable us to allow those with whom we deal to preserve their dignity, and as a result, their respect for what we do, no matter the outcome of the mediation.

GAIL'S GRAMMAR

To *entitle* is to give the right to claim something. To *title*, however is to give something a name. Casually, *entitled* is often used to mean *titled*. But for formal writing, use entitled only when referring to a right.

EXAMPLE: He is *entitled* to two hours of CLE credit because he wrote the article for *Around the Bar* titled "An old mediator's thoughts for the young lawyer."

Fax ideas for future "Gail's Grammar" columns to 771-5913, call Gail at 771-4900, ext. 216, or e-mail her at Gstephenson@sulc.edu.