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MEDIATION

5 Mediation Surprises – And How To Avoid Them

Surprises can be very detrimental to the success of a mediation. Surprises can significantly erode whatever trust existed going into the mediation, and can have a lasting effect on the litigation. So, no – when it comes to mediation, nobody likes surprises.

Here is a selection of five all-too-common surprises that can result in failed mediations and resets of relationships.

1. New productions – expert reports, answers to undertakings

This one is perhaps the most frustrating surprise because it is so easily avoided. Quite often it is not a case of counsel holding onto documents or reports and springing them on their opponent at the last moment, it is a failure to take stock of reports and productions and answers to undertakings sufficiently in advance of a mediation date. The delivery of reports and documents very shortly before or even at a mediation has a significant chance of arousing suspicion and frustration and undermining negotiations.

To avoid this problem, plan out your path to mediation. Every time. Mediations are booked many months in advance, and you should be working backwards from the chosen date and mapping out when expert reports will be obtained and when all answers to undertakings will be completed. And then stick to that schedule - not because it is imposed by the court or in a signed agreement but because it will give you and your client the best chance at a successful mediation when the day arrives.

2. New heads of damages or theories of liability

The only way the opposing party is going to arrive at mediation with settlement parameters sufficiently similar to yours is if you are both working with the same heads of damages and theories of liability. The best way to make sure this happens? Speak to opposing counsel directly and tell them. Examinations for discovery are an easy and obvious occasion on which to share your theories of the case. And if new theories emerge later, you have already started the conversation so it should be easy to pick up the phone and update opposing counsel.

3. Opposing assessment of damages that is completely outside the limits of your expected assessment

This is closely related to the previous surprise. In #2, we identified new theories of damages or lability as being unwanted and avoidable surprises. Here, we are focussed on the quantum of damages. Even if both sides know the opposing theories of damages, it is still important that everyone head into a mediation having a general idea of where the opposing assessment is landing. Firstly, if the opposing assessments are sufficiently divergent that no amount of "mediator magic" will bring them close enough to settle, perhaps it is not yet the right time for mediation. Second, when an assessment of damages at mediation is wildly different than what was expected, this creates a risk that the opposing party will be offended, thus prompting retaliatory offers and souring of the settlement atmosphere.

Again, (and this may start sounding too obvious), communication with opposing counsel is key. You don't have to call opposing counsel and give them your first offers, but you should communicate clearly and early the general scale of your assessment. "This is a huge case, well over your limits." Or perhaps, "We don't see this case as ever getting into six figures." And then reinforce this communication in your mediation brief by including figures with your comments on damages.

4. New friend or family member whose advice is desired by plaintiff

Mediations can of course be extremely stressful days for individual plaintiffs and it is natural that they may want a family member or trusted friend to support them. The problem arises when an "advisor" suddenly arrives on scene late in the day, usually by phone or Zoom, and you did not know this was coming. This new surprise person has not been part of the mediation process nor have they heard your comments nor the discussions with the mediator nor the opposing counsel's submissions and they are often ill-equipped to give sound, helpful advice at a critical point in the day.

So please be sure to ask your plaintiff clients about such people well in advance of the mediation. Make sure the client understands that if they think they might want support from family or friends at the mediation that these people are involved in the preparatory process. And make sure you lay the ground rules for these support people

in terms of solicitor client privilege, legal advice and respect for the mediation process. If necessary - and with permission of opposing counsel and the mediator – you could consider having a support person attend the mediation itself, if in your judgment your client simply won't be able to make a final settlement decision without them.

5. Client authority that is not what you asked for or expected

Yes, it does happen to defence counsel, and it is always awkward when it does. Counsel has reported to their insurance or corporate client with an assessment of the case and recommended settlement ranges. Having received no objections, counsel is then surprised (and sometimes embarrassed) to learn at the mediation itself that the client only has authority to settle for a fraction of what was assessed and reported on. While negotiations may continue at the mediation, distrust can arise when the defence offers do not reflect the type of assessment that defence counsel has been presenting to opposing counsel throughout the case. And if the divergence between counsel's assessment and the client's authority is wide enough, some reputational risks may arise for counsel.

Speak to your defence client well in advance of the mediation – weeks or months, not days. Make sure they have all your reports, make sure they are receiving your full message, not just reading what they want to read, and be explicit about asking for any feedback, concerns or disagreements. While many (if not most) insurance defence clients will not specifically tell their counsel what authority they are bringing to a mediation, counsel should at least ask in advance if the authority is in the same range as the reported assessment.