Upgrade Your Case from Mediation to Guaranteed Settlement

Philip M. Hof, Esquire

Any litigator spending an unsuccessful day in mediation knows the feeling: the client was ready to settle, a release and a check would be exchanged and the risk of an unfavorable verdict would be eliminated. But none of that happened. After twelve hours spent driving from distant points and sitting in mediations, the parties were no closer to settlement then they had been the day before. Without question, some cases can only be resolved by trial or by new arbitration because there is a fundamental disagreement on liability, the law, or the resulting damages. By contrast, many cases in mediation do not resolve simply because of the failure of one or both sides to anticipate the people and information required to bring about a settlement on mediation day.

Although no one can guarantee that a mediation will lead to a settlement, consider the following ten-point guide to improving the likelihood of success.

1- **Have all key players present:** Here is the scenario: By midday the parties have moved closer to settlement. Abruptly, the adjuster from Omaha says that she must leave within 45 minutes in order to make the last flight home. At the same time, opposing counsel has finally reached the worker's compensation manager seeking a compromise of the subrogation lien which will be required if the case is to settle. The case manager explains that there is a separate subrogation adjuster who is on vacation, but they will try to find his supervisor. The supervisor calls, but she will require at least a day to become familiar with the case!

   Many injury cases fail to settle simply because counsel for plaintiff has taken no steps to include the subrogation adjuster or subrogation counsel in the mediation

process in advance. A lawyer should not expose a client to mediation without first attempting to secure the participation of any necessary third parties, such as the subrogation lien holder or the billing supervisor in a hospital that is being asked to compromise the debt. A substantial case against a municipality might require the presence of key council members to be able to ratify a settlement. An adjuster stating that she just flew in from Kansas should be asked if she will be present the entire time allotted for the mediation. And if the parties are very close to settlement, ask the mediator to make extra time available, if possible, rather than resuming phone conference negotiations the next day. If a case does not settle on the day of mediation, the odds that it will settle in the following days quickly decline.

2- **Overuse of Confidential Memoranda:** Because mediation permits *ex parte* communications with the mediator, one or both parties often will submit confidential memoranda to the mediator ONLY. Confidentiality encourages open discussion of the strengths and weaknesses of that party's case, as well as settlement expectations. While confidential memos do serve a function, for example in sharing a draft expert report that has not yet been finalized, they can often provide information that would help settle the case if made known to the other side. Most effective is a memorandum shared with opposing counsel which advocates the strengths of a party's case, with only strictly confidential information being provided in a separate memorandum to the mediator.

3- **Preconditions:** With mediation becoming more common, unfortunately some parties participate without a real resolve to settle the case. The mediator often hears, "I never would have taken the time, put my client through this and incurred the expense had I known that the other side was going to be so unreasonable in its initial figure." Counsel should communicate with one another frankly on the likely opening range of demands and offers. Some lawyers will not mediate unless, the other side agrees to a minimum offer or a maximum demand as a precondition to participating in mediation itself. However, usually one party or the other will not agree to this arrangement, and an opportunity to mediate can be lost. Even when parties agree on opening figures, that does not assure that they will continue to negotiate in reasonable increments. While pre-mediation expectation conferences between counsels can be helpful, preconditions imposed on opening settlements and demands are usually counterproductive.

4- **Timing:** While early mediation, even preceding the filing of a complaint, is often commendable, it may not be realistic. Otherwise, the other side will expect your client to compromise twice: once on liability, which is hotly disputed, and a second compromise on damages, which have not yet been developed. In some cases, a

case can be settled best before a summary judgement motion is decided, for example, on the duty of a landlord to control a subcontractor. On the other hand, a lawyer feeling confident in the outcome of that motion may advise the client to mediate, but not until the motion has been decided. Ask yourself-if you represented the other side, would you have enough information to assess value?

5- **Client Expectation:** It is the responsibility of counsel, well before the morning of mediation, to explain to the client what to expect. Mediation means compromise, not winning. Each side must discount expectations in exchange for an elimination of risk and to end further litigation. Settlement authority can only be granted by the client and must be respected by the lawyer. But the lawyer has the training, experience and, hopefully, the wisdom to advise the client how to respond to mediation negotiations. Any lawyer who simply asks a client, "What do you want to settle the case?" is a lawyer who should plan on the case not settling. The lawyer is paid to advise the client on the often subtle issues that should be considered before initiating or responding to negotiations. Do not delegate that task to an independent client.

6- **Decision by Committee:** Occasionally, an extended family member or close friend will assume a dominant role in the mediation. Having no direct stake in the outcome, he or she may encourage the plaintiff to roll the dice and hope for a high verdict, without considering the attendant risks. While the plaintiff may rely on trusted advisors, beware of those friends or extended family who characterize every offer as an insult, and advise that, if anything is offered, it must not be in the interest of the plaintiff. The mediator should implore counsel to consider the best interest of the client and advise the client accordingly.

7- **Terms of Payment:** Assuming a number is agreed upon, what about the terms of payment? If defendant in a breach of contract action needs ninety days to make payment, will interest be paid? Will security be posted or a consent decree entered of record as security? In tort cases, where the carrier is accompanied by a structured settlement specialist who sits through the mediation for the entire day, it is likely that the defendant will resist settling without at least a partial structure. Will a structured settlement be rejected by the plaintiff? If not, does plaintiff have a structure specialist available by telephone to determine the value of the settlement and the soundness of the investment?

8- **Don't Leave the Law at Home:** Particularly frustrating are mediations that fail simply because opposing counsel do not agree upon the controlling standard of care or legally permitted damages. Hours can be wasted disagreeing on liability

in a landowner, dram shop or professional negligence cases. Counsel should be prepared to provide legal support for his client's position so that time can be spent negotiating, not wasted arguing the applicable legal standards.

9- **Liquidated Damages:** Counsel for both sides should go into a mediation with a clear understanding in advance of what liquidated or special damages are claimed. In an auto case, have the bills been reduced in accordance with the Financial Responsibility Law? Have unpaid or co-paid medical expenses been supported by underlying invoices or provider statements? Has applicability of subrogation been confirmed? Does any wage loss claim include proof that first party auto medical benefits and disability policy payments have been subtracted from any claim? Finally, has a clear spreadsheet been prepared summarizing and providing a total for these damages?

10- **Nail it Down:** Take the time to confirm a settlement before leaving the mediation. Counsel often congratulate one another on settling and, then they're out the door. First thing the next morning, an email awaits advising one party that the other does not consider the settlement to be binding! Consider dictating and signing a memo of understanding before leaving the mediation. A reference to executing a "standard" or "MCare" release can be incorporated. Confidentiality should not be suggested as an afterthought but should be made a term of the settlement in advance. Consider stipulating that the mediator shall act as sole binding arbitrator for purposes of resolving any disagreements in completing the settlement process. This virtually assures that a settlement will not come apart.

Phil Hof is an arbitrator/mediator with ADR Options and a plaintiff's personal injury lawyer who regularly represents physicians as personal counsel