COOPER MEDIATION

Personal Injury Mediation: Strategies for Breaking Through Negotiation Barriers – A New Lawyer's Guide

By Jonathan Cooper, Cooper Mediation Inc.

In the first post in this series, I discussed how personal injury insurance mediations are position-based, some of the common stumbling blocks in negotiations and why mediated settlements are still often seen as preferable to going to court. In this post, I explain how to set yourself up for success during mediation and offer tips on breaking through negotiation barriers.

Prepare Your Client

What makes a good lawyer? It's a question that has many different answers depending on the situation and context – and it's important your client knows this. Your strategy, style and personality as a litigator in a courtroom setting will likely be quite different from how you present yourself as a negotiator at mediation.

Perhaps your client has heard that you have a "tough-as-nails" or "take-no-prisoners" reputation. Maybe you've started explaining your plan of attack should the matter ever come before a judge or jury. Your client's expectations for your performance in a courtroom setting may be completely different than the approach and tone you may adopt for mediation.

Ensure your client knows that dispute resolution in mediation, while still competitive and often intense, requires a degree of cooperation, compromise and flexibility that is absent in court. If they understand this difference, they will not be unpleasantly surprised if you exhibit these skills while negotiating.

Most times, especially with plaintiffs, there is a personal attachment to the value of the claim. It is important for counsel to explain the art of negotiation in mediation to a plaintiff (or inexperienced claims representative). Mediation is a time to look for a common settlement range. A reduction in the proposed settlement amount does not mean the plaintiff is "losing money." This change in thinking allows a plaintiff to see what they're gaining instead of mourning a loss for funds they are not guaranteed. The money doesn't exist on a plaintiff offer that isn't accepted by the defence and vice versa.

Opening Statements and Approach

As at trial, you will be given the opportunity to make an opening statement. However, the type of statement you make at a trial would likely be substantially different than one you'd make at mediation.

In a judge or jury trial, your goal is to convince your audience that you have the superior case based on the facts and the law. In mediation, your goal is to convince your opponent that the risks involved in going to trial make settling (preferably on your terms) something that is in their best interest.

What is the difference? Truthfully, there is some overlap. You should express and exude confidence in your position as you would in a trial setting. However, rather than attempting to put the opposing side on the defensive by attacking their points or evaluation of the evidence, you should simply highlight all the potential paths a trial could take and emphasize the potential risk if things do not go their way.

A good opening statement would highlight the benefits of reaching a mutually acceptable settlement and establish a respectful, civil and cooperative tone to lead you there. By conducting yourself professionally, showing discipline and restraint and demonstrating a thorough understanding of the complexity of the case, you may also prompt them to think twice about facing you in court later. In this sense, it is often seen as a dress rehearsal for trial.

As Alexa Morrison, an American-based litigator turned mediator, writes in Negotiation and Settlement: Weapons of Peace, in mediation the best offense is to not put the opposing party on the defensive through aggressive and unrelenting arguments. "Nobody in the room will react well to feeling bullied," she explains. "More than likely, backs will be raised, defense mechanisms will be activated, and humbling the bully may become more important than settling the case." A calm presentation of the facts and evidence with an analysis that reveals how a trial could take some unexpected directions is more likely to convince the other party that reaching a settlement is a safer option.

Know Your Settlement Range

As you identify the risks of a trial and all the potential ways it could go in your favour or terribly wrong, you will have started the process of establishing your own settlement range. Think of your range as your "best possible day in court" versus your "worst possible day in court" based on the known facts of the case, the law and precedents. In most scenarios, the case shouldn't settle in mediation at either extreme or end of the spectrum. Although this will establish a primary range for an acceptable settlement, since proceeding to court results in added

uncertainty and the potential for additional costs, a “worst possible day in court” should take these factors into consideration.

Knowing your range is not the same thing as your relative position within the range. What is the likelihood everything will go your way in court? What is the likelihood the judge or jury will accept all of the opposing counsel’s arguments and reject yours? As you negotiate and uncover more information about the opposing party’s position and arguments, you may find your odds of success in court change.

If the parties involved in mediation have ranges that overlap, there is an opportunity to compromise and reach a settlement prior to bringing the matter to court. However, this range could vary considerably. If you have confidence and trust in your mediator, consider sharing your general range after a couple of rounds to facilitate movement. (S)he may be able to alert both sides if there room for agreement and facilitate movement to get to the overlapping range.

Make a Plan

Although it’s fairly common for parties to have an idea of their range for settlement based on a case analysis, J. Anderson Little, a mediator and author of Making Money Talk, suggests that often the challenge is lacking a plan for reaching a settlement beyond reacting to another party’s most recent offer. This, he contends, is not proactive or productive. As we’ll see below, indirect communication with the opposing party through these proposals can often lead to misunderstandings of intent, suspicion and breakdowns at the negotiating table.

While it’s important to consider how your actions are being read by the opposing party when negotiating, since they may indeed react to them, it can be very helpful to create a plan for settlement to avoid reacting or overreacting to the opposing party in the mediation.

A plan for settlement is a plan for movement. Sustained or building movement from a party (in whatever increments you find appropriate) is more likely to induce similar movement from the opposing party or at least a willingness to stay at the table for additional rounds. To reduce opportunities for an offer that is a negative reaction to an opposing party’s offer or actions during a round, you may consider preparing a number of offers in advance to use regardless of the counteroffers you get. “Remain objective. Resist the temptation to attribute bad motives to those affiliated with your opponent.”

Understand How Your Actions Could Be Read by the Opposing Party

Without knowing the opposing party’s acceptable settlement range, the offers tabled in negotiations and the movement between rounds are usually dissected to glean as much

information as possible – not only about monetary expectations but also the desire to reach a settlement. Money is the clearest form of communication.

Keep in mind that indirect communication through these monetary offers can lead to much unintentional confusion. Ask yourself these questions: 1) What message am I trying to send with this offer? 2) What message might they take from this offer?

- *Low/High Ball Offers:* Your acceptable range for settlement may vary considerably from the opposing party. Are you starting and/or staying at one extreme end of this range? Is this likely substantially out of the range of what a case is worth? Could they think further rounds are a waste of time? Opening offers which are not only out of the opposing party's range but also significantly beyond your own best-day in court scenario are more likely to lead to failed negotiations.

- *Increments:* How much movement are you showing towards the other end of your range? What signal might you be sending by reducing/increasing these increments in subsequent rounds?

- *Reflexive Emotions:* It's human nature to act reflexively in competitive negotiations. If we see movement from the other party, we are more likely to respond with movement in kind. If we sense stubbornness, based on an offer, we are less likely to make our own concessions in the round. What reaction are you hoping to achieve from the other party? Are you signalling that you are frustrated, discouraged or offended by the opposing party's action or willingness to continue discussions? Move with money but attach messages or meaning and send that through the mediator.

Bring It Back To the Facts and Risks of Litigation

While certain actions or strategies in negotiations can provoke some unintended and unproductive reactions, if you're able to remain calm, cool and collected during negotiations you can continue to make your case that the security and finality of settlement outweigh the risks and uncertainty of a trial. In making this case, Morrison suggests that you "break the analysis down into the various phases of proceedings: case preparation, filings, motions, discovery, hearings, trial, appeals. And put specific dollar ranges on each phase." Is it really worth it to continue and roll the dice if a settlement is potentially at hand?

Consult Your Mediator

I hope lawyers new to mediation will see these blog posts as helpful as they are introduced to the most popular form of dispute resolution. Time and experience are the best teachers. As you participate in mediations, you will learn what strategies and tactics work best for you and how to respond to the type of negotiator you find sitting across from you. Remember, whether you're

new to personal injury mediations or a seasoned pro, trained mediators are present at these sessions to help all parties overcome obstacles that might otherwise prevent a mutually acceptable settlement. Rest assured that we are ready to put our expertise to work for you in these challenging circumstances.

ABOUT THE AUTHOR

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