Inns of Court - September 8, 2005
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Subject: Getting a Civil case resolved

1. The best way for Plaintiff's counsel to get a case resolved before trial is to give the impression you are ready to go to trial:

a. Know the facts, backwards and forward. **Do the work** and let opponent know you have done the work. Be prepared to show the insurance representatives the risks the carrier takes by not moving realistically. Send a message to the insurance carrier that you are not going to stumble in presenting this case to a jury.

b. Have your exhibits marked and in the hands of opposing counsel and the insurance carrier **ahead of time** and before the carrier has made its evaluation of the case.

c. **Complete all discovery** including engineering and medical reports from your experts. Nothing hurts a mediation more than the insurance representative getting information for the first time as they sit there. They have directions for the mediation based on what has been submitted to them. Make sure you have updated your Gordon v. Noel Interrogatory Answer.

d. **Know the evidentiary problems** and have plans to get around them, e.g. post-remedial changes or foundation issues with experts. Be prepared to meet the weaknesses of your case that you expect the opposition to raise. Explain these to your client before the mediation.

e. Evaluate the strengths and weaknesses of all the **witnesses in front of a jury** including the Plaintiff and the Defendant. Discuss these matters frankly with your client before the mediation.

f. Know the likely attitudes of the **jury panel in the venue** of your case and explain that to your client before the mediation.

g. Know something about the trial experience and abilities of **opposing counsel** and how you might neutralize his/her influence at trial. Discuss these matters with your client before the mediation.

2. Plaintiff's counsel at the mediation must use skills as an advocate with the opposing side, but try to be as realistic as you can in private with the client. Remember it is his or her case. **Let the mediator do his or her job**.

a. **Prepare your client** for the trial and for the mediation. Think about letting client speak at the joint session of the mediation. It is likely the insurance representative has never seen the Plaintiff. All the representative has is what his lawyer has told him, and that might not be a fair evaluation. This can be especially helpful if your client has jury appeal.

b. Make your demand high enough to give you **room to negotiate**, but not too high that it is an immediate turn off. Make sure you explain to your client that often in the first stages of negotiation the Plaintiff must move more than the defense moves. Avoid setting up the retort, "We've moved $ _____ , and they have only moved $ _____ . They are not negotiating in good faith." Remember your movements send messages and the opponent's movements have messages as well. Make sure you position your client to move toward reasonable positions.

c. Some lawyers in the private session with the mediator make their case seem invincible with the result of **driving the expectations of the client** to unreasonable heights. To a certain extent you have to pump the mediator up, but after the mediator leaves, bring the client back to earth.

d. Know exactly where you stand with the interests of **subrogated carriers** and make sure your client understands how you will get to a net figure before trial and after trial. You need to have had contact with these folks before the mediation. If possible, have a way to contact these lien holders during the course of a mediation.

e. Know the problems and explain to the client the consequences of trial when there is a **workers' compensation lien**.

3. Counsel for the Defendant and insurance carrier must also send the message to the Plaintiff that he or she is prepared to defend the case.

a. Make sure you receive and carefully **review the Plaintiff's discovery** responses. Urge Plaintiff's counsel to give you the materials needed by the carrier for a proper evaluation of the case.

b. Try to be prepared to nail down **how strongly you intend to contest liability**. Try to have the definite references to medical records that go directly to the causation problems and the permanency problems. Make notes of the gaps in treatment and the

negative matters. The **mediator will need to have these tools** when he caucuses with the Plaintiff and Plaintiff's counsel. It is surprising what effect the use of these records has in bringing the Plaintiff down to a reasonable position.

c. Plaintiffs sense when the Defendant's counsel knows the case. However, Defendant's counsel needs to be careful not to make the Plaintiff angry. What **Defendant's counsel needs to do is gain the respect of the Plaintiff** . Scare tactics usually have a reverse effect.

4. At the mediation the defense counsel needs to remember that his primary duty is to the insured client.

a. The **relationship of counsel to the carrier** that hires him or her can be a bit of a problem in a mediation. Often the insured Defendant is not even present for the mediation. In that case Defendant's counsel needs to explain directly to the Plaintiff the absence of the opposing party from the mediation. In cases where the demand is in excess of the policy limits, it is important to have the defendant present. It is probably a good idea to have the Defendant present if the possible jury verdict could exceed the policy limit.

b. Another problem is that because of the nature of many carriers concerning the hiring of counsel, the Defendant's counsel is very aware that his evaluation and conduct at the mediation may have a bearing on future employment opportunities with the carrier. This results sometimes in some **posturing by counsel** and such posturing may not be helpful to the mediation process. A mediator always takes into consideration the relationship of counsel/carrier because the mediator doesn't want to damage that relationship, but sometimes has to get around it by indirectly bypassing counsel.

c. **Be careful not to low-ball** your own evaluation so that at the mediation you are forced to admit to your insurance client that you have possibly undervalued the case. Some defense counsel can really be an impediment to a good settlement because they do not want to lose face with their insurance carrier client.

d. Often Defendant's counsel does not know what **reserve value** the carrier has placed on the case even though the lawyer's initial evaluation may have an impact on the reserve value placed on the case.

e. Often the insurance representative is on a **short leash**. It is helpful for the mediator to have some idea that it may be necessary to contact someone else at the carrier for authority to make a move.

5. The mediator is seldom in charge of many aspects of the mediation.

a. **Who is present at the mediation?** Often the insurance carrier wants to participate by telephone. This is unfortunate because the nature of the mediation process involves a feel one gets from the face-to-face communication, not only with the opposing side, but also with the mediator.

b. **What about the Plaintiff's friend?** Beware the Plaintiff that brings a relative or friend to the mediation. In most cases it works as a disadvantage because the friend often tends to be a hardliner wanting to show support for their friend or relative.

c. **What are the facts and issues?** The mediator knows nothing about the case except what is given him by counsel. It is really important for the mediator to get Confidential Mediation Statements from counsel. It is not that important to the mediator, if the information is exchanged or kept from the other side. It makes a difference to the course and efficiency, if the mediator can know the undisputed and the disputed facts before the mediation. Sometimes there are particular legal issues that the mediator should brush up on before the mediation starts, e.g. Fireman's Rule.

d. **What about the non-lawyer representative for the Plaintiff ?** It can be a real mistake to proceed with mediation in this situation.

e. **What about the mediator's opinion or evaluation?** Most mediators do not want to go there, because it has the effect of drawing a line in the sand in the minds of the decision makers. Sometimes at the very end the mediator might give strong impressions.

f. **What about the pre-mediation miscommunication?** What one side believes the offer or demand is and the other-side understands may be very different. Often there is a disagreement on whose turn it is? As a matter of form the parties should have this straightened out prior to the mediation because otherwise there is a lot of time wasted in straightening it out and getting the mediation on track.

g. **What if there really is "no good faith"** This can be a killer. Mediators do not like to be used. Lawyers that practice this way are soon discovered and should beware in future negotiations.

h. **At what point is the best time for a mediation?** This varies. If the parties come in early there needs to be a mutual acknowledgement that there will be previously unknown matters which will surface in the mediation and both sides need to be very flexible in order to get by the problem.

i. **What approach should counsel take in the opening joint session?** The only thing that is really important is that everyone remembers that mediation is not an advocacy contest. The goal is a peaceful resolution in which both sides have some risk.

j. **What about a time deadline for resolution?** This operates against resolution. It has usually taken about two years to get to the mediation table. To rush the process at that point seems pretty shortsighted.

k. **Where should the mediation take place?** Some like to have a neutral setting. Others like the place with the best facilities. The secret is to have the mediation location that offers some privacy to the Plaintiff and at which the Plaintiff is most comfortable.

6. The **multi-party** mediation offers some problems.

a. It is good to know whether the Defendants are at war with each other on the liability issues. If they are not at war except for the percentages of fault it may be advisable for the counsel for Defendants to meet alone after the opening session to try to at least let each other know where they are coming from.

b. Usually a mediator will have to get a sense of how fault, if any, will likely be apportioned, or at least how each of the parties views this issue. This can be done to a certain extent in the mediator's first meeting with the Defendants.

c. Plaintiff's may want to consider picking off some of the Defendants with less exposure before going for the bigger bait. Sooner or later one or more of the Defendants is likely to feel lonely. However Plaintiff must always be aware of the empty chair approach the remaining Defendant or Defendants may have at time of trial.

d. Sometimes there are multiple Plaintiffs. It is necessary to find out which attorney is carrying the ball on offense. Find out the Plaintiffs that are in suit for the principle of the case. Find out which of the counsel for the Plaintiff are just along for the ride. Find out which Plaintiff or Plaintiff's counsel the Defendants most fear (usually the one carrying the ball).

e. With multiple Plaintiffs it is important to figure out the specials and the permanency issues in order to approach the sharing of whatever pot can be collected. There may be coverage issues in doing all this that have to be kept in mind.