

# **MAXIMIZING MEDIATION – TECHNIQUES FOR SUCCESS**

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The Virginia Workers' Compensation Commission provides for two separate and distinct means of mediation. First, Issue Mediation is offered by the Commission to resolve isolated issues such as medical treatment, mileage or limited periods of indemnity. The Commission will mediate these issues with an unrepresented claimant in an informal, nonbinding setting. The second form of mediation is for full and final resolution of claims. For the Commission to provide mediation for a full and final settlement, the claimant must be represented by counsel. The following paper does not purport to be an exhaustive list of all potential issues and techniques that should be considered because each mediation presents its own unique circumstances, but this paper provides insights into the characteristics present in successful mediations.

## **TECHNIQUES FOR MEDIATION SUCCESS**

### **Have a Strategy for the Mediation**

An obvious point, but one that bears emphasizing is, it is important to go into the mediation with a strategy. It is important to consider in advance your "best alternative to a negotiated settlement" and your "worst alternative to a negotiated settlement" is a useful primary step to formulating a strategy. It is also important to consider what is the end game and whether or not you have a second to last number before you go into the session.

Many other issues should be considered when formulating an effective mediation strategy to make your mediation a success. You should consider the non-monetary "deal breakers" that have to be resolved. For example, it may be a "no hire" provision when a former employee is settling his worker's compensation claim. From the claimant's perspective, a non-monetary deal breaker may be a guarantee that only a neutral reference will be provided to any future employer. Another non monetary deal breaker may be confidentiality concerns and how they get resolved. Considering all of these issues prior to the mediation helps form an effective strategy for success.

### **Choose the Right Mediator for Your Case**

This statement is not as self-serving as it seems. Picking a mediator is not always as simple and as straight forward as it appears. It is necessary to know the mediator, his or her background and experience, and the mediator's "style." Generally, the employer/carrier wants to close a file, and the injured worker wants to resolve the damages claimed. In these cases, the bulk of the discussions take place in caucus and will be about money, not other interests of the parties. The mediator who understands the intricacies of this process and knows when to advance discussion about financial interests and when to direct the discussions to non-financial interests, is more likely to get a settlement result than a mediator who is not.

Of course, style also includes the mediator's ability to project optimism and solve problems, especially when the parties see no way to bridge the chasm between the offer and the demand. Tenacity and patience are two other hallmarks of a mediator who will get you to a result.

### **Be Prepared**

It is accepted wisdom that the party who is best prepared usually "wins" the day—a concept no less true in mediation. Just knowing your case and analyzing risk may not be enough. Here are some other aspects of mediation preparation that you should be considering:

- In a complex case where multiple defendants are involved it is necessary to consider how each of those interests will be satisfied. Where do the interests between the parties on each side of the case align and where do they diverge? Does the area of divergence present an opportunity to leverage settlement?
- What are the "hidden" interests of the parties? What factors other than the mere resolution of the compensation claim are driving the parties' positions? Is claimant wedded to a certain net number because of plans for how to use the settlement proceeds?
- In a catastrophic case involving serious bodily injuries, have structured settlements been explored? Has the information been provided by the claimant to allow the defense to get an annuity where the claimant has been "rated up"?
- Are all the necessary and correct players in place and on board to settle? For the defense side, this means that adequate authority is available to settle the case. For the claimant's side, this may involve pre-settlement negotiations with lien holders who must release their claims as a condition to settlement.

### **Know Your Client**

It is important to know how your client will respond to the challenges that arise during mediation. How will your client respond to the "stratospheric demand" that the claimant will present? Will your client reach an impasse immediately or back up from a prior offer or will they proceed forward with the mediation? How will your client respond to the mediator's request that the defense consider spitting the difference between the claimant's \$100,000 demand and the employer's best offer of \$50,000, when the consensus is litigation costs would exceed \$15,000? Knowing how your client will react to these situations will help formulate the mediation strategy.

### **Anticipate the Opposition's Strategy**

When preparing for mediation, it is also important to consider what the opposition's strategy may be and what is happening in their discussions. Claimant and

his/her counsel are navigating the cold, hard, dollars and cents evaluation that the defense offers. Comments such as “I can’t believe that is all they think my husband’s life is worth” are natural and expected from a claimant in a death case. To resolve the case, someone in the claimant’s room has to be thinking about the compensable aspects of the case and be able to move beyond the genuine emotion caused by the injury.

### **Think Creatively**

You should expect a mediator to have some capacity to facilitate creative solutions to problems, but being able to do this to some degree with your client before mediation is helpful. Some creative solutions are: Does the claimant have a credit problem? Is the defendant a manufacturer of a product or equipment the claimant could use if it were provided as part of the settlement? Thinking creatively is another way to maximize the mediation.

### **Be Aware**

The Commission will usually allocate about three to four hours for the mediation. This time will include a joint session of the parties and several rounds of caucus. Demands and offers, and subsequent demands and subsequent offers, will be placed on the table. The situation may arise during mediation where the numbers seem to be too far apart, no process is being made, or the mediator is spending all of his/her time with the other party. Be read for these dynamics.

Mediators are typically attuned to the time issue and try to keep the parties on both sides feeling equally well served with his/her attention. As a “professional defendant,” the mediator necessarily has to spend less time with you to explain what is going on and what it might mean. You should not feel like the mediator is biased because of this. The mediator is just trying to work effectively toward a solution.

### **Make the Money Talk**

Have a reason for the numbers being offered or demanded. When the mediator is reduced to sending numbers back and forth between the parties, not much can be accomplished. What is the basis for the number? Where do you want to go to resolve the case? How can you signal effectively on the other side where you want to end up with your number? Using brackets to test whether the gap can be closed and to uncover what the parties’ true range for settlement might be is a way to signal effectively to the other side where you want to end up with your number. Stay alert to the idea that the parties will usually settle a case once they reach a mediation session, and the longer you stay at the table, the more likely it is a settlement can be achieved.

### **Force the Opposite Side to Make a Hard Choice**

Having done a lot of preparation, including having a strategy, clients and counsel will know when their offer/demand to the other side makes the other side think twice before simply walking away. Unless there is some risk, it is too easy to abstain from further offers and continue to play out the litigation.

### **Be Patient**

The last, and perhaps the most significant, technique that aids in mediation is to be patient. Parties come to mediation prepared to settle, but also prepared to go to war. Uncoupling advocacy from the process can and does take time. Witness the number of cases that settle after the mediation day has concluded. Transforming expectations from an advocates all out win to a compromise result is not always a quick and easy process.