

MEDIATION TIPS

By
Kevin Thomas McIvers

A monthly series of short articles on successful mediation advocacy.

Tip # 2: “No Surprises Please!”

Here is the familiar scenario. In a wrongful death, elder abuse case against a health care company, plaintiff’s counsel demanded \$750,000 two months before the mediation. The defense attorney figured that \$250,000 - \$400,000 would settle the case, and planned to pull for the lower end of the range on a dangerous case. The carrier evaluated the case accordingly. At mediation, plaintiff made an opening demand of \$2.5 million. The defense team was furious. They had no ability to negotiate in that realm, and had wasted time and money preparing for a very different negotiation. A variation on the theme is when one side springs new, devastating evidence for the first time at the mediation, shifting radically the realistic range for negotiation. In either case, the surprise tactic renders the opponent unable to participate (without more time to evaluate the new position or evidence), wastes resources, and destroys trust needed to best negotiate resolution.

Why does this happen so often in mediation? Often, it is simply lack of preparation. If counsel does not really understand the merits of a case or the client’s desires until the day before mediation, there is little chance that the expectations of the opponent can be well managed. Remember, **managing the expectations of the opposition before mediation is the key to a successful negotiation.**

This problem may also result from speaking loosely about settlement numbers with opposing counsel. Once a number falls from your lips, it is not forgotten. For instance, in a recent mediation the plaintiff’s attorney complained to me that the defense was only at \$50,000 after 3 hours, when defense counsel had suggested last month (and the plaintiff had been told to expect) a real range of about \$200,000. Be very wary of loose talk about numbers.

There are sometimes legitimate reasons for a last minute change of position, even with diligent preparation. A key witness may be located. The definitive new appellate case may appear. *Sub rosa* films, just received, may prove that plaintiff is a fraud. Or, your client may demand an “about face” in your position, justified or not.

What should you do if positions must legitimately shift on the eve of mediation? Immediately tell the opposition, and explain why. If awkward, ask the mediator's advice, and possibly arrange a pre-mediation conference call with the mediator and opposing counsel. The professional courtesy will be greatly appreciated. Even if you can not reveal the full reasons for the change in position, share enough information to maintain your credibility. Informal sharing of new evidence may allow the mediation to go forward fruitfully, or the mediation may go off calendar, to allow discovery on the new issue (better than a failed mediation). Often, the mediation session is converted into a valuable informational session, with no expectation of final closure. In any case, professional integrity and relationships are maintained, and expectations may be adjusted appropriately. Advance communication to avoid big surprises is the key.

Clever readers will note that this article *assumes* some pre-mediation sharing of positions, which the author views as critical. Many lawyers are reluctant to do this. Next month, we will look at the importance of ***“Pre-Mediation Negotiation.”***

Mr. McIvers is a full-time Santa Barbara mediator. He can be reached at kevinmcivers@cox.net, or through *Judicate West* (897-3843).