



Setting the stage of negotiation

Engineering the negotiation prior to the mediation is the secret to maximizing results.

This story is for you if:

- You show up to mediation and have never discussed settlement numbers with the defense;
- The defense has not revealed to you their assessment of liability and damages; or
- You are often disappointed at the defendant's inability to settle in a reasonable range at the first mediation.



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The myth:

The moment of "settlement" takes place during mediation, because this is where all of the parties have an opportunity to openly discuss case details.

Why this myth is misleading:

The process of negotiation is very similar to the process that engineers follow. Engineers apply technical and scientific knowledge to design and implement processes that achieve a desired objective or find solutions to problems. Before laying the concrete on the foundation, the engineer uses physics and mathematics to analyze the situation and test potential solutions. This "process" takes place at the beginning of a project and is part of a complex planning scheme that is organized in a disciplined way toward finding suitable solutions to problems.

Many trial lawyers do not follow this process. Rather than taking the time to test their theories or positions to see if they will perform as expected, most lawyers show up at mediation, put the spotlight on their case and hope for the best.

Contrary to what most lawyers believe, negotiation begins the moment the client walks through the door. Each piece of information that is disseminated reflects upon the anticipated result. Every communication with

opposing counsel, whether orally or in writing, sets the expectations and lays a foundation for the negotiation. Inferring that your client might "take something between x and y dollars" will cause the defense attorney to note that in the file. From this point on, you will never be able to increase that number without something dramatically changing in the case.

As a result, engineering the negotiation prior to the mediation is the secret to maximizing results. "Engineering the negotiation" involves strategically providing information about your client's story well in advance of the mediation. This will provide the defendant with both the proper expectations for resolution and enough data to justify why the plaintiff's case should be settled.

Surprising the defendant with information at the last minute, or coming in with a demand that is so extraordinary that the defense becomes shell-shocked, will only lead to a stalled negotiation. However, setting the foundation for the negotiation by providing relevant information about your client's case and providing clues about your expected settlement amount will allow the defendant to analyze the situation well in advance of the mediation. You will then also be in a position to gather information from defense counsel in advance of the mediation. This will allow you to properly manage both your client's expectations and the method and manner in which you negotiate the case. ♦