

# Mediation Myths and Lies

By Luciano Adrian Rodriguez

Over the course of the past twenty years, many attorneys have developed myths about mediations in court-annexed cases. Attorneys who handle court-annexed mediations develop certain concepts and ideas about how mediations should proceed, and how mediators should act. Most of these ideas and concepts, when examined closely, are mediation myths; some are just lies. Below is a discussion of some of these mediation myths and lies.

## For Court-Annexed Disputes, A Strong Mediator Is Better

Many attorneys classify a strong mediator as a mediator who is highly evaluative, expresses opinions about the case being mediated, and uses his/her influence as a neutral to convince the client to accept a given offer or demand. A weak mediator is classified by these attorneys as an attorney who will not express opinions about the case, and refrains from “twisting arms” or attempting to convince a party to accept an offer or demand.

The myth about strong mediators is that a lawsuit cannot settle without the mediator “twisting arms” to get the matter settled. Most attorneys who believe this myth will freely admit that the mediator should twist everyone’s arms and even allow that, in some cases, their own clients need to have their arms twisted to accept a proposed settlement. This myth is perpetuated by mediators who accommodate these attorneys. These mediators often decide in their own minds where the case should settle, and then try to convince one or both sides to accept an offer or demand that the mediator believes is appropriate.

Lawsuits do not settle because the mediator convinces anyone to do anything. Lawsuits settle in mediation when the clients and their attorneys are convinced that the proposal is the best offer they can attain that day. The mediator’s role is to communicate these offers precisely, to analyze the differences between the parties, and to discuss in detail any counter-offers with each of the parties. If the party does not accept as true that the offer on the table is the best offer he/she will receive on that day, and that such offer or demand is near the true settlement value of the case, then the mediator’s expression of his/her opinion about the offer has no effect on the settlement of the case. More often, strong arm tactics negatively affect the non-accepting party’s opinion about the mediator and the mediation process. This is why the better mediators refrain from giving their own opinions about the offer or proposal, and go to great lengths not to force one party, or any party, to accept an offer or demand.

The belief that the mediator can convince a party to accept a certain offer or demand simply by expressing his/her own opinion about the case is a mediation myth. When opposing counsel suggests to you that a given mediator should be used because he/she is “strong,” the reality is that you will be expected to accept whatever the mediator tells you is the best offer. When opposing counsel tells you that the case needs a strong mediator, it is a lie.

## Allowing The Party To Speak At The Opening Session Is Always Dangerous And Should Be Avoided

Many plaintiff attorneys approach the mediation with a strong belief that the client should never speak at the mediation. These attorneys believe the myth that clients will negatively impact the case when they speak during opening session. The myth is that the client will make a poor showing and reduce [or increase] the settlement value of the case.

It is believed that clients are too ignorant to speak at the mediation opening session. Undoubtedly there are situations in which the client’s participation will result in a devaluation of the case because the client has said the wrong thing at opening session. Usually the reason for this is that the client’s counsel has not spent a sufficient amount of time educating the client about the mediation process and about the realities of his/her case.

When the client is well prepared for the mediation, and understands the mediation process, the client can usually favorably affect the value of the case. The opponent is better able to gauge how the client could affect the opinion of the jury or fact finder. If the plaintiff is an “attractive” witness [a person who is likely to be found truthful and sympathetic to a jury], having that person speak at the mediation opening session is more likely to enhance the settlement value of the case. If the plaintiff is an “unattractive” witness [someone who even if telling the truth, is not convincing] then there is even more reason why the plaintiff should participate in the opening session: the opponent must be shown that the client will be able to hold his/her own in front of a jury. Often the defense will re-value the plaintiff’s appearance in light of a well delivered opening statement by the plaintiff about his/her damages or injuries.

Clients usually care enough about their case to do what an attorney asks them to do. If an attorney tells you that his/her client is just too ignorant to participate at his/her own mediation, this is usually a lie. The truth is probably that the attorney has not dedicated enough time to client preparation. The idea that clients will negatively impact the case when they participate in opening session at mediation is a mediation myth.

### **The Opening Offer From Plaintiff Must Be Very High In Order To Reach A Reasonable Settlement**

This mediation myth is believed by most attorneys. These attorneys, on both sides of the bar, believe that if a plaintiff does not make an outrageously high demand at the opening session, they will not extract the highest offer from the opposing side. These attorneys also believe that if they dare make a demand close to the true settlement value of the case, the opponent will try to settle the case down below the true settlement value of the case simply because the plaintiff made such a low initial demand. In practice this is not true.

If the opening demand by a plaintiff's attorney is based on the actual and reasonable settlement value of the case, and the attorney clearly and strongly alerts the opponent that the demand for settlement is purposely being presented based on the actual settlement value of the case, the opposing side will usually honor the spirit of the demand, and correspond when making a counter-offer. The key is to clearly explain to the opponent how the plaintiff calculates the value of the case. If the math supports the valuation of the case, the opponent will respect it. If the attorney sets a value that is unreasonable, it does not matter how the case is postured in opening demands; the case will not settle for a larger or smaller amount larger than the true settlement value of the case.

A side benefit to making demands based on the actual value of the case, and not on an exaggerated value, is that the mediation tends to proceed to settlement rapidly and ends early. Once the parties clear up minor disagreements relating to specific parts of the demand and counter-offer, the case usually settles very quickly. The belief that the plaintiff should begin negotiations with a ridiculously high demand is a mediation myth. The idea that by starting very high, the case will settle for more than its true settlement value is a lie.

### **Not Making A Pre-Mediation Demand Will Lead To A Higher Settlement**

Many plaintiffs' attorneys come to mediation without ever making a pre-mediation demand. The myth surrounding this practice is that, somehow, not making a pre-mediation demand leaves more room to attain a higher settlement at mediation. This is a myth; the opposite is usually true.

When no demand has been made by a plaintiff, the defense comes to the mediation basing their evaluation on its own valuation of the case. Usually this estimation of the case value tends to be lower than the plaintiff's valuation of the case. The result is that the opening demand at mediation by plaintiff in these instances will cause a surprise to the defense. Surprises at

mediation usually result in no settlement; or, at best, a lengthened and much more difficult mediation conference.

Giving the defense a pre-mediation demand that is realistic and supported by appropriate damage calculations provides both sides an opportunity to discover whether the range of settlement is too far apart. If the parties are truly very far apart, one or both sides may determine that mediation may be premature until the settlement valuations of the case become more realistic.

The attorney who tells you that he/she gets more money in settlements at mediation by not making pre-mediation demands is lying. The idea that not making a demand or an offer until mediation leads to higher mediation settlements is a myth.

### **If The Other Side Is Not In Your Range, Use Brackets**

Many mediators and attorneys like to use bracketed offers or boxes in order to get the other party within range, or to narrow the gap that has been created by the exchange of offers. This is how bracketing usually works: one side says they will [go up to] or [come down to] a certain number if the other number will [go up to] or [go down to] a given number. Sometimes, mediators will suggest the brackets or boxes in order to speed up the mediation.

Brackets or boxes are excellent negotiation tools when used properly and when used at the proper time. In practice, however, brackets or boxes, are almost always used the wrong way, and at the wrong times. Coming into a mediation with an idea of bracketing or boxing the offers to get "down to brass tacks," is usually the wrong reason to use bracketed offers. If a mediator tells you that the only way to get the mediation process to move is to bracket offers, he or she is lying. Using the brackets or boxes early in the offer and counter-offer session is usually the wrong time to use this technique.

There is only one instance in which the early use of brackets is effective. The early use of brackets must be spontaneous on the part of the parties or their attorneys, and not "manufactured" by the mediator.

Except for the spontaneous request for brackets by the parties, the most effective use of brackets occurs when the parties are close to each other in offers and counter-offers. Brackets are most effectively used to narrow a small gap between the parties that cannot otherwise be narrowed by further negotiation. This usually occurs at the end, not at the beginning, of the negotiation session.

The early use of brackets causes the parties to be forced to jump through mental hoops in the negotiation process without warning, and in a very quick manner. Requiring these mental jumps so rapidly, without taking the time to explain why the

initial offers and demands were improper, usually jeopardizes the negotiation process. The parties will not accept these mediation gymnastics easily.

The idea that bracketed or boxed offers or counter-offers help the mediation process, and speed up the negotiations is a myth. If the mediator comes into your room and tells you that the only way to kick start the mediation is that you should propose a bracket or box do not believe it.

## Let's Meet In The Middle

Closely related to the bracketing myth is the myth that many attorneys believe about the negotiation process: that when an offer or counter offer is made, the offering party expects to settle the case somewhere in the middle between the amount of offering party's demand and the amount of the last offer. In normal cases, where the attorneys are in total control of the numbers being proposed, this is may not be incorrect assumption. There are, however, cases when the assumption that the parties will settle at the midpoint between the demand and the offer can lead some attorneys and mediators into difficulty.

Many clients involved in mediation do not negotiate to a mid point. Culturally, some groups are known not to negotiate to a mid point. Many clients consider mid-point negotiation to be helpful or useful only in simple matters involving small amounts in controversy. For serious matters, for matters involving substantial amounts of money, mid-point negotiations are considered by many as inadequate.

Along the border, many persons involved in negotiation at mediation are of Hispanic background. Hispanic cultures generally use one method of negotiation for simple, everyday negotiation, and a very different form of negotiation for serious or important matters. The attorney should be cautious when using midpoint negotiation methods in a legal matter. I get the impression that clients do not consider the midpoint form of negotiation, commonly used in mediations, to be appropriate for matters of such importance. It seems to me that clients consider midpoint negotiations, as we use them in mediation, to be appropriate only for trading with a shopkeeper at a mercado; these clients do not believe that this kind of negotiation should be used in a court case.

So, if some people do not use mid-point negotiation tactics, what tactics do they employ? I refer to the method of negotiation, used all over the world, except, it seems, by Texas attorneys, as "negotiating from 'no.'" What is negotiation from "no"? The typical negotiations, in a serious matter, start by one party asking the other to make a demand, and that party responding with "no." These negotiations sometimes have a difficult time getting started, because no one wants to make the

initial offer or demand. No one wants to make the initial offer because they know that the other side will be saying "no" to the proposals.

The solution here is to negotiate without offers or demands. The parties narrow the gap between them by discussing their differences in their respective positions and the reasons for their differences. The mediator and the parties strive to understand each other's positions in as much detail as possible. Each party's position is made clear to the opponent. The efforts of the negotiation are dedicated to reaching a better understanding of each other's needs, wants, desires, goals, and aspirations. Offers are proposed only as suggestions, or ranges, or possibilities. Actual demands and offers are used only at the very end of the negotiations when the parties have explored carefully and exhaustively their respective positions in the dispute. To an untrained negotiator, negotiations of this kind seem not to be moving at all. To the untrained eye, there appears to be no movement at all between the parties, until the very end.

The moral of the story: beware of people who do not negotiate to a midpoint or from a midpoint. Texas parties and attorneys should bear in mind that midpoint negotiations, for many people, are adequate only for the mercado, where people are negotiating about the price of tomatoes; not for negotiations involving millions of dollars, or very serious claims. Beware of negotiators who believe in the midpoint myth. When parties will not negotiate to a midpoint or from a midpoint, skip the demands and offers. Concentrate on moving the negotiations forward with rational and persuasive arguments for your position. Also, do not allow the mediator to call an impasse simply because no offers have been exchanged. In mediation "we don't need no stinking offers." In mediation, what we need is settlement. Keep your eye on the settlement ball.

The idea that in order to reach settlement you must have an offer and a counter-offer immediately is a mediation myth. The mediator who tells you that the mediation is at an impasse because the opponent will not make a counter-offer is lying.

## The Devil Made Me Do It

Some parties come to mediation only because they believe that they have to go through the mediation process in order to get a trial setting. These parties will tell you that although they cannot settle at mediation, they still have to go through mediation because, otherwise, they will never get a trial setting. This idea is mostly a myth in state courts. There are many ways to avoid a mediation that the parties believe will fail.

When there are specific reasons for at least one of the parties to believe that mediation will not be fruitful, that party should quickly move to object to the mediation so that unnece-

essary time and expense can be avoided. The idea that objecting to mediation will upset the judge, or prejudice the judge against the objecting party is a myth. If an attorney tells you that a certain judge will hold it against you if you object to mediation when you have legitimate reasons to object, that lawyer is probably lying. Every effort should be employed to avoid going to mediation when the mediation is likely to fail. Clients do not appreciate going through a failed exercise of mediation merely to satisfy a judge's whim.

### **Having A Failed Mediation Is Better Than Not Having A Mediation At All**

Many attorneys believe that when the parties are too far apart, having a mediation, even if it fails, is better than not having a mediation. These attorneys believe that even a failed mediation will bring the parties closer to settlement. This is a myth. I believe that this is completely contrary to what actual practice reveals.

Experienced mediators will tell you that when the parties come to mediation with the idea that they are too far apart from settlement range, and are simply going through the process of mediation, bad things are likely to happen. For example, one party may perceive the other party's position as even weaker than they originally believed it to be; future negotiations will be less likely to occur after a failed mediation in these cases.

Another possibility is that in the frustration of having to travel to the mediation site, and having to expend the monies to pay for mediators, attorney's fees to attend mediation, and expending other associated costs, the parties will become more polarized against each other. Again, this is likely to prevent fruitful negotiations prior to trial.

If one of the parties is weak, and the other party had not perceived the exact nature or character of the weakness, a failed mediation is likely to reveal those weaknesses in greater detail. This will also cause problems in future negotiations.

Whenever possible, a premature mediation, or a mediation that is likely to fail, should be avoided. The belief that the cases will settle merely by showing up at mediation is a myth. The attorney who tells you that the mediation process, by itself, will lead to settlement, is lying.

### **A Good Mediator Can Settle Any Case**

There is a mediation myth, promulgated mainly by mediators, that a good mediator can resolve any dispute. As good as many mediators may be, the idea that the settlement control is, somehow, with the mediator, is purely a myth. The mediator who tells you that he/she can settle any case is lying. The medi-

ator, at most, is a conduit to fruitful negotiations. The persons who believe that a mediator can settle any case if he/she is good enough are usually retired judges who do not clearly understand the mediation process.

If the parties show up at mediation believing the mediator can resolve the dispute because he/she is "very good," will end up losing control of the case by letting the mediator work out a settlement that only the mediator believes is a good settlement. The desires and wishes of the parties are ignored. The mediator and the attorneys end up convincing the party that the mediator is so good that he/she knows best what the settlement value of the case should be. As soon as the attorneys or the parties turn over the case to the mediator, and rely on the mediator to resolve the case, the parties and their attorneys have resolved to accept the best offer or demand the mediator can obtain instead of relying on their own best judgment and desires relating to the case.

### **In Mediations Where The Parties Are Upset With Each Other, The Opening Statement Should Be Avoided**

Experienced mediators will place a lot of thought and emphasis on the opening statement. A good opening statement, by a thoughtful and experienced mediator, is probably the best conduit to reaching a settlement that all parties will accept.

In cases where the parties are very distant in offers, or where there is animosity that has been built up prior to the litigation, or during the litigation, the first instinct of many attorneys is to avoid further animosity. These attorneys will often avoid a joint opening session. These attorneys believe that, by avoiding having the parties meet face-to-face in an opening session at mediation, ill will and bad feelings can be avoided. This is a myth.

Bad feelings and ill will between the parties will not disappear because they are placed in separate rooms at mediation. If anything, the ill will and bad feelings may get worse when this happens. This myth arises from the belief that conflict should be avoided during mediation. Contrary to the belief of many attorneys, mediators thrive on conflict. Conflict, per se, is not the enemy of settlement. Exposing the differences between the parties that derives from sincere differences of opinion, can help the mediation and negotiation process. The mediation process can assist the parties to exchange this sincere and real conflict, in a controlled manner. However, conflict created by the parties, where there is no real conflict, or conflict perceived by the parties, where there is no real conflict, is the real enemy of settlement. Separating the parties at mediation, and keeping them apart, and not giving them a thoughtful opening state-

ment to guide them during the negotiations will create real conflict, and will create more ill will and will increase the animosity between the parties.

Going directly to offers and counter-offers, without a joint session, and without an introduction to the process of settlement, and without having the parties confront each other with their sincere and honest feelings about the case, is likely to lead to more conflict between the parties. The best way to handle parties in conflict is to go through an opening session guided by an experienced conflict management professional such as a mediator. The idea that existing conflict between the parties will be avoided by avoiding a joint opening session is a myth.

## **You Need To Have A Mediator With A Legal Background In The Subject Matter Of The Case**

Many attorneys believe that unless the mediator has a working knowledge and a legal background in the subject matter of the case, the mediation will not proceed smoothly, and will take much longer than it would with a mediator who is knowledgeable about the case. These same attorneys believe that having a mediator who is not familiar with the legal basis of the case will lead to a failed mediation. This is a myth. The trained mediator does not deal with the subject matter of the dispute; the mediator works with the negotiation process.

Mediation is the art of facilitating settlement discussions between the parties with the goal of reaching a settlement acceptable to the parties. When the parties require that the mediator have expertise in the area of the litigation, it usually means that the attorneys or the parties are expecting the mediator to be evaluative about the case. In actual practice this means that one side wants the mediator to tell the other side how the case should be settled. A good mediator does not meddle in the facts and circumstances of the case itself. A good mediator does not base the negotiation process on his/her telling one side what the law is or what the law says.

A good mediator can proceed through the entire mediation simply by asking questions of the parties and their attorneys, and by asking the parties to react to the positions of the opposing parties. A good mediator can proceed through the entire mediation without ever expressing what they, the mediators, believe to be true, or correct, or legal. They merely keep asking questions. If asked to express their opinion, the good mediator will answer a question with a question, and just keep on going.

The parties at mediation should expect the mediator to facilitate the discussions between the parties, to keep the talks between the parties headed towards a resolution of the dispute, and to assist the parties if the negotiations get off-track. If the parties appear to be operating under misconceptions about the

intentions of the opposing side, the mediator is expected to clarify the positions of each party and to explore the reasons for these misconceptions. The mediator is also expected to be thoughtful and attentive about opportunities to settle the matter. The actual merits of the case, the legal background of the case, and the opinions of the mediator relating to the merits of the case, are irrelevant to what the parties want, or what they will accept.

It is only in those instances where the negotiations veer off track, that the mediator carefully questions the parties about where the discussions are headed, and whether or not the parties desire to return to their prior discussions. The mediator, throughout the discussions, keeps careful track of the negotiation process. The mediator is alert to the complex signals that may come from those discussions and is always alert to all opportunities for settlement.

Therefore, the background of the mediator in the legal merits of the case is unimportant and irrelevant. The mediator's ability to handle negotiations between the parties, and to keep the negotiations moving towards settlement, and to be attentive to what the parties are saying with or without words, and to be perceptive of every opportunity to reach settlement, these are the qualities that are required for a successful mediation. The mediator who tells you that he can settle the case because he/she is an expert in an area of law is lying about being able to settle the case. The idea that a mediator with a legal background in the particular case being mediated is required for a successful mediation is a myth.

## **A Good Mediator Does Not Need Pre-Mediation Position Papers**

Many mediators insist on pre-mediation position papers from the parties. At the beginning of my mediation experience, I was proud of the fact that I did not require pre-mediation position papers. This is still my position. If the parties do not desire to prepare pre-mediation reports for the mediator, I will not require them. However, after many years of mediating, I have come to greatly value pre-mediation position papers. The more detailed they are and the more materials that are furnished prior to mediation day, the better I am able to prepare for the mediation. The more information available before mediation day, the better a good mediator can tailor and hone his opening statement to address the possible problems that may come up during the negotiations. The belief that pre-mediation position papers are not helpful to a good mediator is a myth.

The purpose of position papers for the mediator is not to educate the mediator about the legal merits of the case, but to enlighten the mediator on the status of the negotiations and of

the offers and counter offers. Position papers should deal with a discussion of the background and history of the case that explains the reasons that the parties have not been able to settle before mediation day. That is, the purpose of position papers is to help the mediator conduct fruitful settlement discussions.

The position papers should not be designed to convince the mediator that one party is at fault or free of fault; liability and responsibility issues of the case are for the attorneys to deal with. Position papers should discuss the particular areas of conflict between the parties, and the differences in their positions, and the history of the negotiation process before mediation day. This kind of information is invaluable to a good mediator in guiding the negotiation process to a fruitful result.

Providing pre-mediation position papers speeds up the mediation process. This information helps the mediator get to negotiations as quickly as possible after the opening statements. Mediators who tell you that position papers, when properly prepared, are not helpful to the mediation process are lying.

### **Everyone Should Dress Down For Mediation Because It Helps Everyone Relax**

Dressing down for mediation seems to be in vogue in today's mediation environment. Many attorneys feel that dressing down, and not wearing the formal attire used in the courtroom, is helpful to set a more relaxed tone for the negotiations. Dressing down does not set a more relaxed tone for the mediation. The idea that dressing down will lead to more fruitful mediation discussions is a myth.

While dressing down for mediation may be very comfortable for the attorneys, I find that the parties themselves, especially plaintiffs, do not dress down for mediation. I often sense a feeling of discomfort from plaintiffs when their attorneys show up at mediation in casual dress. I get the impression that these plaintiffs [and sometimes defendants] that casual dress at mediation is not appropriate. To many clients, casual dress at mediation somehow translates to them as a casual concept of the value of their case. Most of my work in mediation takes place along the Texas border, and certainly most of my work is in South Texas. Perhaps the Hispanic culture is responsible for these sentiments among many plaintiffs and defendants.

Corporate representatives do not seem to mind the dressing down as much as plaintiffs, and lay defendants. I suggest that the attorneys, both on the plaintiff's side and the defense, refrain from dressing down for mediation, but instead dress in normal courtroom attire. If there is a chance that the attire of the attorney will affect either the plaintiff, or some of the parties at mediation, then the attorneys should wear their customary courtroom attire for mediation. The idea that casual dress is more conducive

to settlement at mediation is a myth. The attorney who tells you that mediation works better when everyone dresses casually is lying; he/she just wants to wear their jeans on a week day.

### **Mediations Should Always Be Done As Early As Possible In The Litigation Process**

There is no doubt that an early mediation can lead to reduction in litigation costs for the plaintiff and defendant. It would seem logical, then, that mediations should always be scheduled as early as possible in the litigation to avoid unnecessary costs. In practice, however, the scheduling of a mediation is a very delicate balancing matter. Careful balancing of the needs of the case must be done to avoid scheduling a mediation too early. The determinant factors in deciding if the mediation is being scheduled too early are the following:

- Has there been enough discovery?
- Is there on-going medical treatment?
- Have all the medical experts given their opinions?
- Have all the experts given their opinions?
- Are there pending motions that are dispositive of the case?

The delicate balance between scheduling too early and too late is one of the most difficult tasks of the attorneys in preparing for mediation. The idea that mediation should always be scheduled early in the litigation process is a myth that does not take into account the value of having all of the relevant information available prior to settlement negotiations. The proper time for mediation depends on the specifics of each case. Making the correct decision about when to schedule a mediation is probably the single most important determinant of whether a case settles or not.

### **Plaintiffs' Attorneys Should Throw Very Hard Punches At Opening Session In Order To "Soften" The Defendants And To "Impress" The Plaintiff**

Many plaintiff attorneys come to mediation with the belief that they must be very harsh and strong against the defendants in order to impress their client with how good an attorney they are, and to defeat the defendant's defense posture. The idea that this conduct is conducive to better settlements at mediation is a myth. In effect what is accomplished is that the plaintiff now believes the case is stronger than it may be.

The typical example is the plaintiff's attorney who attempts to impress the family in a death case by showing gory photographs of the death scene, and makes the decedent's family cry during the mediation opening session. What has now happened is that the original demand that was planned before mediation is now not "enough." The plaintiffs become even more polarized in their positions and the mediation process is in jeopardy.

Another example is the attorney who raises the demand from what was disclosed prior to mediation to the client and to the defense. Now the plaintiff begins to doubt whether the initial demand was high enough.

One of the best examples of a plaintiff's mediation opening statement that I have ever heard is from a plaintiff's attorney who spent his entire opening statement speaking about how good a person the decedent was and how well he was regarded by his co-workers and his employers. Not one disparaging word about the defense was mentioned during the entire opening statement; not one gory photo was shown. Of course, all of this information had been disclosed to the defense and the insurance representatives, prior to the mediation, in a carefully prepared settlement brochure and video. The case settled for almost twice what I believed was the true settlement value of the case.

The idea that an attorney should make a jury argument at mediation in order to impress the opponents or his/her own clients is a myth. The attorney who tells you that he/she got more money, or settled a case for less by making a jury argument in mediation is lying.

## **Complex Or "High Dollar" Cases Need More Than One Mediation Session**

It is not uncommon in multi-party, layered insurance, or "high dollar" cases, for attorneys to expect that these cases require multiple mediation sessions before a good settlement is obtained. This is a myth. In practice, these kinds of cases require multiple mediation sessions only because the proper pre-mediation preparation has not been undertaken by all parties involved in the case. In some cases, the attorneys hurry to schedule mediation early in the litigation process, hoping that an early settlement of the case will save litigation expenses and attorney's fees for the client. In practice, however, these hurried mediations lead to a failed mediation and the need for subsequent mediation sessions. Hurried mediations give rise to the myth that complex cases require multiple mediation sessions.

If all of the parties involved in complex cases undertake the proper pre-mediation investigations, and they collect all of the information necessary so that the mediation can proceed in a productive manner, there is no reason why these cases should not settle at the first mediation session. When the parties enter mediation in complex, multi-party, layered insurance, or "high dollar" cases without having done their homework prior to the mediation, then inevitably these mediations fail, and will require additional negotiation sessions.

Since these cases typically have a high budget for expenses, the attorneys in these cases often come to mediation unpre-

pared; they use the mediation to find out what they need to do; do those things, and then come to mediation a second and sometimes a third time before they actually reach settlement.

There is no doubt that in complex, and in multi-party cases, sometimes multiple mediation sessions are required. The reason for these multiple sessions is because there are numerous parties, or because the settlement must be structured in a manner to accommodate numerous parties. By this I mean that the parties make a conscious effort to divide the settlement talks to resolve some disputes before others. Layered insurance cases come to mind. In these matters, sometimes coverage issues must be resolved before attacking the other portions of the case. This is different from going to a mediation to discover that the case should have been settled piecemeal.

Approaching the mediation with the idea that the case is going to require multiple mediation sessions is a mistake. Complex cases do not always require multiple mediation sessions; they require more careful and intense pre-mediation work. Lawyers who tell you that complex cases must have multiple mediation sessions are lying [and they probably have children attending expensive colleges].

## **Mediations Can Only Succeed When They Are Done Right**

Many attorneys believe that unless the parties have an opening session, followed by a division of the parties into caucus sessions, followed by an exchange of ridiculously high demands, and insanely low offers, the mediation cannot succeed. In other words, most attorneys believe that there is a set pattern and formula that must be followed for the mediation to be successful. This is a myth.

Mediations can proceed to a successful conclusion without ever breaking out into caucus sessions. Commercial, construction, and some family matters can proceed from beginning to end in joint session without caucus sessions. Naturally, in the joint session cases, the parties often need to have a brief private session with their attorneys or counselors, but the joint session remains in place, and the conferring parties excuse themselves to have a private session, and then return to the joint session.

Mediators that deal in non-court annexed matters, do not routinely use the caucus method of mediation, and proceed through the settlement discussions without ever separating the parties.

It is common for attorneys to insist that the Plaintiff make a demand before the defense makes an offer. I have been involved in many mediations during which no offers are exchanged between the parties. The only offers exchanged are communicated in confidence to the mediator. The mediator

proceeds through the settlement discussions without ever exchanging demands or counter-offers until the very end of the discussions.

In “big boy” mediations I rarely use caucus sessions. In these cases I proceed through the settlement discussions totally in joint session. It is typical in these cases to set a light and informal tone for the mediation, and to insist that the parties be as blunt and forthright as possible in their statements to the opposing party. I often ask the parties to tell the opposing side why they believe the opposing side’s position or demand is “excessive,” “ridiculous,” or “insane.” Then the responding party is asked to be equally blunt and direct in their response. It seems that getting “down and dirty” in these “big boy” mediations helps the parties address the issues of the case more easily than trying to be tactful and polite. Parties in these mediations appreciate the idea of getting to serious business quickly and directly.

Caution must be used in these direct party-to-party discussions that the parties are ready to discuss the case in exacting detail, and that these parties are authorized to negotiate the case directly, and to settle the matter without having to seek outside authority. When this is so, there is high probability of success in these mediations.

### **Avoiding The Myths And Lies**

For a successful mediation, there is no substitute for careful preparation by the attorney. The more careful and exhaustive the preparation of the case, and of the client, for the mediation process, the more likely a fruitful mediation will result. The exhaustive exchange of information between the parties, prior to mediation, will also greatly enhance the likelihood of success at mediation. The calculation of damages, and the gathering of the necessary information to calculate damages is also extremely important. Be careful not to believe the greatest mediation myth of all: that any case can settle at mediation. Cases do not settle at mediation if the attorneys do not prepare.

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