

COMMENTARY

Properly Setting Up for Settling Success: Preparing to Mediate a High Exposure Case

With the right preparation and planning, mediation can prove to be a powerful tool for resolving high exposure cases. In this article, we review considerations that should be addressed to set your high exposure case up for settling success.

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Special Sections

By June J. Essis and Katherine Tenzinger

If you watch some of any popular law series on TV, you would believe that every litigant has his day in court in front of a judge and jury. Statistics tell us a different story. According to the Administrative Office of the U.S. Courts, less than 1% of all civil cases filed in federal court reach trial—the number actually is a stunning 0.7%. Whether the reasons are due to the high costs of trying a case and or the uncertainty of a jury, litigants and their counsel are taking case resolution into their own hands. As a result, alternative dispute resolution has boomed, creating its own industry where retired judges and attorneys preside as mediators and arbitrators.

With the right preparation and planning, mediation can prove to be a powerful tool for resolving high exposure cases. In this article, we review considerations that should be addressed to set your high exposure case up for settling success.

Who Is the Mediator?

Before a mediation can be scheduled, the parties need to agree upon a mediator. Usually, the parties propose their favored options. Typically, plaintiffs propose plaintiff-friendly mediators and defendants suggest defendant-friendly mediators.

A high exposure case requires more thought as to who will serve in this important role.

First, be deliberate in checking a mediator's background and expertise. Consider whether his experience accurately covers the issues in your case. Not every retired civil court judge is appropriate to mediate a products liability case. Perhaps an attorney who has represented a party in a factually similar suit would be a better fit. In high exposure cases, the mediator must be conversant in the issues and relevant case law. Her previous practice areas, representative matters, and experience is not only instructive but can be imperative.

Second, consider your mediator's familiarity with the case's venue. The venue often always bears upon the case's value. Not only the attorneys, but the mediator must be familiar with the venue in order to comment on how jurors or judges will receive and react to certain evidence and argument and how they will value the damages. This will certainly assist the mediator in coming up with her opinion as to the value of the matter for settlement purposes.

Third, take note of the mediator's disposition and personality. All participants must view the mediator as credible in order for the mediation to succeed. The mediator must have a personality to match the participants. For example, if your client or your adversary needs some "encouragement," then consider a mediator who is direct in his assessments.

When Is the Mediation?

Once a mediator is selected, the next consideration is timing. When to hold the mediation in the litigation process is a strategic decision.

A high exposure case could be ready for mediation before the close of discovery or even before the initiation of suit. If you are proceeding with an early mediation, you need to formulate a plan for collecting relevant information. For example, you may need a third-party investigator to document the accident scene and take witness statements. An open dialogue with adverse counsel also is key in order to obtain confidential information not otherwise available. This would include obtaining medical records, medical bills and employment documents.

In selecting a time for mediation, also consider what information may have a material effect on the case value. For example, if you suspect credibility issues with the adverse party, then you may want to delay mediation until after depositions and or surveillance of the party. Or if there are concerns about the legal sufficiency of the claims or defenses, then mediation may be most productive after dispositive motions.

If mediation proceeds early, then be prepared to make concessions on certain claims and defenses. Proceeding to mediation without a medical expert can be cost efficient. However, arguments about the extent and permanency of injuries will not be as impactful as they are not supported by a medical expert report. In cases where medical treatment and injuries appear reasonable, then this risk may be more sensible than delaying mediation and paying for a medical expert.

The ultimate consideration in timing the mediation is whether and when you will have sufficient information about the underlying occurrence and damages in order to provide a comprehensive evaluation of the case.

Who Will Attend?

In selecting the mediation date, consideration also must be given to who will attend mediation.

Mediation is most successful when the parties and decision-makers attend in person. This was difficult if not impossible during COVID. Regardless, attendance without proper authority is fruitless. The attending decision-maker must be fueled with the relevant facts and law and be prepared to negotiate with sufficient authority. What qualifies as "sufficient authority" varies from case to case. In high exposure cases, "sufficient authority" may not be the full amount of the

adversary's demand but rather the top end of the projected value. The flow and progress of a mediation will be hindered if authority needs to be requested for each move or if there is simply insufficient authority in light of the damages, case law and venue.

Depending on the facts of the case, other attendees may be necessary for a successful mediation. In cases with technical issues, having an expert attend may be beneficial. Cases with disputed liability could require the attendance of a nonparty witnesses to provide testimony. This is especially relevant if depositions have not been taken as of the time of the mediation.

What Is the Mediation Format?

Typically, mediation will begin with a joint session followed by a separation of the parties and “shuttle diplomacy” by the mediator.

During the initial joint session, the mediator typically provides general background on his understanding of the case and how the mediation will proceed. Often, the parties will have an opportunity to address the group. The specific facts of your case will guide how to proceed here. For example, in a motor vehicle fatality case, there may be value to allowing the decedent's representative to speak about the decedent. Any statement by your client should be discussed and practiced in advance. On the other hand, in more adversarial cases, it may be best to hold a joint session only with counsel or forego a joint session all together. This is a strategy decision to be guided by your mediation objectives and individual case.

After the joint session, the parties usually are moved into separate rooms. The mediator then moves between or among rooms conveying demands and offers and other information. In a high exposure case, use these sessions to explore your arguments and the counter arguments and evidence that would be admissible at trial if the matter proceeded. A well-selected mediator should be able to provide valuable insight into how jurors and judges will react to your case theories and will value damages in the venue the case is filed in.

What Will You Submit?

In a high exposure case, it is imperative to submit all relevant materials to the mediator in advance of the mediation.

The cornerstone of your submission should be a written case memorandum. The memorandum should address the underlying incident, the relevant legal issues, an assessment of liability and damages, and valuation of the case. The memorandum should include relevant law if there are matters in dispute. The memorandum will save time and effort on mediation day as the mediator will be well-acquainted with the relevant facts and issues. Taking the time to write a memorandum in advance of the mediation ensures you do not forget any relevant information, law or arguments.

While you may have been living with this case for an extended time, your mediator has not. Do not assume anything. Identify all relevant issues, including legal issues, defenses, and factual issues. Your submission should be persuasive. Point out the evidentiary shortcomings of your adversary and outline why the opinions of your experts will be accepted over those of your adversary. Be sure to take advantage of the opportunity to test your legal theories and arguments—it is one of the benefits of mediation.

The submissions should include all evidence that will help the mediator get a grasp on your case—accident scene photos, maps, diagrams, etc. However, be disciplined in what you submit to the mediator. Provide only relevant pages of extensive documents like medical records and deposition transcripts.

Cases often fall into the high exposure category because of potential weaknesses like a distracted driver or a poorly maintained product. If your case has “bad facts,” then your submission should be submitted confidentially. A confidential memorandum allows a frank discussion of your case's shortcomings with the mediator. Furthermore, identifying these

issues in your own submission gives credibility to your position and arguments.

Year after year, case statistics show most civil matters are resolving outside of trial. Incorporating the above recommendations will pave the way for a well-planned and well-prepared mediation, which is an invaluable tool in high exposure cases.

June J. Essis,

a partner with Weber Gallagher Simpson Stapleton Fires & Newby, serves as the firm's commercial transportation co-managing partner. She represents corporations, insurers and insureds in defense of their claims in federal and state courts in Pennsylvania.

Katherine Tenzinger,

a partner with the firm, defends commercial transportation companies, their insurers, drivers, and brokers in state and federal courts in Pennsylvania and New Jersey.

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