

A man in a suit stands in the center, holding a large globe. He is flanked by two elephants, one on each side. The background is a dark blue gradient with large, overlapping circular shapes. The overall image is semi-transparent and serves as a background for the text.

THE CASE FOR PRE-SUIT AND EARLY MEDIATION

BY GREG PARENT



Where resolution is always the ultimate goal, mediation serves a vital purpose as a vehicle for exploring settlement in high stakes litigation where unnecessary and protracted litigation costs may be avoided by all parties. At times, the only consistent factor in all of these matters is the complete unpredictability of what is possible at mediation.

Regardless of when a case is mediated, however, even the most jaded skeptics should come to the table with a plan and pathway toward resolution, even when such an outcome seems unlikely. Often the process of mediation causes a shift in strategy by one or more parties. When those parties who never contemplated seeing things differently, do not have a plan to move forward, a mediation stalls out. Fortunately, even in those situations, the process usually provides a strong foundation of trust which may allow the neutral to capitalize on continued settlement negotiations.

While the individual methodologies may be as unique as the personalities involved, there are three basic tenets on which one can build a successful platform to explore resolution at an early mediation. They can be summarized as follows: Evaluate, Elucidate, and Elevate.

Evaluate Your Case And Benefits To Quiet Discretion Thoroughly

With hindsight, most people come to the realization that they should have talked directly to the person with whom they had a beef instead of blasting scathing opinions against their perceived foes on social media. Even before the advent of the internet and gossip was just spread by word of mouth, keeping unflattering news private had a certain intrinsic value for those who might otherwise appear negatively.

With increasingly sophisticated big commercial defense clients, there are often incentives to keeping litigation out of the public record. Thus, cases that come to pre-suit mediation may benefit from the privacy afforded by parties in that forum and translate into value from a high profile defendant that a plaintiff may not have been able to ascertain.

Sometimes there are a bevy of substantive facts and issues about a case that are known before the expiration of the statute of limitations and, thus, it is a great time to explore early resolution through mediation. Having most facts alone is not enough, however, as the manner with which you proceed can have a tremendous effect on how your case is valued from all sides.

Pre-suit mediation does not mean less preparation. In fact, your work may be as hard or harder than preparing a case already on a trial calendar. The most effective presentations at mediation are the ones that show a thoughtful and thorough attention to detail. Especially in a pre-suit posture, one needs to demonstrate having a command of the law, facts, medicine, experts, and venue.

Elucidate Your Opponents and Elevate Yourself

What does a pre-suit mediation need to look like? If you're dealing with high-stakes litigation, more often than not you are dealing with a decedent. A common refrain heard in these big cases is the mantra, "I don't want to

show my hand and let them cure whatever holes I point out.” This is a valid and honest concern, however, the reply is to show one’s opponent the things that cannot change and enlighten all sides as to their true exposure so they can evaluate a case properly. In other words, you have to give up information to get what you ultimately want.

High stakes case, from a defense perspective, bring the following important people into play: named partners, senior associates, seasoned claims professionals or in-house general counsel, and corporate executives from the C-suite. When one’s case draws talented and sophisticated defense counsel and claims professionals, it is necessary for the plaintiff to educate everyone as to a case’s strengths. The defense also benefits from seeing and hearing the plaintiff’s side speak. That subtle reveal of charisma may make a defendant re-think their trial strategy.

The same is true from the defense perspective. If you show that you are well-versed on the issues and ready to challenge the allegations being lobbed your way, you may give the plaintiff’s team some pause. Additionally, early mediation provides a “taste” of the adversarial nature of protracted litigation. It is invaluable for the plaintiff’s counsel to learn the client lacks the resolve for trial. Similarly, when tried and true defenses are aired for peer review, by way of the mediator, defense counsel may learn that some arguments may not be as potent in front of a jury.

For plaintiffs, consider a presentation to show the “value” of that person’s life with family photos, testimonials, and with some family members present to tell a decedent’s story. Done correctly, these can be powerful aids in telling your story. Additionally, provide recent verdict and settlement data in the jurisdiction where you will file suit. Note any outliers about specific counties.

In one high stakes mediation I handled, the national claims counsel scoffed at my suggestion the plaintiff’s case had greater value in local DeKalb County, GA. She opined that it would not be as liberal a venue as Brooklyn, NY. Never having practiced in the Big Apple, I simply shrugged my shoulders and gently urged her to check with her vast network. When I returned to the room, she exclaimed that she had confirmed my information with her colleagues. That realization led to the case getting resolved at mediation.

The moral of the story is that you have to sometimes help the other side “help” you by narrowing and clarifying the issues in a clear and concise manner. This becomes even more paramount when your case involves decision-makers who are flying to Atlanta from other cities. The more sophisticated the defense client, the more sophisticated your pre-suit presentation may need to be to reveal both your legal acumen and your showmanship before a jury. Additionally, early mediation provides a forum for the defense to demonstrate their abilities such that it allows a plaintiff’s attorney to better estimate her client’s resolve.



Greg has been a neutral with Miles Mediation & Arbitration since 2013. Relying on a comprehensive background that includes having worked as Claims Adjuster, Defense Attorney, and Plaintiff’s attorney, Greg has been able to parlay his extensive litigation and claims experience into a very successful career as a sought after mediator and arbitrator. He can be reached at gparent@milesmediation.com.