



Leonard S. Levy

The view from the other side

The defense reveals the mistakes that could cost your client money in mediation

When representing clients in personal injury, products liability or other consumer matters, obtaining the best possible result often means having to go to trial. But more often it means obtaining the largest amount of money possible through the negotiation of a settlement. How to accomplish this was the subject of a number of conversations with defense attorneys, adjusters, and experienced plaintiffs' attorneys. The question posed to them was, "What mistakes do plaintiffs' attorneys make which prevents them from negotiating the best possible settlement?"

Settlement is often touted as being preferable because of the certainty of result. Going to trial means that you are leaving your client's fate in the hands of a third party, a judge or arbitrator, or jurors. Clients are generally advised that it is good to have control over the result, and that the control is achieved through determining that it is better to settle if the offer is sufficient to avoid the risk of taking the matter to trial.

While that is generally true, it does not go far enough. It may be "better" to settle, but it is best to obtain the highest possible settlement. The difficulty is to determine whether a proposed settlement offer is the best possible, or whether you are still leaving money behind, which the insurance company would have paid. Can you ever be certain? Perhaps so in the context of the payment of policy limits with an insolvent defendant insured. But with the exception of circumstances such as that, it is difficult to know whether the folks in the other room had more money they would have been willing to part with.

When you use the services of a mediator you trust, your degree of certainty may increase. But is this faith justified?

Perhaps, but you are relying in large measure on the assessment skills of the mediator, and his or her conclusion that there was no more money available for settlement. The problem is that very often (and I know this will shock many of you) parties lie, even to the mediator (especially about "the bottom line"). Further, even when the defense is telling the mediator there is no more money for settlement (and even the adjuster believes it), that is not necessarily true.

Defense counsel and adjusters interviewed for this article all requested anonymity. Since candor can often be a byproduct of concealed identity, and since the subjects interviewed were accountable to no one in this context in any event, anonymity was granted. The product of those interviews was the following.

Have the right people at the mediation

In a number of mediations, defense counsel and adjusters have represented to the mediator that although he or she may believe the case has more settlement value, their superior just won't budge. In those instances in which the adjuster or counsel have allowed direct conversation between the mediator and the adjuster's superior, the ability to obtain additional authority is greatly enhanced. The reason is that, unless the adjuster's superior has drawn a line in the sand, and moving past that line will result in his or her losing credibility with his or her superiors (or subordinates), one is generally better having direct contact with the person with whom he is negotiating; that is, the one with real authority.

Think of it like buying a new car. The salesman excuses himself to go to his sales manager. He then returns and says,

"You know, I just can't get him to budge. I really tried for you, but he just won't go for it." In that context, you are negotiating with someone who is not in the room, just like the adjuster's superior who is not present in a mediation. That puts you, and the mediator advocating your position, at a real disadvantage. It is much easier for one in authority to say "no" when he is not engaged in a face to face conversation with someone advocating the other party's position. That is why it is always important, to the extent possible, to do all you can to make certain someone with sufficient authority to resolve the matter appears on the defense side.

But having the right people at the mediation does not just mean having the right people on the defense side. It also means having the right people on the plaintiff's side as well. In a recent mediation involving a fractured heel, requiring multiple surgeries, permanent injury, and anticipated future surgeries (confirmed by the IME doctor), the plaintiff, who lived in the Midwest, decided to be available by telephone only. At one point in the mediation, the adjuster asked to see the plaintiff, just to get a sense of how she presented herself. When told that was not possible, the adjuster began to harden his stance. He clearly was perplexed that he was denied a piece of information that would have helped his evaluation, and he also concluded that since the plaintiff did not seem to care enough about the case to make the trip out for mediation, the same thing may very well happen at trial. The mediation session ended in non agreement after a mediator's proposal was not successful in resolving the case.

See Levy, Next Page

The following week, a Mandatory Settlement Conference was held in the matter. Again the plaintiff did not show up, and the offer did not increase. The judge ordered the plaintiff to fly out and appear the following Monday. Not only did the matter resolve, but it resolved for more than \$150,000 over the “line in the sand” amount drawn by the defense.

The pre-mediation demand

One way to achieve that is to make a settlement demand before the mediation, sufficiently in advance of the mediation session to allow the defense side to analyze the demand in several respects, including determining who must be present. In the interviews with defense counsel, the most universal agreement on mistakes made by plaintiffs’ counsel surrounds the concept of a pre-mediation demand.

The failure to make a demand before mediation was cited by defense attorneys as one of the biggest mistakes plaintiffs’ counsel can make. Their reasons include making it more difficult for the defense to analyze the case and lay the foundation for obtaining sufficient authority, not providing the defense with the opportunity to have the proper people available at mediation, dooming a mediation from the inception by not providing the defense the opportunity to obtain opinions of experts (doctors, etc.), and generally, not paying attention to the information carriers need to justify a payment.

Failure to make such a demand will often result in not having the right people present at mediation. On a number of occasions, defense counsel and adjusters have remarked that, had they known the amount of the demand, either someone else would have attended the mediation, or some arrangement would have been made to have telephone contact with someone with more authority.

In mediation a few years ago, not only did plaintiff’s counsel fail to make a pre-mediation demand, he refused to make *any* demand. His rationale was that the insurance company knew what number they wanted to pay, and he simply wanted them to offer it. It took some

time for the matter to resolve, and not at the initial session, because the insurance company did not have a person present (or available) with sufficient authority to resolve the case. A demand was finally obtained (after some considerable time), but only by approaching plaintiff’s counsel through conversation about ranges of possible jury verdicts, the high end of which was made the basis of an opening settlement demand.

This also illustrates another mistake often made by plaintiffs’ counsel: failing to consider what the adjuster needs in order to say “yes.” Too often, counsel become caught up in the trap of believing he or she is negotiating with “the insurance company.” Certainly, different companies have exhibited a variety of what can be termed “institutional persona” in their approach to cases. Some companies have reputations of being more reasonable than other companies, certainly. But what is fundamentally true, no matter what company you are dealing with, is the fact that a decision whether to pay, and how much to pay, must be made by an individual, answering to another individual.

The right opening demand

Virtually no case settles for the amount of the opening demand. Therefore, it is important to understand the variety of purposes for that demand.

The opening demand is an opportunity to send a variety of messages. Included is illustrating to the defense that you know what you are doing. Counsel who put out a number that is far beyond any possible verdict range do their clients a disservice. One message sent with such a demand is that plaintiff’s counsel has not correctly analyzed your case. Another is that he or she does not know how to do so. Robert Fink, past president of CAALA, put it this way: “Start high, but don’t start too high, or you risk scaring off the other side. Hit the high end of reasonable. You want to keep the negotiation going.”

When you make an “out of the ballpark” demand, you generally don’t appear tough, just unreasonable. Further, you put yourself in a position of having to lower

the demand considerably, just to obtain a counteroffer from the defense. Making a big drop off an initial demand may be the only play you have if you wish to negotiate a settlement, but it may undermine your credibility, and make it appear that you do not know the value of your case.

Springing a mediation surprise

Preparation for mediation requires doing everything necessary to convince the other side to see things your way. Often, little consideration is given to what effect a surprise will have on the defense. Adjusters will view the case based upon what they have in their files prior to the mediation session. They will discuss the reasons for their conclusions with their superiors and obtain authority based on those conclusions. Certainly, if you can provide the mediator with additional reasons, perhaps in the form of fact-based arguments, that can be used to persuade the adjuster that he or she is overlooking something, you create the opportunity to move the defense closer to seeing things your way.

However, distinguish that situation from providing the defense, for the first time at a mediation, with a new claim for economic damages, a new series of medical bills or a greatly increased demand. According to defense counsel, such surprises create a variety of impressions, none of them conducive to producing a settlement, much less increasing the amount of the settlement offer. The problems created by such surprises include the defense concluding that the plaintiff’s attorney really does not know his or her case and is learning as he goes. Attempting to advocate plaintiff’s position to the defense in this context becomes a more difficult task for the mediator.

Another effect of the “mediation surprise” is that it has deprived the defense of the opportunity to consider the effect of this new information, and discuss it with those from whom it is necessary to obtain additional settlement authority that might be warranted by the new information.

A greatly increased demand, even when accompanied by an explanation

See Levy, Next Page

that plaintiff's counsel only recently learned of additional facts or damages, has the same effect. The impression left is that counsel did not prepare properly for the mediation, doesn't know his case and is not ready to settle.

The question of confidentiality

While confidentiality in mediation is absolutely essential for the process to work, the concept of confidentiality can be carried too far. Virtually every fact and argument set forth in the overwhelming majority of mediation briefs are known to the defense, or will be known before trial. So what if discovery is not completed. The idea in mediation is to create the impression of risk for your opponent. So often, the phrase, "But I don't want to give them free discovery," is used in response to a mediator's request that the information is essential to the other party's perception of risk. The idea is for the defense to appreciate the risk and pay your client money, not to spend the money on their lawyers in generating or responding to discovery. That puts nothing in your client's pocket.

So, provide the defense with a brief, and do so sufficiently in advance of the mediation session to provide them with an opportunity to consider your arguments and evidence. If there is something that you feel you must keep confidential, put it in a separate brief or letter to the mediator and label it as confidential, as Robert Fink advises. Matters such as impeachment evidence, which would not otherwise be revealed through discovery, fall into this category. Certainly, if you have something that would create the "Perry Mason moment" at trial, keep it confidential.

However, keep in mind that, consistent with not compromising your ability to try the matter effectively, you need to make certain your opponent is sufficiently educated to perceive the risk of not making an offer of sufficient size to resolve the matter.

Adjusters and risk

In many ways, adjusters are like script readers in the movie industry: it is much easier for them to say "no." Unless

a movie is made by another studio and becomes a blockbuster, there is little risk that the movie script reader will ever have to answer to anyone for the decision to reject the script. Similarly, an adjuster refusing to offer sums of money sufficient to settle a matter, can almost always justify the decision, which will only enhance the adjuster's reputation as "tough" and not inclined to give away the company's money. In the rare occasion a "blockbuster verdict" is obtained, it generally has little effect on the adjuster or his or her career.

The idea, then, is to focus on those factors which will create the perception of risk. A true policy-limits' case should, for example, be geared to demonstrating that there is a very good likelihood of a verdict in excess of policy limits. Factors such as the effect on an insured's business or reputation are other considerations which help create the impression that there is an unacceptable risk to either the carrier or the insured.

Threats and other hostile acts

The impression plaintiff's counsel should strive to make is of a prepared professional, who knows his or her case, has analyzed the facts and the law, and has come to reasonable conclusions about the value of the case and chance of success. This impression goes a long way toward persuading the defense side that there is risk. It is also helpful to create the impression of a tough negotiator and forceful advocate for the client's position.

Showing hostility towards defense counsel and/or the adjuster will rarely, if ever, create such an impression. In fact, according to defense counsel, it serves to make the defense side dig in their heels and generally react negatively. Threatening sanctions for claimed discovery lapses or dire consequences for failing to meet a deadline does not get you more money from the defense.

The key is to recognize that which will trigger a desire or inclination to pay, and that which will produce the opposite result. One example of the latter, cited by defense counsel for a large property casualty carrier, is showing a lack of courtesy to the adjuster or his attorney. "Do attor-

neys really think that it is necessary to be discourteous in order to exhibit toughness? Quite frankly, it hardens the adjuster's and defense counsel, and makes them less apt to see things plaintiff's way." Understand that in mediation you are trying to persuade the defense to voluntarily part with as much money as possible. Getting someone angry at you is likely to yield precisely the opposite result.

Focusing on costs

Once upon a time, and long, long ago in a time almost now forgotten, insurance carriers would pay money simply because it would cost more to pay counsel to defend the case, than to settle the matter. Those days are long gone.

Keep in mind, that if a mediator were to walk into the defense caucus room and make the argument that payment should be made simply because it would cost more to defend the case than it would be to settle it, the mediation is essentially over. That mediator no longer has any credibility with the defense.

Certainly there are times when a carrier will take an upcoming expense item into account in deciding how much to pay. For example, if an additional \$1,500 is required to resolve a case, and an IME examination is to be scheduled, an offer might be increased by that amount. However, a no liability case, if perceived as such by a carrier, will not be converted into a case worth five or six figures because it would cost more to try it. Focus on exposure, not expense.

A good reputation with the defense

There is no sin in being on good terms with members of the defense bar. In more than one instance, for example, Robert Fink has been able to obtain a more favorable settlement for his client because of his reputation as a "straight shooter." Clearly, establishing such a reputation is not something you can instantly acquire. However, it is surprisingly easy to acquire a reputation as an unprofessional jerk who is not worthy of courtesy.

There was a time when courtesy was routinely extended, and apologies given when accommodation for a request could

See Levy, Next Page

not be made to opposing counsel. Behaving in this way was conducive to cooperation and resolution of matters. People naturally tend to want to reciprocate. Given that fact, act toward the defense in a manner consistent with their wanting to reciprocate. By establishing a reputation as trustworthy and professional, you will enhance your ability to resolve matters, and for larger amounts than you might otherwise obtain.

Losing control over your client

It has often been said that a case never gets better than when your client first walks into your office. That may not always be true, but it is true enough of the time for you to control your enthusiasm, and exercise a degree of restraint in selling your client's case to him or her. Clients very often remember the highest number they ever heard you mention as the value of the case, and build expectations around that number.

In mediation, your client will be exposed, often for the first time, with the defense's arguments. The mediator will be advocating the defense position to you and your client (and your position to the

defense), in an effort to get both sides to think about the weaknesses in their respective cases. The defense will make an offer, which very often has the effect of generating anger in the plaintiff.

Then the real discomfort begins. The plaintiff's attorney who recognizes the weaknesses in the case is now faced with the prospect of having to advise the client to take an offer far less than the client expected. Of course, the mediator, who is knowledgeable, may recognize the position you are in and attempt to gently lower the plaintiff's expectations. This process is uncomfortable for plaintiff's counsel who anticipates his client's words to the effect, "But you said I could get six figures, and now you think it should settle for this paltry sum."

What is the effect on the ultimate settlement amount? First, settlement may not take place at all, because your client is unwilling to lower the expectations. Second, the client may lose some confidence in his attorney, who will be placed in the unenviable position of having to hold at a number he or she knows is more than the settlement value of the case or appear to be less than an effective

advocate. The case may not resolve, and additional discovery and trial preparation will become necessary. In short, the net recovery amount to your client may be diminished and the amount of time you have had to spend on a case which might very well have settled, has increased.

Conclusion

If you intend to maximize your clients' recoveries through settlement, especially at mediation, it is essential that you pay attention to the needs and goals of the people in the "other room." These goals are sometimes, simply, to pay your client as little as possible, and still resolve the case. By paying attention to what defense counsel have revealed here, you will be in a better position to obtain the best possible result for your clients.

Leonard S. Levy mediates exclusively for ADR Services, Inc., primarily in Century City and downtown Los Angeles. He has been mediating since 1999, and specializes in personal injury, insurance (including surety and fidelity and bad faith), construction, business, and real estate matters.

