CONVENING:
SUGGESTIONS FOR "TABLE-SETTING" A MEDIATION

From the first moment of the mediation, Tom had a sinking feeling. He and his client walked into the opening session with the mediator to find that the only people facing them were the opposing outside counsel and a young human resources assistant—someone obviously at a level with authority to accept a surrender and no more. The rest was predictable. His client was insulted and assumed that settlement was never going to happen. The offers from the defense side came slowly and in tiny increments, even after Tom, with some frustration, made a substantial downward move at the urging of the mediator to "get the ball rolling" and "show them you came to make a deal." Inevitably, management was not willing to get beyond a woefully inadequate amount although the mediator acknowledged that the figure did not begin to reflect the realities of the case. Tom and his client were faced with the choice, late in the day, of simply accepting an inadequate settlement or resigning themselves to returning to litigation.

"I Saw This Coming"

Tom knew who the Group Vice-President was—he had taken the man's deposition. He knew who the general counsel was—she had come to his client's deposition. He knew who the insurance carrier was from Rule 26(a) disclosures and interrogatories. He was lulled into not rocking the boat by a desire to keep things on a friendly basis and his belief that defense counsel knew best who needed to come from his side.

It was especially galling because Tom had tried to prevent it. He asked management counsel whether the company would send someone to the mediation with authority, and was told, "Oh, sure, of course." When he protested at the mediation, defense counsel told Tom it was all right because, "We can reach the people we need to reach by phone." And it was too late at that point to prevent it any more.

Behind The Scenes

You never know for sure about these things, but defense counsel may have originally tried to get the right people to come to the mediation. The Group Vice President rejected the idea as soon as defense counsel suggested that he attend:

> Why do I need to be there? I'm not a lawyer, and you can call me if there is some reason that our position should be

> different from what we have discussed. I have production problems to deal with that won't allow me to spend a day getting through O'Hare, work into the evening, spend the night in Chicago and then be exhausted the next day. What's the matter, don't you think you can handle this well enough on your own with all you know about the case?

Next to beg off was the general counsel:

> Oh, it really won't be possible for me to come. My husband is in Europe on business that week and I need to pick up my daughter from day care at 6:00. To do that, I would have to leave immediately after the mediation started. You can just call me at my office when something happens, I've only got a couple of meetings scheduled for that day and I'll have my blackberry in the meetings in case something important comes up. You know what we are willing to spend to settle the case and I trust you to keep the number as far below that as necessary.

Then defense counsel probably turned to the Director of Human Resources, who had an airtight excuse: she was going on maternity leave before the mediation. But she said she could send her newest Human Resources assistant, "It'll be great experience for him to see how you get the mediator to talk the plaintiff down from an inflated demand into something we can live with. He's never been in a mediation before."

The insurance adjuster refused to come to the mediation, explaining:

> First of all, you are still within the retention on this case, and we don't usually get involved in these things before you have exhausted the insured's retention and we are spending our own money on the case. Oh, I see that you are pretty close to it, but still, we don't make exceptions to that rule unless it's

> really necessary, and it doesn't seem to be in this case. Plus, we could not help you even if we came. Our claims committee needs a complete report on the case to make an evaluation, and we need it at least four weeks before the mediation because the committee only meets once a month. So you would be too late anyway.

Once the mediation got started, the dynamic set up by this attitude played itself out in a predictable way. The mediator picked up on the limited authority at the table and discussed it with the defense counsel. "Can't we have one of these key people on the phone for the opening session so that the plaintiff has a sense that you're serious?" This suggestion was refused because "I can convey what's important and anyway, Tom and I have a good relationship and even if he postures to you, he realizes that I know how to value a case fairly."

As things got a little more tense, the mediator asked if it might not be a good idea to have him talk to the money person at the other end of the phone. "I recognize that if you are making the plaintiff's points, they could think that you are getting weak or something. Maybe I can give you some air cover on this case." Of course, the mediator is also concerned (but can't say) that the decision-maker is receiving only a filtered version of the case. If the decision-maker has a reason for low-balling the case, the plaintiff side

needs to know that and understand where it is coming from if they are going to take it seriously rather than interpret it as bad faith.

But defense counsel refuses, "I think it's my job to communicate with my client and I'll get your points across. It's been made clear to me that they do not want to get involved in discussions with the mediator."

Actually, however, the Group Vice President was "tied up" with an emergency matter most of the day and could not even be reached. The in-house attorney took more than a half-hour to call back the two times she was called and said, "My hands are kind of tied here. I mean, I wouldn't recommend more money to settle the case unless I heard something extraordinary, which I'm not. Even if I did make the recommendation, management has the final word because it does not come out of my budget." The human resources assistant got an interesting education in the mediation process and how it can be used as a tool to reduce the former employee's demand, but also knew that no one who was involved was going to listen to him even if he thought, which he did, that the case sounded really bad. The only information the insurance carrier got was that there had been a mediation, and it was unsuccessful.

Only A Party Can Ensure That The Right People Are At The Table

Tom had no one but himself to blame for the way things turned out. Defendants often avoid bringing the person with the power to write the check along to the mediation because those people do not want to be bothered; because they do not understand how mediation works and think that they are in a position before the process starts to know what their "bottom line" should be; and because they prefer not to be influenced by the process—all the while obtaining the benefit of the influence the process has on you and your client. Traveling to the mediation site can be a hassle that the person who holds the purse strings would prefer to avoid. As often as not, only because of the insight gained during the mediation itself does the defendant come to realize the level of authority actually needs to bring the case to settlement.

The mediator can talk about the importance to the process of having people with real authority at the table, but cannot begin to know beforehand what that means and ensure that it happens. Only a party to the mediation can do that because only a party to the mediation can refuse to participate unless this vital condition is satisfied. Every time you let this issue pass, you are selling yourself and your case short.

The most important point of this article is to exhort you to insist that opposing counsel to come to the mediation with someone who can actually write the check you want. The only effective way to address that issue is up-front, before the mediation has started and usually before agreeing to mediation in the first place. As long as we are on the topic, it is worth considering some other pre-mediation points as well.

Why Convening Is Important:
If You Get Stuck At One Stage,
You Probably Didn't Finish An Earlier Stage

There are at least six stages of a negotiating (mediation is a format for negotiation):

- Convening, when the participants, format and ground rules for the negotiation (mediation) are decided.
- Introduction, in the initial moments of discussion, where the tone and tenor of the discussion are started.
- Opening, where the parties state their starting positions.
- Informational stage, where parties posture and provide supporting information presented to justify the appropriateness of their positions.

- Bargaining, the exchange of offers and counter-offers that move towards a final figure, with justifications and a variety of ploys and bluffs such as good cop—bad cop, the out-of-control client, the walk-out, threats, "take it or leave it ," and most important, the "lack of authority" gambit.
- Closing, where the parties come to agreement, clean up open points and redistribute terms established through bluffs.

This is how the dance almost always plays out to the neutral observer's eye, and when things stall at one stage, it is usually a sign that something went wrong at an earlier stage. Usually the only remedy is to go back and repeat the earlier stage, which is awkward. For instance:

- ✓ One side or the other clams up when asked to explain the basis for its offer. This can happen when the introductory stage went so badly that the silent party is responding with passive-aggressive behavior or pouting.
- ✓ The parties really are in different universes—a common problem, though not easy to spot because of the posturing in negotiation—which is usually the result of an

incomplete exchange of information. This is why good mediators resist waiving the opening statement.

- ✓ One side may be unwilling to commit to a specific figure or range as a starting point due to the absence of a critical party from the mediation, such as an insurance carrier or the person from whose budget the payment will be made.
- ✓ A party who feels a need to test the other side's willingness to come to the desired outcome will not be willing to "close" at a "best and final" offer from the other side where she or he as not experienced enough back-and-forth bargaining.

First Suggestion: Make Sure All Defendants Participate

Where a necessary party is not represented at the bargaining table, the parties who do participate can only address those elements of the agreement that do not require the consent of the absent party. Where the employee's attorney has multiple defendants, an absent party may mean not only less than the maximum recovery but also less leverage on the party who does show up. It can mean that the party who is present is

anticipating and hoping to affect how things will go in the negotiation with the absent party rather than focusing on satisfying your client's demands.

However reasonable the assumptions relied upon and outcome in the settlement you reach with the first party may be, you are likely to find both challenged by the absent party when that conversation begins. You may well find that concessions, now unavailable, you could have obtained from the first defendant are critical to a good outcome with the second party.

Rarely will the negotiation reach a satisfactory conclusion unless everyone who is affected by the resolution is present and participating. Addressing this at the get-go will help prevent having to suspend the process while the absent party is brought into the loop.

Second Suggestion:
Identify and Discuss Each Participant As A Condition of Mediation

When you accept "on the phone" participation, you are telegraphing this important message to the other side:

We don't really expect to influence your thinking about

Ev[illegible] message like that?

All right, perhaps your indifference to who attends the mediation may not consciously be read that way before the mediation starts. But you do set yourself up to be put into the box Tom was put into if you leave the important question of who is at the table up to the other side without even having an explanation and some input into that choice. You even take away from defense counsel the tools needed to bring the right people to the mediation if you are agreeable to whatever the defense chooses to do.

Here are some possibilities:

- Insist on knowing who will be present at the mediation from the defense side, and refuse to set a date until those names are on the table.
- Insist on getting the information not just on the insurance coverage, but on whether there is a reservation of rights and the carrier's actual involvement in the defense process (when the insured's retention is not exhausted, the carrier is generally not involved in decisions).
- Find out who the adjuster or claims rep on the case is and find out when they need information about the case in advance of the mediation to be able to make their assessment. They all

require this. Ask to get on the phone with the adjuster and defense counsel if you think you are being snowballed.

- Discuss with opposing counsel the particular people participating:
    - It's important to have the person whose budget is impacted by the settlement present—sometimes the legal cost is billed to the legal department and the settlement dollars come from the operating unit.
    - Think about the pros and cons of having the person whose decision is being attacked by the case present. This individual will usually be against settlement, but may be someone in a position to derail settlement, and if so, you want that person at the table to hear from the mediator all the unpleasant things that are coming for him or her.
    - Don't be afraid to make suggestions. If tensions between you and defense counsel are frayed, suggest that the client relationship person (often a transaction/general counsel) attend and lead the discussion. Offer in return

to have the referring attorney come and lead your side's discussion.

- Don't ignore the problem that may exist on your side. Spouses often play a crucial role in making settlement decisions and you can offer to bring the spouse to ensure that they are not shielded from the process.

- If someone is going to be "available by telephone," force an explanation of why the case is not important enough for the person to be present. Then follow up:
  - The person who is "present by telephone" must be on the line to hear the opening session of the mediation.
  - The person who is "present by telephone" must be "continuously available" and willing to interrupt any other business to confer with defense counsel.
  - The person who is "present by telephone" must be available to speak with the mediator and must do so during at least the first private caucus.
- Stick to your guns. You may well have a story of a past experience in which a settlement that should have happened

did not because the key person was not experiencing the mediation process personally. If you do not, discuss the issue with the mediator, who will have such stories if he or she has any significant experience.

Third Suggestion: Preconditions To Mediation

You cannot do this in every case, but where you are strong, or where you are concerned that mediation is likely to be an exercise in posturing rather than a serious attempt to settle, you can lay down preconditions to participating in a mediation. These can put you in a commanding position from which to negotiate. Here are some examples:

- ✓ Compliance with discovery. This is especially important if you think opposing counsel wants to settle the case before you discover something very helpful or very sensitive.
- ✓ The players attending the mediation can be negotiated beforehand, as noted above.
- ✓ If people are coming from out of town, it is legitimate for you to insist that they *not* have an arbitrary time when the "need to get to the airport." It is common for a defense side participant to announce at the opening of the mediation session, "My flight is

at 5:15, so I really need to be out of here by about 3." Don't let them put the bum's rush on you. It is not uncommon that people only start to get serious after 3. How long it takes to reach settlement depends on the complexity of the facts and the personalities of the participants—which you cannot predict.

- ✓ A firm offer above a certain point: "I'm not going to waste my time if you are just going to come in and try to persuade me that this is not a six-figure case. I want it in writing, before the mediation, that you are willing to put over $100,000 on this one." Beware, however, that the management side will resent being forced to make concessions before the mediation starts and you will need to start with a show of flexibility at the outset to reward the pre-mediation offer.
- ✓ A commitment to pay your fees if there is a settlement on the merits, no questions asked. You'll have to specify what they are and discuss the basis.
- ✓ There can be other non-monetary conditions that are important to your client. The usual pattern is to settle on dollars and it is common for management then to take a firm stance on non-

monetary items, insisting that the employee shoulder the risk, on the theory that the money is the key point anyway. Or you may want to avoid the chance that management will offer non-monetary concessions but then reason that the settlement should be lower as a result. You can make a non-monetary requirement a "deal-killer" item and insist that the matter be agreed (and the detail on it nailed down) before you will agree to mediation.

- ✓ Timing of the mediation, payment for the cost of the mediation, who will be the mediator, and anything else that is part of the process.
- ✓ In a case involving a current employee, requiring that the employer take a firm position on whether they want the person gone and are willing to compensate the person for the need to obtain new employment, or whether they seriously want the person to remain in the job.

Conclusion

The negotiation, one might say, begins as soon as the conversation starts. There are many opportunities to build in advantages, or avoid

disadvantages, when you start the process with some simple precautions that will protect it from getting off course.

The greatest problem of all, as noted above, is the tendency of the defense, deliberate or inadvertent, to shield the decision-maker from influence by the plaintiff and plaintiff's attorney and to implicitly downplay the value of the case by participating "by telephone" (or even e-mail). This detracts from the value of mediation and while a mediator will never call off a mediation on that ground, you should seriously consider whether to mediate if that is one of the ground rules. And you can only head off the problem by confronting it and being a little impolite if necessary at the convening stage.