Tips for Young Lawyers

By Carie L. Hall and Michael L. Forte

Ten Tips for a Successful Mediation

Florida courts require parties to attend a mediation conference before trial. Lawyers who view mediation simply as a required exercise, however, do their clients a disservice. Every lawyer will experience a mediation conference in which opposing counsel is unprepared and does not appreciate the details of his or her client's position or damages. All too often, lawyers appear at mediation with no planned presentation and no plan for negotiations. In those cases, mediations can be unproductive. However, with adequate planning, preparation and communication with your client, you can set your client up for success at mediation even if the other side is unprepared. Below are ten tips to guide you toward success.

Confirm objective information in advance. A personal injury case is unlikely to settle if the parties cannot agree on the extent of medical treatment or the amount of medical specials. Where a discrepancy does exist, often the plaintiff has the more up-to-date information. To avoid this scenario, send updated discovery requests to the plaintiff two months before mediation. At the same time, request updated medical records and bills from the plaintiff's main medical providers and lien-holders. These steps will go a long way to prevent surprise during the plaintiff's opening statement. If a surprise does occur, at least you will be able to explain your pre-mediation efforts to your client, and that the plaintiff failed in his or her obligation to provide the requested information.

Never trust technology. If you use technology to present your opening statement, test the laptop, projector, and screen in your office the day before you mediate. Arrive at the mediation location at least 30 minutes early for setup. You do not want a room full of people watching you silently for 10 minutes as you untangle and plug in cords. Instead, you want everything in working order by the time your client walks through the door. Bring a hard copy of the presentation with you to the mediation in case the equipment fails despite your best efforts.

Always be right. The opening statement is a time for advocacy on your client's behalf, and your opponent will expect nothing less. But make sure any factual information you convey is rock-solid, and have the supporting documentation at your fingertips in case the plaintiff's attorney challenges you. Having the supporting documentation within easy reach will allow you to project confidence and demonstrate your thorough preparation.

Disclose important non-monetary conditions early and often. After spending hours successfully negotiating a settlement amount, you do not want to have the plaintiff's attorney object to confidentiality. Nor do you want the attorney to object to indemnification, treatment of the outstanding liens, or other non-monetary conditions. To avoid this scenario, relay all important non-monetary terms to the mediator in your pre-mediation written statement. Then relay these terms directly to the plaintiff and opposing counsel at the end of your opening statement. In this way, all discussions of a settlement amount will take place against the backdrop of the non-monetary conditions. If you want a Medicare set-aside, consider sharing the analysis from your Medicare vendor with the plaintiff's attorney in advance. The attorney will need to prepare his or her client for the set-aside concept, and this preparation can be accomplished more efficiently if done before the mediation conference.

Anticipate questions your client will ask during caucus sessions. During caucus sessions, you will be sitting in a room with your client for several hours. These sessions are a good opportunity for you to build on your professional relationship with that client. Also be prepared to demonstrate your mastery of the file. You must be

ABOUT THE AUTHORS

CARIE L. HALL is an associate at the Tampa office of Rumberger, Kirk & Caldwell, P.A. She focuses her practice in the areas of casualty, product liability and commercial litigation. In her casualty practice, she defends clients against premises liability,auto negligence and other tort claims. She earned her law degree from Stetson University College of Law.

MICHAEL L. FORTE is a partner at the Tampa office of Rumberger, Kirk & Caldwell, P.A. He practices in the areas of retail and hospitality, law enforcement defense, products liability and construction. He graduated from Stetson University College of Law in 2002.

ready to discuss your total verdict value and settlement recommendation and your basis for your evaluation of the case. You also must be prepared to discuss exactly what additional work will need to be done to get this case ready for trial. Beyond this, anticipate the small details of the case in which the client may be interested. These details likely did not figure predominantly in your evaluation, but nevertheless help provide a more complete picture of the claim. Which of the plaintiff's medical providers have received letters of protection? What is the total amount of specials plaintiff will be able to board at trial? Did the plaintiff have any gaps in his or her work history? What is the occupation of the plaintiff's spouse? What types of pain medication has the plaintiff tried during his or her treatment course? What are the ages of the plaintiff's children? Each time you mediate, make a mental note of the questions your client asks. In this way, you can better anticipate the types of questions you will receive from that client at future mediations.

Have a recommendation ready. Some clients take charge of the negotiations. For those clients, you will not need to offer much, if anything, by way of advice during the negotiations. Other clients may be indecisive or flatly ask you how much to offer. Regardless, always be ready for your client to ask your opinion. If you have a pre-mediation settlement demand, you can walk into the mediation with an idea of what to recommend as your first offer. Each time the mediator comes back with a new demand, be ready to advise your client regarding what your next move should be and why. Even if your client has taken charge of the negotiations in previous rounds, he or she still can turn to you at any time to ask for your opinion.

Obtain and project full settlement authority. Review Florida Rule of Civil Procedure 1.720 regarding mediation attendance requirements and the certification of settlement authority. The client and insurer attending the mediation must have full authority to settle without further consultation. Never say anything to the mediator or opposing counsel about "needing to make a phone call" before making your next offer. For various reasons, people in your caucus room may make phone calls back to their offices. Do not let them do this in front of the mediator. You want to avoid even the appearance of not having full authority to settle.

Acknowledge any undisputed weakness in your case. If your case has an undisputed weakness, acknowledge it to the mediator. You do not want the mediator to perceive you as ignoring bad facts. When you acknowledge the weakness in your case (without overemphasizing it), the mediator is more likely to trust you when you emphasize your case's strengths. In addition, try to avoid having your client make a final offer if the offer is not really final. Offering more money after a final offer hurts your credibility with both the mediator and the plaintiff's attorney. The plaintiff's attorney will remember this episode of waffling at the next mediation with you.

Listen for cues. Mediators frequently provide clues, even if not intentionally. Take notes on the information the mediator brings each time he or she enters your caucus room. If after several rounds of negotiating, the mediator asks whether you would ever pay as much as $X, it might be that the plaintiff has told the mediator $X is the plaintiff's bottom line. If a mediator asks whether you will settle if she could talk the plaintiff down to $Y, it might be that the mediator already has the plaintiff at $Y, and you might be able to settle for even less than that amount. Brackets also provide cues. If the plaintiff proposes to you a bracket of $750,000 high and $250,000 low, conventional wisdom says the plaintiff is signaling to you that the midpoint of $500,000 is his or her true number. But pay attention to the bottom number of the bracket as well, because often the plaintiff will settle for that bottom number.

Carefully review the mediator's settlement agreement form. Even the best mediators sometimes have bad settlement forms. Make sure the form lists the correct parties. If confidentiality was one of your conditions, generally you will need to write it into the form. Also, the form usually will contain terms providing that the defendant must pay the funds to the plaintiff within X days of the mediation. Check with your client to make sure the check can be processed within that timeframe. Then, write in a provision that you first must have the signed releases before tendering the check. Once you provide a plaintiff with a settlement check, the plaintiff has a reduced incentive to get the signed release to you. Also, you want to make sure the plaintiff returns your release properly executed, with no revisions, before you provide the settlement funds.

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Proper planning, preparation and communication with your client are essential to successful mediation. Following these tips will help you assist your client in reaching a successful resolution of the case. Keep in mind that settlement is not the only possible outcome of a successful mediation. Even if the parties do not reach an agreement at mediation, you can learn valuable information about your opponent's view of the case. Most importantly, taking the time to properly prepare for all parts of the mediation (opening, negotiations and the settlement agreement) will ensure that you are providing the best service for your client and will help foster their confidence in you.