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Preparing for a successful mediation



By Paul Walsh

Success in mediation of personal injury cases doesn't happen by accident – it happens with preparation. Attorneys who take the time to check the right boxes in preparation significantly increase the odds of a favorable settlement. All cases are different but basically, the four keys to preparing are:

- A. Obtain sufficient information and documentation either pre-suit or vis-a-vis formal written discovery
- B. Assess and value the case yourself
- C. Consider the merits and risks of trial
- D. Educate, discuss and prepare your client as well as the insurance representative (defense)

Pre-mediation calls are always a good idea to identify key issues and points with the Mediator e.g. unique liability, damages and/or party factors. This maximizes the opportunity for a productive and successful mediation.

A. Obtain key information and documentation

Obtaining key information and documentation are necessary to support one's liability and damages claims or defenses. At a minimum, identify and obtain the following:

1. Insurance information
 - All policies (primary and umbrella)
 - Policy limits
 - Reservation of rights
2. Party assessment, statements and/or depositions
3. Special damages and supporting documentation including
 - current medical lien(s)
 - wage loss
 - out of pocket (OOP)
 - futures

While it may be premature to obtain expert reports, it may be worth the investment if there are critical liability issues, future damages claimed, etc. At a minimum, they can be referenced for internal review. Counsel may also consider a claw back agreement to exchange reports for mediation purposes only. It goes without saying, any claim for future impairment, medical expenses and cost projections must be supported with the appropriate medical expert opinion(s). Otherwise, claims for future special damages are unlikely to move the needle with the defense.

B. Assess and value the case

Before walking into mediation, ideally both sides have assessed and valued the case. It plows the field to crystalize the disputed issues and weight of fundamental factors. Settlement value and the potential verdict range should be considered. While these may overlap in large part, compute the costs of getting a case to and through trial.

The following components merit consideration:

1. Circumstances of the accident
2. In wrongful death cases, manner of death
3. Severity of injuries
 - a. Diagnostic test results
 - b. Treatment rendered
 - c. Ongoing care
 - d. Impairment
 - e. Prognosis
4. Special damages (medical, wage loss, OOP, futures)
5. Intangible and miscellaneous factors including:
 - a. Party assessment – are they likeable or not
 - b. Sympathy
 - c. Loss of consortium/companionship claims
 - d. Inflammatory evidence
 - e. Photographs, video (depiction of accident, scene, injuries)
 - f. Punitive damages
 - g. Delay damages - they add up
6. Venue

The case value is driven in large part by the venue. Suffice it to say, a case in Philadelphia is more likely to have greater potential exposure than the same case in Allegheny County. Talking the case over internally is a good exercise to avoid tunnel vision and falling in love with your case.

In sum, obtaining the relevant information and documentation outlined in the aforementioned menu provides great insight into determining the value of your client's case. While formula driven analyses i.e. multiplying special damages, risk-benefit analysis, etc. may be helpful, they should be kept in context. The key is to determine the critical factors driving the case value.

C. Trial considerations

Any seasoned trial attorney knows, there are no guarantees. Trying a case in Allegheny County entails waiting until the day of trial to find out who your judge and jury will be. As to the latter, you don't pick a jury – you use the allotted strikes to remove those prospective jurors perceived the most detrimental out of a random panel. The resultant jury is the proverbial Hobson's choice. The only common thread of a jury is most of them don't want to be there. The voir dire process merely gives some indicators of a prospective juror's background which is a far cry

from a deep dive into what their true beliefs and biases may be. No matter how good you think your case is, there's real risk entrusting it to a jury you don't know. It's literally a one-shot deal.

D. Preparing clients for mediation

Prior to agreeing to mediate, counsel should educate, inform and discuss assessment of the case with their respective clients and insurance representatives. All of the aforementioned factors along with trial risks should be discussed to arrive at potential settlement and verdict ranges. If counsel and their clients are aligned in terms of value and resolution strategy, this will determine whether a case is ripe for mediation. With proper preparation, the chances of a successful mediation increase dramatically. ■

Paul Walsh, Esq. *was the founder and managing partner of Walsh Barnes PC before starting Walsh Mediation LLC.*