The New Mexico Trial Lawyer

The Journal of the New Mexico Trial Lawyers' Foundation

July / August 2012 Vol. XXXXIII No. 4

Keys to a Successful Mediation

by James A. Hall

After fifteen years as a District Court Judge in Santa Fe, I retired from the bench at the end of 2009. Since leaving the bench, my practice has included a substantial amount of mediation work. Over the last two and a half years, I have conducted hundreds of mediations and I have become fascinated by the dynamics between the participants in mediations and by the factors that contribute to a successful mediation. This article sets forth my observations about the keys to a successful mediation. Keeping in mind the readership of the Trial Lawyers Journal, I have focused on the role of plaintiffs' attorneys representing individual clients in civil actions. Like courtroom advocacy, preparation is often the key to success in mediations; therefore, I begin with steps that should be taken before the mediation.

Before the Mediation

For most attorneys, the first step in the mediation process is the selection of the mediator. If you want to enhance your chances of success at the mediation, I would suggest that you engage in a short intellectual exercise before considering the selection of the mediator:

1. Identify the impediments to settlement.

I suspect if I asked most lawyers why a particular case had not settled, they would respond, "we just disagree on the value of the case" or, perhaps more generally, "the other side is unreasonable." In my prior life as a trial judge, I generally assumed that cases did not settle because the parties/lawyers just could not agree to an acceptable settlement amount. After participating in multiple mediations, I have concluded that the interplay between the parties and the attorneys is far more nuanced and that there can be many other underlying impediments to settlement. Here is a list of potential impediments to settlement:

- The two sides have an honest difference of opinion as to the value of the case.

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Keys to a Successful Mediation
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- One or more of the parties have unrealistic expectations of the litigation process.
- One or more parties simply will not listen to the advice of their attorneys regarding settlement.
- One or more parties have insufficient information to properly evaluate the case.
- One or more of the attorneys have insufficient experience to properly evaluate the case.
- One or more of the parties in the case have become angry at the opposing party either before or during the litigation process resulting in an irrational view of the merits of the case.
- The lawyers involved in the case have developed such an antagonistic relationship that it has impacted the willingness to settle.
- A party is resistant to settlement as a matter of "principle" and wants their day in court.

This list is certainly incomplete and each case may include several of these factors. My point here is that the first step to a successful mediation is to sit down and take ten minutes to make an honest assessment of the specific impediments to settlement in the case. This process may not be easy as it will require the attorney to engage in some critical evaluation of his or her own client and some self-examination of his or her own role in any impediments to settlement. I would recommend that you take the time to write down the specific impediments to settlement that you have identified, because, as you will see below, you can take specific steps both before and during the mediation to overcome the impediments you have identified.

Once you have identified the impediments to settlement, you can move on to the next key to a successful mediation:

2. Pick the right mediator for the case.

In my time as a mediator, I can proudly identify a number of cases in which I believe my work as the mediator was essential to the resolution of a very difficult dispute. Unfortunately, I can also identify other mediations which, in my view, were spectacular failures. Thankfully, the number of mediations in the second category is much smaller than the first; however, any mediation that fails causes me to reflect back as to why that particular mediation was not successful. Certainly, there have been times where I have concluded that the chances of success might have increased if I had handled a particular part of the mediation in a certain way. More often than not, however, I reach the conclusion that I was not the best mediator for that particular case.

The identification of the best mediator for a case depends on the particular impediments to settlement. Pull out your list of impediments to settlement and ask yourself who would be the best person to overcome these particular impediments. For example, if one of the impediments to settlement is that your client has unrealistic expectations of the litigation process, you should ask yourself whom your client would consider credible in explaining what the litigation process can do and, more importantly, what the litigation process cannot do. In that circumstance, perhaps a very experienced lawyer or a former judge may carry a certain level of credibility with your client that may be helpful in establishing realistic expectations about the litigation process.

If one of the impediments to settlement is an honest difference of opinion as to the value of the case, you would probably want a mediator who you trust to give you thoughtful feedback on your evaluation of the case. More importantly, you would want to select a mediator that will be viewed as credible by the opposing party and attorney. If the impediment to settlement is an honest difference of opinion as to the value of the case and the opposing party and attorney do not believe that the mediator can credibly evaluate the case, there is little chance that they will seriously reconsider their own evaluation during the course of the mediation. If, on the other hand, the opposing party and attorney respect the judgment of the mediator in these areas, there is a far greater chance that they will alter their valuation in a way that moves the case toward settlement.

As one final example, if one of the impediments to settlement is anger directed at the opposing party (or even the opposing attorney), you would want a mediator who has the interpersonal skills to work through that anger and achieve a settlement. It does not matter whether the anger exists in your client or in the opposing party; if it exists on either side, you need to have a mediator who has the interpersonal skills to deal with such emotion.

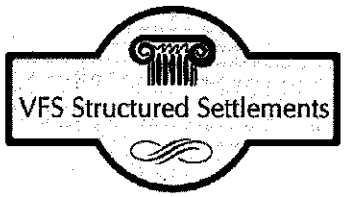
Let me provide one final bit of advice regarding the selection of a mediator: be proactive rather than reactive. It is almost a given that every civil case in New Mexico will be ordered into mediation by the Court. Don't simply wait until the opposing lawyer or the judge asks who you would suggest as a mediator and then give a response off the top of your head. Instead, create your list of impediments to settlement and, if necessary, go to other trial lawyers and get their advice as to who would be best suited to overcome those specific impediments. Pose the specific question to other trial lawyers: "I have a twenty year old client with a relatively minor injury who believes that he should get a settlement that should take care of him financially for the rest of his life. Who would be a good mediator to make him understand that the realities of what might happen in court?" Or, "I have a case with XYZ Insurance Company on the other side. Is there a particular mediator who has been successful in getting them to re-evaluate their view of a case?" If you do your homework on who would be a good mediator in advance, you greatly increase your chances of settlement.

Don't simply wait until the opposing lawyer or the judge asks who you would suggest as a mediator and then give a response off the top of your head.

Once you have the right mediator in place, you should turn your attention to the opposing party:

3. Get the right information to the opposing party.

In order to have a successful mediation, it is essential that the plaintiff's lawyer recognize that the settlement dynamic is different for each side of the case. For an individual plaintiff, the decision whether to settle the case usually rests solely with the plaintiff, subject to the advice of the attorney. The merits of the case can be discussed within the mediation setting and new information can be considered. If the new information is compelling, it may result in a change of opinion as to what constitutes a reasonable settlement. The point



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here is that the plaintiff's side of the case may have more flexibility during the actual mediation to consider new information.

The dynamic for the defense is often different. Generally, the defendant in a civil case is represented at mediation by a defense attorney and an insurance adjuster. The adjuster present at mediation has been given a predetermined amount of authority to settle the case based upon their analysis of the information received prior to mediation. This pre-mediation determination as to the value of the case is extremely important because it establishes the initial parameters within which the defense is willing to negotiate. I say "initial parameters" because the mediation process often affects what both parties view as an acceptable settlement. Nonetheless, the pre-mediation determination by the defense as to the value of the case provides the initial starting point, and the more advantageous that starting point is to your client, the better the chances of a successful mediation.

Let me give a simple example: in a personal injury case, if the adjuster is provided with $25,000.00 in past medical expenses prior to mediation, the adjuster and the insurance company will use that figure in determining what initial authority will be provided to the adjuster for the mediation. If, during the mediation, the adjuster is suddenly provided with an additional $10,000.00 in past medical expenses, two things will happen. First, on a personal level, the adjuster will be frustrated that he or she did not have the information prior to the mediation. It is important not to underestimate the potential effect of this frustration in the mediation context. Adjusters are human beings and it is not in your client's interest to unnecessarily frustrate them. Second, on a professional level, the adjuster has to incorporate this new information into their valuation of the case. The actual mechanics of incorporating this new information may prove challenging particularly if the new information is sufficiently important to move the value of the case outside the pre-mediation authority given to the adjuster. I have been involved in many mediations in which we have been able to incorporate significant new information submitted to the defense during the mediation and still settle the case; however, I have usually concluded that the result might have been better for the plaintiff if the information had been provided to the defense prior to the mediation.

Here is a simple way to look at this issue: the higher the adjuster's authority at the start of mediation, the better for your client. An adjuster's authority does not come out of thin air. It comes from the information he or she has prior to the mediation. The more information you can provide to the defense prior to mediation to increase their valuation of the case, the higher the adjuster's initial authority.

Finally, I should note that in personal injury cases, this issue most commonly arises in evaluating the damages portion of the case. Providing clear documentation to the defense of past medical expenses, the need for future medical expenses, past lost wages, projected future lost wages, and any other element of damages goes a long way in establishing an adjuster's initial authority.

Now that you have provided the defense with what they need for the mediation, you should turn to your client:

4. Prepare your client for the mediation.

I suspect that every lawyer has a fairly standard speech that they give to their client to prepare them for mediation. I would guess that the standard speech includes an explanation of the mediation process and the need for the client to be patient with the process. Before you give your client the mediation speech, I would suggest that you think about the impediments to settlement that you identified earlier and consider whether you can prepare your client in a way that helps overcome those impediments. If you have identified an impediment that involves your client's expectations, attitude or emotional state, you may be able to begin the process of overcoming that impediment in your pre-mediation discussions.

The most common example of this would be when your client has unreasonable expectations regarding the value of the case and the potential outcomes of litigation. You may

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already have had conversations with your client trying to get him or her to be realistic about what a reasonable settlement would be. In preparing your client for the mediation, you can continue this process by letting the client know that the mediation provides an opportunity to hear from the mediator about the strengths and weaknesses of the case. In cases where I have been the mediator, I know some lawyers talk to their clients about my experience as a judge and how I will be able to give them the benefit of that experience in letting them know what might happen if they went to trial. If you are hoping that the mediator will be helpful in making your client's expectations more reasonable, it would be wise to build up the credibility of the mediator before mediation by extolling the credentials of the mediator, so that the client will be receptive to the mediator's observations during the course of the mediation.

If one of the impediments to settlement involves emotions that your client is experiencing in connection with the case, such as anger toward the opposing party or a strong sense of loss in a wrongful death case, you can prepare the client for the mediation by letting them know that it is acceptable for them to express those emotions to the mediator. In some cases, a party needs the opportunity to express those emotions to some neutral third party before they can begin to move past the emotion and realistically evaluate a settlement offer. A mediator can often provide this outlet. By identifying this impediment in advance and assuring the client that expressing such emotion is acceptable in mediation, you can improve the chances of settlement.

Now that you have the right information in the hands of the defendant and you have your client prepared in a manner conducive to overcoming the impediments to settlement, there is still one more person you should talk to so that you are fully prepared for the mediation:

5. Talk to the mediator before the mediation.

In New Mexico, it has become the general practice to submit confidential written mediation statements to the mediator prior to the mediation. In addition to the written mediation statement, I make it a practice to try to talk to the attorneys a few days prior to the mediation. I find that these confidential conversations with the attorneys are often very useful to me in preparing for the mediation for the simple reason that attorneys are often more candid with me when we talk, as opposed to what they are willing to write in a mediation statement. It is in these conversations that lawyers often share with me what they view as the significant impediments to settlement. For example, many lawyers (on both the plaintiff and defense sides) will tell me directly that their clients have unrealistic expectations as to what constitutes a reasonable settlement. Other times, lawyers will provide me with insight as to the best way to interact with their client or the best way to deal with serious emotional issues.

Too often, lawyers think that the route to a successful mediation is some clever negotiating strategy.

These types of insights are extremely useful in preparing for and conducting the mediation. When I am in possession of this type of information, I am able to adjust my own behavior in the mediation to avoid potential problems and to work in conjunction with the lawyer to achieve a settlement.

I should note that I have had one federal magistrate and a very few lawyers express a concern that such communications are somehow improper because they are outside the formal mediation or that they constitute ex parte communications. I simply disagree with this view. Rules regarding ex parte communications apply to decision makers (judges, arbitrators, jurors, etc.). As a mediator, I have no decision-making power; therefore, I don't believe such rules apply. Moreover, the very essence of mediations is ex parte in the sense that confidential mediation statements are submitted prior to mediation and mediators meet privately with one side or the other during the course of the formal mediation. I view my pre-mediation conversations with counsel as simply a useful extension of the confidential mediation statements which are submitted to prepare for the mediation.

AT THE MEDIATION

If you have undertaken the steps above, I truly believe that you are ninety percent of the way to a successful mediation. Too often, lawyers think that the route to a successful mediation is some clever negotiating strategy. In reality, the

work that you do before the mediation to identify the impediments to settlement and to provide the other side with the information they need to adequately evaluate the case are far more important in reaching a good settlement for your client. There are, however, some useful things to keep in mind during the mediation.

6. Have your most important and compelling evidence ready, but let the mediator do his or her job.

At this time, most mediations in civil cases are conducted with the mediator shuttling between the parties. While there may be a joint session to commence the mediation, it is usually the mediator that talks privately with each side about the strengths and weaknesses of a case. I have found that there are advantages to this arrangement because it is clear to me that the way information is received is highly dependent on who is presenting the information. As the mediator, I possess a status of neutrality, as opposed to advocating for one side or the other. As a result, information coming from me to a party may be received very differently than it would be received if it were coming directly from the other party.

I have participated in mediations in which an attorney insists that he or she be permitted to present an opening statement to the other side. It is usually the hope of that attorney that the opposing party will be overwhelmed with the compelling arguments that they present and, therefore, will be more willing to settle the case at a favorable amount. In my experience, this approach is seldom successful and it sometimes undermines the effectiveness of the mediator.

The problem with this approach is that the opposing party knows that the attorney for the other side is an advocate for their client. As a result, the opposing party often does not view the attorney as a credible source of information. The opposing party will often devalue any information coming directly from the attorney for the other side.

I have seen this happen on multiple occasions. After the lawyer presents

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an opening that he or she thinks is brilliant, I proceed to a private session with the other party and they routinely attack the validity of whatever the attorney presented, even if the information presented is compelling. Moreover, if the information is compelling, the fact that it was presented directly by the opposing attorney may undercut the perceived neutrality of the mediator if the mediator appears to agree with the opposing lawyer. To put it another way, it is far more effective for me as the mediator to ask a party, "Aren't you going to have a problem with the testimony of witness X?" than for the opposing attorney to say "We are going to win this case because witness X is on our side." The former is more effective because of the neutrality of the mediator.

It is important, therefore, to let the mediator do his or her job in relaying important information about the case. This can be difficult for some lawyers because it requires turning some measure of control over to the mediator; nonetheless, it can be critical to the success of the mediation.

There is, of course, a risk to turning this control over to the mediator. You know your case better than the mediator and the danger exists that the mediator will not have a clear understanding of the important components of the case. It is very important, therefore, that you have your most important and most compelling evidence ready so that you can provide it to the mediator in a clear and concise manner. This includes having access to the most important documents in the case so that those documents can be presented to the other side by the mediator. On many occasions, I have had great success with a party when I have been able to discuss with them the potential effect on a jury of specific documents that will be exhibits at trial. I have to rely on the attorney to provide me with the information I need to have an impact on the opposing party, but I need to be given the leeway to present the information in the most effective manner.

It is important, therefore, to let the mediator do his or her job in relaying important information about the case.

The approach set forth above provides a way to deal with the opposing party, but how you interact with your client during the mediation is also important.

7. Try to work cooperatively with the mediator in discussions with your client.

Over time, I have learned that the success of the mediation process often depends on the relationships that develop over the course of the mediation. In many cases, the plaintiff has little or no experience with the legal system and has never participated in a mediation. Recognizing the stress that all aspects of litigation can have on people, I do my best to make the plaintiff feel as comfortable as possible during the mediation. I have found that an important factor in whether I am able to relate well to the plaintiff is how the plaintiff's attorney interacts with me in private sessions with the plaintiff. The plaintiff often takes his or her cue on how to interact with me from the attorney. If the attorney engages in an open and honest dialogue with me, the client usually is willing to open up and have a good discussion about the pros and cons of settlement. Conversely, if an attorney appears either guarded or antagonistic toward me, the client will usually adopt the same posture.

This distinction is important if you want to take full advantage of the mediation process. In my view, an open and honest discussion about the strengths and weaknesses of a case and about the pros and cons of settlement is essential to a meaningful mediation. This does not mean that the attorney and the mediator must always be in agreement about all aspects of the case. Frequently I find that what I view as important aspects of the case may not be the same as those aspects of the case identified by the attorneys. The key here is not agreement; it is that the issues can be discussed and considered. I believe the client deserves this type of a meaningful discussion about the choice between settlement or litigation.

If the attorney appears either guarded or antagonistic toward me in private sessions, we rarely achieve a meaningful discussion about the options available to the plaintiff. In those circumstances, my role is limited to little more than that of a message carrier, taking offers and demands back and forth between the parties. It is still possible that a settlement may occur, but the chances are certainly decreased.

The ideal circumstance occurs when the mediator's observations about the case are consistent with

the advice you have been giving your client all along. When the mediator is consistent with the attorney, it reaffirms the advice you have previously provided. This is most powerful when it involves the identification of a weakness in the case or a significant risk in proceeding to trial. If you have a client who has unrealistic expectations about the outcome of a trial, those expectations can be brought closer to reality if both the mediator and the attorney are providing similar views. Sometimes all it takes for a client to come around to your assessment of the case is for an independent person, i.e., the mediator, to give a similar assessment. You can only take advantage of this dynamic with your client if both you and the mediator have set the appropriate tone for open and honest discussion. Otherwise, the impact of the observations of the mediator is lost on your client.

If you have a client who has unrealistic expectations about the outcome of a trial, those expectations can be brought closer to reality if both the mediator and the attorney are providing similar views.

8. Be patient and let the process play out.

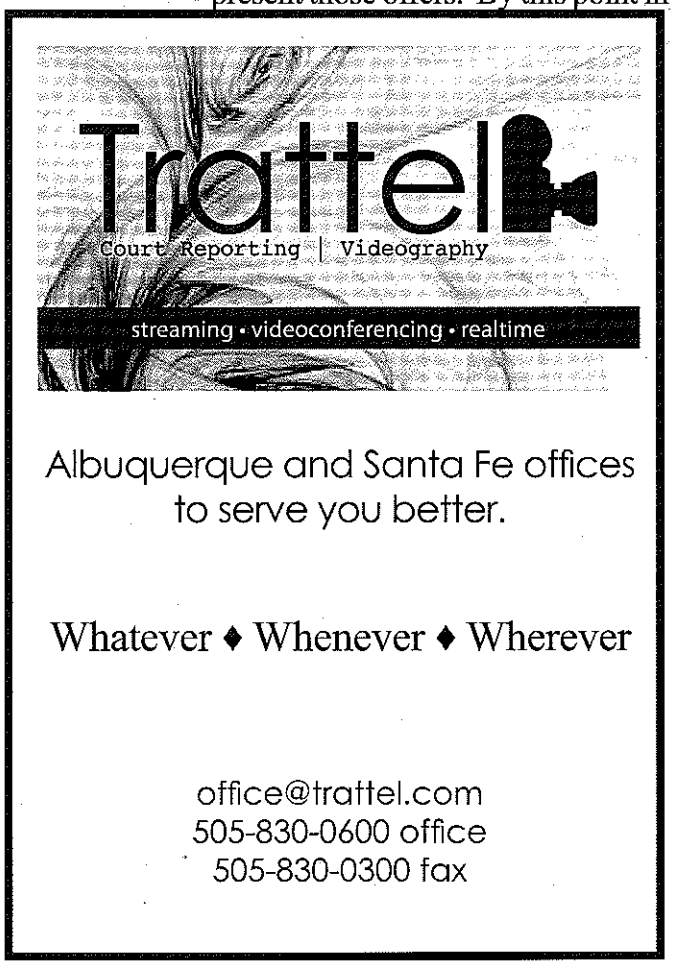
In conducting mediations, I am frequently surprised at the final outcome. Cases in which settlement initially appears hopeless end up with an agreement. About halfway through the mediation, I often find myself thinking that the parties are so far apart that there is no way that we will be able to reach an agreement. This is the point in the mediation where a sense of frustration can develop and the temptation exists to quit. I have had lawyers say to me (usually in a loud voice), "if they don't give us a reasonable offer right now, we are leaving!" Some lawyers even feel compelled to follow through on that threat and storm out of the mediation.

If you do walk out before the process is complete, just keep in mind that you may be walking away from an opportunity for your client to achieve a good outcome in the case. It is usually far better to wait and see what happens. You and your client might be surprised.

9. Listen to the mediator, particularly when you are trying to close the deal.

After several hours of back and forth, there usually comes a time when the parties are not too far apart and it appears that an agreement is within reach. As the plaintiff's attorney, you feel that the negotiations have entered a reasonable range of settlement and you want to close the deal. Often this is the most delicate part of the mediation. For whatever reason, some human beings have difficulty making that final step to reach an agreement. For some people, the thought of letting the case go can be difficult. Often, people have second thoughts about whether the settlement range is fair and they want to go back to where they started. Some people just do not want to agree to anything proposed by the other side and it is important to them that the opposing party acquiesces to their final demand. Finally, for some competitive individuals, they view it crucial to "win" the last few moves, no matter how small the increments.

This is the point in the mediation where you should listen closely to the mediator's recommendations as to what offers to make and how to present those offers. By this point in



the mediation, the mediator has a feel for the other side and a feel for how they will react to what is presented. For example, if the mediator is dealing with an opposing party who absolutely refuses to accept the opposing party's offer and has to be sure that it is their offer that is accepted, the mediator may need to get a promise from you that you will accept the offer before they actually make it. If it appears the other party is beginning to have second thoughts and is about to go backwards in the negotiations, the mediator may recommend that you move quickly to complete the settlement. If you happen to be one of those competitive individuals who wants to "win" the last few steps, you may want to heed the mediator's advice that you not push the other side too far and risk losing the settlement. The key here is to recognize that mediator is probably in the best position to know what is needed to close the settlement. As always, your obligation is to your client and, if achieving a settlement is in your client's best interests, it may be time to follow the recommendation of the mediator.

As always, your obligation is to your client and, if achieving a settlement is in your client's best interests, it may be time to follow the recommendation of the mediator.

After the mediation

Hopefully, all your cases will settle on the day of the mediation. If a case does not settle, however, you should not despair for two reasons.

10. Keep in mind that many cases settle after the mediation.

A mediation is often just the first step toward settlement. The mediation process may identify areas where additional information needs to be developed or exchanged and, once that information is obtained, the case may still settle. New information may have come up during the mediation which may cause one party to want to go back and re-evaluate the case. After that re-evaluation, the case may settle. Sometimes it is useful to proceed with some additional discovery or motion practice and then return to an additional mediation to attempt to settle the case. I have often had great success in reaching a settlement in a second mediation. Regardless of the reason that settlement did not occur on the day of the mediation, you should always keep open the possibility that the case will settle in a manner that best serves your client's best interests.

Finally, the second reason that you should not despair if your case does not settle is that there is nothing wrong with going to court for a decision. I happen to be one mediator who believes in the court system and believes that people should be able to have their case decided by a judge or jury if that is what they want. If you have participated in the mediation process in good faith and, after seriously considering the best offer from the opposing party, you and your client make an informed decision that trial is the better course of action, you should not feel bad about going to the court for a decision. If you are proceeding to trial, I would suggest that you not forget the discussion that occurred at the mediation. Hopefully, at the mediation, you engaged in some good honest discussions with the mediator as to the strengths and weakness of your case. Perhaps the mediator brought up some issues you had not fully considered in preparing your case. A mediation is a great opportunity to get unbiased, neutral feedback on your case from either an experienced lawyer or former judge. Don't waste that feedback. Use it in preparing your case for trial and it may help in getting a good court result for your client.

Judge James A. Hall served on the First Judicial District Court in Santa Fe from 1995 to 2009. During his tenure on the bench, he handled cases in the Civil Division, Criminal Division and Family Court. He was twice elected by his colleagues to serve as Chief Judge of the First Judicial District, serving from 2001-2008. He was named an Outstanding Trial Judge by the New Mexico Chapter of the American Board of Trial Advocates and received the Seth D. Montgomery Distinguished Judicial Service Award from the State Bar of New Mexico. He is a graduate of DePauw University and the University of Michigan Law School.