MEDIATING A PERSONAL INJURY CLAIM

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I ROLE OF A MEDIATOR

Blair: To be an honest broker, to facilitate, sometimes to evaluate (but only if it's helpful at that particular time), to connect with the participants, to keep them at the table (time is on your side), to get them fed (the cheeseburger rule holds that you can't settle a case without a cheeseburger), to make them comfortable, to work early towards the elements of a written agreement (what do you need as part of the deal?), to give them a heads-up about deal-killers, to let the process work, to tell the truth.

James: To listen, to inquire, to understand the positions of both parties and help them assess the risks of not settling. Don't be dictatorial, but instead explain risks and options. Tell the parties where you believe them to be vulnerable even if they don't like hearing it. I explain to the parties in the opening session that they have two roles in the opening session. One is to articulte their position to the other party. The other role is harder and that is to listen to what the other party is saying. Then we are in a position to talk when we get to private sessions.

Sullivan: A mediator must have instinct and insight. In some ways it is not unlike picking a jury. What I think a good mediator must do is use those tools to determine where each party and each decision maker are coming from. You must get across to the parties and their lawyers the fact that you are not a judge, so that they understand you are not the person they have to convince. Your role is to carry the information to the other side so that the other side more fully appreciates what may or may not appeal to a jury of six or eight jurors or a judge.

II THE PLAINTIFF

Blair: This is the person who has never done this before, who has rarely if ever had her ideas tested by opposing views, who has assigned blame and spent the money before she got there, who has likely never heard an honest apology or statement of regret, who needs guidance in negotiation, who needs time to accommodate risks and costs.

James: This plaintiff is the neophyte in the room and therefore the person that must be heard if you want to gain trust. I probe the wrongdoing, the injuries and the affect on the person's life in the opening session. I also tell all of the parties that they must become good listeners, especially to things they don't want to hear, because a jury may believe that which they are rejecting, so we must be willing to hear it in order to assess the risk and to know if settlement is an option.

Sullivan: In a personal injury lawsuit the Plaintiff is the most important person to assess. How emotional? How objective? How stubborn? How realistic? How has plaintiff been indoctrinated by his/her lawyer, his/her family, his/her background? How the incident has affected his/her life and his/her lifestyle? How will all these things impact the mediation process? Any injury will be more real to the victim than to anyone else. There is a need at the outset for that to be acknowledged. Then the mediator needs to plant a seed that resolution is the preferred solution. Some folks just don't want resolution. They want to prove something, even if it means continuing stressful conflict. Sometimes they want to just prove they were right. Sometimes they just want everyone to understand the depth of their pain and their loss of part of their life. Like every one of us they want the cause of their loss to be the responsibility of someone else. It's not vengeance. It's just vindication. A mediator must figure out where the plaintiff is coming from, and then find a way to give them this sense of possible vindication. The Plaintiff is not the only one for whom instinct and insight must be applied. Most of the others in the mediation can be more difficult.

III THE PLAINTIFF'S LAWYER:

Blair: I never get between lawyers and clients, so I rely on plaintiff's counsel to have a good grasp of risks, costs and values. I find that a good plaintiff's lawyer can usually answer the question, "What do they want to pay?" "I'm not asking whether you'll take it or not, but what do they think the case is worth?" Listen very carefully to the answers to these questions. I try not to be put off by negotiating syles with which I disagree. Let the guy negotiate his case.

James: It is important for the mediator to know what the plaintiff's lawyer expects from the mediator. More important is to let the lawyers know what the mediator expects from the lawyers and the parties. This means that it is important for the lawyers to know in advance that I want everyone in the room to speak at the opening session. The plaintiff is wanting to know that his or her lawyer is standing up in his or her behalf. Then it is important for the plaintiff to express feelings and history, both good and bad. For the defense to see the value in this is to recognize that this is not an opportunity to fight, but to listen. The defendant will not get a settlement if it does not allow the plaintiff to vent, to express sorrow, grief and loss. A wise defendant will then tell the plaintiff they are sorry for their loss, but if it goes to trial, here are some of the things we will have to talk about, doing it civilly and firmly.

Sullivan: The Plaintiff's lawyer can be the key. Is the lawyer steering the ship? How independent from the lawyer will the Plaintiff be? Sometimes the lawyer is in total control and sometimes the lawyer is fighting for control. Other times the plaintiff's lawyer wants to abandon all control. A mediator has to sense which is the case. Avoid at all costs

embarrassing the lawyer in front of his client. If necessary, see if you can pull the lawyer aside and speak directly to the problem. Some lawyers advocate so strongly to you in front of their client, that the client's expectations rise to unattainable heights.

IV THE DEFENDANT 'S LAWYER:

Blair: I ask the defense lawyer, in confidence, "What do you think it will take to buy this case?" "I'm not asking what you will pay, but where are they going?" "What's their real number?" Good defense lawyers can answer these questions. Again, as with plaintiff's counsel, I try not to be put off by negotiating styles or tactics with which I disagree. Let the defense lawyer negotiate her case as she chooses. Find out, publicly or privately, if anyone on the defense side has to leave early. Find out early what the settlement agreement needs to say.

James: The defense lawyer should refrain from strident advocacy and show some concern for what the plaintiff has gone through. The lawyer should set forth some of the contentious issues that will be presented at trial. These positions are not inconsistent. Some plaintiff's lawyers refuse to participate in opening sessions because of past experience with hostile defense lawyers. Everyone then pays a price for that. You can make your points without hostility.

Sullivan: Sometimes I encounter defense lawyers who will posture for the carrier client. It's almost as if they are in the ring and the carrier representative is in their corner delighting in every punch thrown. The problem is the mediator is not there to absorb the punches of the defense lawyer. You can sense when the defense counsel is pandering to the carrier's representative. At that point you have to find a way to direct your approach to the representative. The way to do this is talk to the lawyer with words that are meant to impact the decision maker.

V THE DEFENDANT 'S INSURANCE CARRIER:

Blair: Treat these people as experienced professionals. Be sensitive to their negotiating styles and patience. Be ready to explain that most negotiations are positional, with many changes of position on both sides. Say that time is needed in the other (plaintiff's) room for information to be processed and reality to sink in. Find out for sure if the claims rep is a leave-early and plan accordingly.

James: The representative of the carrier can be very effective if getting a case settled. In cases of serious injury or clear liability that representative can express sympathy and concern. Believe me that defendant representatives are often responsible for the plaintiff believing that they are being fairly treated and their claims seriously considered. Ususally the defendant comes with clear authority and so it is important for the mediator to listen to the representative and be honest in the assessment of the case with the carrier.

Sullivan: A mediator needs to get a sense of what the real authority the representative has, without actually getting the number. As the negotiation goes on the mediator has to determine whether the authority of the man in the room is going to do the job, and, if not, the willingness of the representative to make a call or calls to get the case resolved. Then worry about the 4:30 P.M. deadline.

VI THE PHYSICALLY ABSENT INSURANCE CARRIER:

Blair: No one likes the absent claims rep, but it's nonetheless common. Establish at the opening joint session who is there and who isn't. Ask the defense lawyer, in front of everyone, whether arrangements have been made so that the absence will not be a problem. Ask whether the claims rep is reachable throughout the day by telephone. Elicit from defense counsel at the opening session that the absence of the claims rep does not indicate a lack of serious purpose in getting settled. If possible, have the claims rep participate in the opening session by telephone. Call upon the claims rep to introduce herself by telephone and say a few words. Find out privately when the claims rep takes lunch or goes home and plan accordingly, i.e., get a cell or home phone number so that the negotiation is not crippled.

James: This can work fine, but I find myself isolated from the decision maker under these circumstances and it becomes the lawyer with whom I am dealing. All in all, I would prefer to have the carrier representative present.

Sullivan: It is more difficult to settle a case without the real decision maker in the room, face to face with you. It is helpful to read the body language of the decision maker and to have him or her read your own body language. Absence of the decision maker sends a message to the Plaintiff and his or her counsel that the carrier doesn't take the case too seriously. I actually believe that the absence of an in-person carrier representative may be a disservice to the carrier's insured. Nevertheless we can't let that absence stop the process, if everyone has agreed to that absence.

VII THE DEFENDANT WITHOUT AN INDEMNIFIER

Blair: Speak plainly about risk and cost if the case goes to trial. The uninsured at risk defendant should want to get the case settled. If not, find out why not and explore the reasons. Encourage a business analysis. Talk about likely jury value if the case is one of liability. Then talk about what's a reasonable deduct for comparative fault. Then talk about any particular risk factors which may give the case added value (heat vs. light). Talk early about what would be seen as a reasonable settlement demand from plaintiff. "I know they are high now, but what if they gave you a reasonable opener; and what should that number be?"

James: Here we start to deal with emotions, just as with the plaintiff. So, listen, listen and listen. Try to help the party understand the risks and options available. If this is a case of serious injury and liability that person will be afraid. The plaintiff is afraid. Let's be an educator and compassionate.

Sullivan: Make sure the Plaintiff and Plaintiff's counsel understand the impact of the demand they are making. They need to know the real financial wherewithal of the opponent. When the Defendant is a big operation that is self-insured, it is not unlike dealing with an insurance carrier, but the representative's job could well be at stake depending on the outcome of the mediation. The mediator must give this representative the tools to convince his or her boss that the concessions were justified and necessary. This might include some of the mediator's notes.

VIII THE OTHER PERSONS PRESENT

Blair: I don't like the wild card of well-meaning but uninformed and opinionated friends or family attending the mediation with lots of ideas but no responsibility for the outcome. Of course, these extra folks can be positive factors and I will initially give them the benefit of the doubt. But in a tough case with the extra person counseling obstruction, I will say to that person, "I fear that you are here to prevent Alice from settling a case which is in her interest to settle. Do you want to take responsibility for making her go to trial and risking a bad result? I can't help Alice find out the other side's top number if you are urging her to quit the negotiation."

James: This can be helpful or hurtful, but I am not hestitant to say that this is the plaintiffs claim and they should not put that plaintiff in the position of feeling a failure in their eyes of family in friends. Further, if necessary, I visit the issue of how that person will feel if the plaintiff turns down and offer and comes up empty at trial.

Sullivan: It is a problem. The more people you have to convince, the more difficult it will be. This often happens in a Plaintiff's case with a token consortium claim. You have husband and wife and it is pretty easy to figure out who is dominant in the relationship. If the dominant person is the one with the consortium claim, you need to get them to look at the litigation as something their spouse should not be put through. You need to make that person the agent for compromise. In other cases where it is a friend that is urging obstinacy, sometimes you just have to ask them, "How many cases have you tried to a jury?" Some how you need to make the extra party your friend in the negotiations.

IX MULTIPLE DEFENDANTS

Blair: Talk with plaintiff first and say to defendants that they should "committee" the case while you are gone. Then return and find out whether the defendants can agree to a sharing agreement of some sort to get some numbers on the table. Say to defendants, "I am encouraged from what I've heard that you can buy the case reasonably today. What if you can buy the case, not for a goofy high number, but for a settlement number and not a jury number? Without talking about splits, what is a good fair attractive number? Now, can we negotiate a sharing agreement to work towards what everyone agrees is a good deal?" Also, deal early with the possibility that part but not all of the case may settle. Explain in the opening session that you as mediator are here to settle the entire case because that's what the parties want to accomplish. But say that later in the day, if one party wishes to negotiate

directly with another, to the exclusion of other parties, you as mediator will be required to carry those settlement messages too. Establish that all parties understand that partial settlement is a possible outcome of the mediation, even if no one wants that result.

James: Sometimes a split will be agreed on before the mediation. If not, then discuss with the parties an agreement….joint offers, or, indivdual offers. One party settling out, leaving the other holding the bag. I usually anticipate more problems than are actually there. Mediating the division of partitipation in offers may take some time. Sometimes the parties are in agreement to share in a formula to a dollar limit and then one party backs out. Sometimes the plaintiff would prefer to take out one defendant.

Sullivan: The reality of this situation is that you will seldom get multiple Defendants to agree on the split. First you need to get them to agree on a range of what the damages might be without regard to apportionment of fault. The mediator must deal with the problem of differing views on the questions of liability. Often each Defendant's carrier will believe their insured has little or no fault. Often the carriers have different ideas of the Plaintiff's comparative fault. Often you have policy limits questions that impact the positions of the other Defendant, e.g. the UIM carrier that wants to stand on the sidelines, "They haven't even offered policy limits." I believe that the mediator must look for the part of the case on which some consensus may be reached, achieve that consensus and then piece by piece convince the Defendants of a shared view of fault. Then work the numbers up from there to something the Plaintiff should not turn away from. If it comes down to it, try to leverage the Defendants with the possibility of separate settlements. Make sure the Plaintiff is aware of which Defendant is left holding the bag. That can be leverage on the Plaintiff.

X MULTIPLE PLAINTIFFS

Blair: I would separate the plaintiffs and find out how they feel about confidentiality. If they want their negotiations to be confidential and not shared with anyone but defendant, I want to know that. I would advise defendants not to make combined unallocated offers as that is usually not productive.

James: This is difficult. Take in the offers for each party and work it as you would individual cases.

Sullivan: It's not a huge problem if each Plaintiff is represented by different lawyers. You just carry the ball for each one, but you will have problems with the Defendant or Defendants, making comparisons of each Plaintiff's case. There are confidentiality issues as between the Plaintiffs which need to be resolved one way or the other. If one lawyer represents two Plaintiffs, who are not related by marriage or parenthood, there are tremendous ethical difficulties for the Plaintiffs' counsel. In the first caucus with the Plaintiffs you need to go over the ethical considerations.

XI THE CONFIDENTIAL MEDIATION STATEMENT

Blair: I give parties the option of submitting shared or confidential mediation statements.

James: I like having a lot of information, but for the most part I would encourage the plaintiff and defendant to share their views. Most important is for the plaintff lawyer to get all of the bills, specials and expert opinions to the defendant and carrier well in advance of the mediation. Getting the statements is important, but hearing the plaintiff may be the most important thing of all.

Sullivan: How much preparation time should a mediator puts into a case can be a problem? Sometimes I feel as if I spend too much time reviewing all sorts of documents and deposition testimony. I even cut back on billing all the time I spend. Nevertheless I think it is important to the Plaintiff and to the insurance carrier to know I have a handle on the factual and legal issues in the case. I prefer frank and open confidential information from the lawyers, but I very seldom get it in the Confidential Mediation Statements. They are usually just advocacy positions, which I wouldn't mind being shared with all the participants ahead of time. This really counsel's call, and a mediator just must deal with he or she is given.

XII THE MEDIATOR'S NUMBER

Blair: I don't pretend to have the clairvoyance of Carnac. I will sometimes suggest to counsel, post-mediation, my notion about the number which defendant won't pay and plaintiff won't take.

James: I don't try to give advice to either party about what I think the case is valued at. So, if the parties are not going to get together, I tell them that I have a number that is my number and is a number that I don't think that the defendant wants to pay, but which I think it might, and that it is a number that the plaintiff doesn't want to take, but which I think she might. And, that usually works. Not negotiable.

Sullivan: I will, in later stages of the negotiating, advise the parties of where I sense the other side might stop. This is not intended to be a "Mediator's Number". Often it is a guess on my part and I have sometimes been way off. It does, however, give the parties a point of reference for their private discussions. Often when I arrive at, and give a mediator's number, it will be between the alternative numbers I have proffered earlier.

XIII DISCLOSURE OF RELATIONSHIPS WITH COUNSEL OR PARTIES

Blair: DO IT!

James: Do it.

Sullivan: When you've been a trial attorney as long as I have, you have some connection with most of the lawyers you mediate with. I try to go out of my way to list relationships in a way that sends a message that this knowledge is not going to influence anything I will do in the mediation.

XIV MEMORIALIZING THE SETTLEMENT

Blair: Up to the parties but, as noted above, raise the idea of the essentials for a written agreement ("what do you need to have in the written agreement?") very early in the process. Try to get the basic deal points established at the beginning, when it's relatively easy, leaving no excuse for late deal-killers to come in from left field.

James: I let the parties do it. I don't do it.

Sullivan: I try to have ready a simple form that recites the amount of the settlement, the anticipation of later formal releases or dismissals, confirms the method of satisfaction of liens, and memorializes the division of the mediator's fees. I usually have it on a smart stick or disk, soothe parties can have a secretary make any changes or additions. I am very concerned about confidentiality provisions in view of the IRS position in the Dennis Rodman case.

XV THE UNUSUAL CASE

Blair: Sounds like higher risk, higher cost, more uncertainty on appeal, more reason to get settled. I would be candid in saying to parties, "I've never seen a case like this and can't predict what's going to happen to you in court. You are on your own. All I know for sure is that someone's going to get shot at and hit."

James: They seem different, but the same. All about feelings and emotion and translating to money. Reducing risk is what we are encourageing the parties to do.

Sullivan: An unusual case may involve serious injuries, multiple parties with workers' compensation liens, workers' compensation offsets, ERISA ramifications, tax consequences, social security ramifications, contested medical subrogation issues, or the net effect of hospital liens. When these are added to issues of questionable liability, medical causation or contested permanency, there can be some bizarre results. Some cases might involve special legal theories like the fireman's rule, municipal liability, dram shop issues, collateral source issues, an eggshell plaintiff, employer retaliation issues, carrier's reservation of rights, evidenciary spoliation, subsequent remidial measures, product liability state of the art issues, Daubert type gatekeeper problems, legal excuse or sudden emergency. In these matters it behooves the mediator to bring special knowledge to the table, so that he or she can discuss them with counsel and explain them to the parties themselves.

XVI OPTIONS TO MEDIATION – PROS AND CONS

Blair: I do arbitrate and like it. The reasons to arbitrate are speed, efficiency, privacy and predictability. A good arbitration agreement will do the trick. I do not ordinarily arbitrate a case which I have previously mediated absent compelling reasons and a rock-solid written agreement.

James: I don't arbitrate. If they are not going to get it done in mediation, they can try it or arbitrate. Sometimes I am doing a second mediation.

Sullivan: I've done some. My first warning is make sure you have ground rules going in especially about the role of the arbitrator in asking questions. My first time as an arbitrator counsel agreed that it would be a good idea if I asked questions of the witnesses. I did so without too much regard as to how I was being observed by the parties. Very soon the parties started to recognize the factual problems in the case. The lawyers took a break and went out and settled the case on their own. Since that time I let the lawyers ask the questions and I keep my mouth shut. I do not have much experience with High-Low Arbitration or Baseball arbitration. The options seem plentiful. I am attaching a desription of some different types, the source of which I have long forgotten. The last one "Mediation /Arbitration" is not something I would be very comfortable with because of the confidential information gained during the mediation process.

TYPES OF ARBITRATION

NORMAL ARBITRATION

- Arbitration is by contract so that it can be set up any way the parties desire so long as public policy is not violated.
- Arbitration can be by private jury as well as by arbitrator.
- The arbitration agreement can provide for an appeal to a private appeal panel.
- The Ninth Circuit allows for appeal into the judicial system if the parties so contract.
- The Seventh Circuit allows for an appeal to be a private appeal panel.

INFORMAL ARBITRATION

- In an extensive arbitration requiring considerable discovery and many days for hearing, parties might agree to allow the arbitrator to do his own discovery.
- Instead of counsel taking depositions, the arbitrator will do his own questioning of witnesses and examination of documents.
- Counsel can provide the arbitrator with questions to ask or documents to look at; however, the arbitrator does the actual examination.
- After discovery is completed, counsel are given the opportunity to argue their cases in an oral hearing.
- The arbitrator then prepares preliminary findings of fact and presents them to counsel for corrections, additions, or changes they wish to make.
- The parties then designate those findings upon which they can agree and those which are still in dispute.
- The arbitrator then decides the facts in dispute, makes his conclusions of law, and the award.
- The advantages of the process is that the arbitrator tries to accommodate the parties and make the process as non disruptive as possible; it saves considerable money in attorney fees and costs to the parties; and it is expeditious.
- A final advantage is that it keeps communications open between the parties, which often leads to settlement.

HIGH-LOW ARBITRATION

- The high-low figures are negotiated by the parties.
- The arbitrator is not informed what those figures are.
- This form of arbitration is used extensively by insurance carriers.
- The parties protect themselves by negotiating the ceiling and the floor, e.g. ceiling at $40,000 and floor at $15,000 – If arbitrator gives $60,000 all the Plaintiff gets is $40,000 - If arbitrator finds no liability the Plaintiff gets $15,000.

FIXED HIGH-LOW ARBITRATION

- When liability is in issue, but damages are not, the parties can arbitrate just liability.
- Damages are set by the parties before the hearing—a fixed high if liability is found, and a fixed low if it is not.
- The arbitrator is informed that the only issue for decision is liability, and that the amount to be awarded has already been determined depending on the ruling.

BASEBALL ARBITRATION

- The parties set their own high-low figures for damages rather than negotiate them.
- The arbitrator is not informed what the high-low is.
- The middle mark between the high-low is determined and if the arbitrator's award is one dollar above the middle mark, the plaintiff's high figure is awarded. If one dollar below the middle mark, the defendant's low figure is awarded. If the arbitrator awards the middle mark, it becomes the award.
- Up until the arbitrator makes his decision, the parties can raise or lower the middle mark by plaintiff lowering the high figure and defendant raising the low figure.
- One result of baseball arbitration is the parties are forced to set realistic highs and lows for fear that if the middle mark is too high or too low the other side will win.

FIXED BASEBALL ARBITRATION

- In situations where the parties are negotiating an ongoing relationship, and enter arbitration to resolve differences between them, fixed baseball arbitration can be used.

- In this instance the parties present their best position on each issue in dispute and the arbitrator must select one or the other. He cannot make an independent decision.

- This forces the parties to offer their best position on each issue for fear that arbitrator will select the other party's position.

- The natural consequences of the process is to push the parties close together so that many times they will reach agreement.

RAPID CITY ARBITRATION

- This form of arbitration begins with the normal arbitration hearing.

- Once the parties have rested, the arbitrator reviews the evidence with them and give his reactions. He does not disclose his final decision.

- He then gives the case back to the parties and asks them to continue their negotiations to reach a settlement.

- If the parties get close, he might even step in as a mediator and help settle the matter. In this instance, he will seal his decision and if settlement is not reached, it will be given to the parties.

MEDIATION /ARBITRATION

- The parties agree to mediate first, and if this fails, the mediator becomes the arbitrator and makes a final decision which is binding.

- This procedure is limited to smaller cases with a dollar amount of $50,000 or less.