

Caring about Getting a Settlement

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Learning objectives: This paper argues that adjustors/claims managers, and defense lawyers can and should do more to increase the chances of a claim/case settling . . . before, during, and after mediation, and offers some suggestions about how to do it.

I. PERSPECTIVE

- A. Legal career
- B. Judicial career
- C. Mediator career
- D. Ignorance of your corporate culture

II. ATTITUDE OF YOUR SIDE

- A. Caring without communicating fear or weakness
 - 1. Plaintiffs (most) prefer not to sue
 - 2. Don't make it morally justifiable or essential if you can avoid it.
 - a. "He never even said he was sorry!" "The adjustor was rude and insulting!"
 - b. How about a letter/call /visit to plaintiff from your insured? (Doctors who admit blame and apologize get sued less, not more.)
 - 3. Don't create distrust. Appear honest and helpful.

4. Be frank about option of litigation v. settlement.
- B. Encourage and remind them to give what you need to evaluate case.

III. MEDIATION

- A. Don't be afraid to suggest it (Before suit is OK!).
- B. Timing of mediation
1. Judicial mandates: Speak truth to power; tell judge if you're not ready.
 2. Schedule it even if all work not done; gives something to work toward.
- C. Who's in charge? You or defense lawyer? Tell them to return calls and emails.
- D. Help (make) plaintiff's lawyer prepare! (Why be indifferent to whether the mediation succeeds?)
1. Importance of preparation
 - a. Pres. Abraham Lincoln and Coach John Wooden
 - b. The "most effective negotiation tool"
 2. Lack of preparation
 - a. Number one complaint of mediators
 - b. Difference between "arbitration" and "mediation" (preparation)
 - c. *Caring* about outcome not a substitute for preparation
 3. Encourage submission of damage evidence (medical bills, records, wage information) early.
 4. Send reminders? ("squeaking wheel")
 5. Suggest postponement? Involve mediator.
- E. At mediation
1. *Care* without communicating fear or weakness: "Let us never negotiate out of fear. But let us never fear to negotiate." Pres. John F. Kennedy
 2. Getting to ZOPA ("Zone of Possible Agreement")
 - a. Low-ball in response to high-ball : "We'll get reasonable when they get reasonable!"

- b. “Low-hanging meat” works both ways.
- 3. Use as opportunity to convince opponent
 - a. Don’t let your pride (or theirs) get in the way.
 - b. Don’t delight in shaming plaintiff’s lawyer (plaintiff may go get a better one!). Produces resentment and defensiveness to save face.
 - c. Be credible (e.g., don’t summarize excerpts from documents, use the real thing; be careful in complementing opposing lawyer, or expressing empathy, lest you appear phony).
 - d. Show respect for the process (close the smart phone, laptop, tablet, etc.; pay attention to the opponent’s presentation, or appear to).
 - e. Analyze options: settlement v. trial
 - (1) time (including appeals! Timeline is powerful)
 - (2) expense
 - (3) uncertainty of outcome
- 4. Treat opponents with respect
 - a. Control your own behavior. Don’t counter-attack.
 - b. Defuse their anger, fear, suspicion. Acknowledge their points.
 - c. Educate them to costs of not settling. Demonstrate your BATNA.
 - d. Turn opponent in to negotiating partner. (Pres. Abraham Lincoln on speaking sympathetically about Confederates)

Getting Past No: Negotiating in Difficult Situations, W. Ury (New York, Bantam, 2007)
- 5. Don’t fear looking for a way to settle. (You DO *care* whether this mediation succeeds or not, right?) (Help the mediator: “Could we have another general session today, to try to break the impasse?”)
- 6. Try hard to be objective. Demand that your lawyer help you. Discourage playing to you as audience.

- a. Avoid “self-serving role bias.” (Harvard buyer/seller example). “I sometimes failed to persuade the court that I was right, but I never failed to persuade myself.” Roger Fisher
 - b. Avoid “partisan perceptions.” Human tendency to disparage or vilify opponents. Can become self-fulfilling prophecy. More likely to act in ways that worsen other side’s behaviors. *The Godfather, Part III*: “Don’t hate your enemies. It only clouds your judgment.”
- 3-D Negotiation*, D. Lax and J. Sebenius (Boston, Harvard Business School Press, 2006)

- 7. Avoid the blame game; do what it takes to keep communications alive.
- 8. Don’t ask mediator to breach ethics (“Who’s in charge in the other room?”). Demeaning and distracting.
- 9. Don’t spend TOO much time arguing over who is “right.”
- 10. Manage your pessimism (most mediations have it); stay patient; remember the statistics.

IV. AFTER MEDIATION

- A. Don’t part enemies.
- B. Call or use email to continue communications; involve mediator to keep it a “mediation.”

V. CONCLUSION

“Blessed are the peacemakers, for they will be called sons of God.” MATTHEW 5:9 (New International Version, 1984)

"Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison." MATTHEW 5:25 (New International Version, 1984)

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