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CHAPTER 12

MEDIATION: THE GOOD, THE BAD AND THE UGLY

In almost all wrongful death actions, as in many injury cases, the plaintiff will be forced to consider settlement at mediation or go to trial.

A. Why Do Parties Consider Mediation and Settlement?

Trial is risky for both the plaintiff and the defendant. This is because neither side can truly know what the jury's decision will be. A jury could award a plaintiff nothing, or, just as easily, award the plaintiff a very large sum of money. All trial attorneys will tell you that they have won cases that they should have lost, and lost cases that they should have won. Plaintiffs and defendants settle for the purposes of controlling the risks of both low and high verdicts.

By way of example, let's assume that a jury can only find for the plaintiff in an amount between $1 and $100. Of course, the plaintiff would want to recover an amount as close to $100 as possible, and the defendant would want to pay an amount as

close to $1 as possible. However, the settlement would never result in either $1 or $100; rather, a settlement would result in an amount between the high and the low. Theoretically if the plaintiff has a weak case (either because liability is questionable, or the damages are unclear), then that case would settle between $2 and $20 out of the total $100 available. If the case is good, then settlement may be between $40 and $60. Finally, if the case is very strong, then the settlement may be between $70 and $80 of the $100 available. Notice that the defendant will rarely give up all of the available funds.

B. What is Mediation?

Mediation is a process to reach a settlement agreement. Most of the time, the mediator is an attorney, and sometimes, a retired judge. The mediator seeks to persuade each side to come to a middle point in resolving the case. However, the mediator cannot "force" a settlement.

The mediator accomplishes resolution by telling the plaintiff all the problems with his/her case, trying to convince the plaintiff(s) to decrease their settlement demand. At the same time, the mediator tells the defendant(s) all the problems with their case, for the purpose of increasing the amount of money they are willing to pay.

Mediation can be either voluntary or court-ordered. Voluntary mediation seems to have the better results, because the parties have elected to mediate the case. Court-ordered mediations are less effective because the parties are forced to spend some time mediating. If the parties are too far part, and refuse to budge, then the mediation is a waste of time.

C. The Process of Mediation

Mediation begins with all the parties meeting in one large conference room. The initial meeting usually takes sixty to ninety minutes. Typically, the individuals who are present at the mediation include the plaintiff, the plaintiff's attorney, the defendant's attorney, the defendant's insurance adjuster, and of course, the mediator. It is important to observe that rarely is the defendant present; this is because the defendant's insurance company makes the decision on how much money to pay. The exception to this rule is in cases involving medical malpractice when the doctor will often be present as well.

The process begins with the mediator making general statements about the benefits of mediation, and then concludes with positive statements about each of the attorneys. This makes sense because the mediator wants to do a good job; and saying nice things about the lawyers always gets people in a better state of mind, and of course, it's the attorneys who select the mediators.

After the mediator's opening remarks, each party has an opportunity to make a presentation. The plaintiff's attorney would argue the merits of the plaintiff's case and the defendant's attorney would argue the merits of the defendant's case. There is usually at least some validity in each of the party's arguments, because those cases that are "slam dunks" do not require mediation.

Next, each party is moved to a separate room. The mediator will then meet with the plaintiff's side to discuss the case, the purpose being to obtain an initial settlement offer. This usually takes another thirty to sixty minutes. After obtaining an initial concession from the plaintiff, the mediator will go to meet with the defendant's side. Once again, the mediator will work with

them for another thirty to sixty minutes for the purpose of returning with a counteroffer from the defendant.

The mediator then starts the process of going back and forth between the plaintiff's conference room and the defendant's conference room, exchanging various offers and counteroffers. Many times, the true negotiations do not really start until four to five hours into the mediation. Ultimately, the parties either strike a compromise or no resolution is reached.

D. The Good and the Bad of Settlement and Mediation

Ironically, the good and the bad of mediation are one and the same thing. As many mediators will say, a good result is where both parties are unhappy, but can live with the results. Accordingly, the plaintiff is better off recovering some money and avoiding the risk of getting nothing or receiving a low jury verdict. This decision also avoids the additional time and expense of a jury trial. For the defendant, it is better paying off the plaintiff than risking a possible high jury verdict. In essence, a settlement is a compromise of a claim – and it is the safest approach for both sides. Unfortunately, for a plaintiff to get true justice, often he/she must be willing to go to trial.

E: The Ugly

From a wrongful death or catastrophic injury plaintiff's perspective, there are ugly parts of mediation. For families and individuals having claims for wrongful death, medical malpractice, and catastrophic injuries, mediation is the most stressful and difficult part of the litigation process.

Why is mediation so stressful? This is because everything about mediation is designed to prey upon the participants' fears and anxieties about trial.

Yet, the pressure is greater on the plaintiffs than the defendants. This is because the actual defendants are only occasionally present. Most of the time, the defendant is represented by defense counsel and the defendant's insurance company. These folks, of course, are professionals and immune to the pressures of mediation. Yet, in contrast, the family has never gone to mediation before, and they are the ones who feel the pressure. Moreover, the defense will do everything possible to increase that pressure and stress for the goal and objective of settling a case for less than it is worth.

i. The Defense Will Drag Out the Mediation for an Entire Day

With the intent to increase the stress on the plaintiff, defendants often engage in various delays, sometimes up to three or four hours into the mediation, before they start making serious settlement offers.

Why drag it out? The defense views settlement like a fisherman; once a fish is hooked, it is only a matter of time before the fish will be exhausted and, eventually, be caught – or in this analogy, give up and settle.

The defense will use one of two processes in mediation, both designed to wear out a plaintiff. The most common approach is to start with a very low offer. No significant offers to increase the settlement will be made until the mediator has moved back and forth between the plaintiff's and the defendant's conference rooms and the process has appeared to stall out. Then, a reasonable offer will be made, and the defense will make the plaintiff fight for each and every dollar, all designed to wear out the plaintiff. In addition to wearing one out, a low initial offer has a few other effects. The defense is using a psychological technique called priming. The defense team is attempting to convince you that the true value of the case is less than you think, hoping that such

priming will have an impact on you when it becomes close to the settlement date. It may also have the effect of undermining your confidence in your attorney.

The second approach is to make one reasonable offer, but never come any further off that initial offer. Both approaches serve the same goal, stressing out and tiring the plaintiff, for the goal of obtaining concessions. The defense correctly believes that the more a plaintiff worries about what will or will not happen at trial, the more a plaintiff is willing to settle for less.

ii. The Defense Will "Push All of the Buttons" of the Plaintiff

The defense counsel will use any and all psychological tricks to further push for settlement. These tricks fall into three different categories. They often use all three.

Apologize. Many times the defense counsel, and sometimes the defendant, will apologize for the incident. You must be able to see through this falsity. The apology is merely self-serving, untrue, and an act. After all, talk is cheap. If the defense were really sorry, they would never make you file a lawsuit, take your deposition, or go through mediation. Rather, they would just cut to the chase and make a real settlement offer from the start.

Blame you. The alternative is that the defendant will blame you for the injury. This is seen most frequently in cases in which the injured are children. Typically, the defendants will blame the parents and make sure the parents really "feel" that blame. After all, any parent whose child is injured feels some psychological guilt. The defense tries to use this guilt to push for a settlement. Blaming you has the additional advantage of lessening the responsibility of the defendant.

Undermine your confidence in your attorney. While the plaintiff's attorney will argue the strengths and benefits of the plaintiff's case, the person receiving the information, the claims adjuster, is a professional. There are no arguments in which the plaintiff's counsel can "trick" the claims adjuster who has sat through a thousand mediations. Do you think that one used-car salesman can trick another used-car salesman? The answer, of course, is no. However, this is usually the first time the plaintiff has been in mediation. The defense counsel will take advantage of this fact and will seek to undermine your confidence in your attorney by making presentations and arguments that often are not permissible at trial. Please note that the defense counsel will do this in a very "nice way." Once again, this is merely an act. Good defense attorneys always seem nice. Many times they must speak for individuals or companies that are undoubtedly at fault, and by appearing nice and approachable, they seek to diffuse their client's malfeasance.

iii. Nothing is Secret

The mediator will, of course, tell you that everything you say in the mediation is confidential. Although, from a technical legal perspective, this may be true, yet, from a practical perspective, it is untrue. The safest approach is to say as little as possible to the mediator.

The confidentiality clause protects the parties in certain limited ways. For example, after mediation, the defense may not say at trial, that you were willing to take $100,000 at mediation, and thus, limit your damages at trial. Likewise, the defense may not say that in mediation you admitted to some wrongdoing, or admitted that someone else caused the injury.

However, nothing prevents the defense from adjusting their trial strategy in response to how the mediation proceeds. If there

was an admission one made at mediation, the defense may cross examine you and ask about that admission. Likewise, the Defense may emphasize or deemphasize how they present evidence based upon mediation. Stated differently, I always believe that the facts learned at mediation come out – in one form or another, at trial.

It is for this reason that I always suggest to clients that they never tell the mediator anything that they would not tell the defense. The concepts under the Miranda warning[18] apply here: anything you say can and will be used against you.

iv. Practice Pointer: You Must be Willing to Walk Away and Proceed to Trial

Many times, the defense will simply not offer enough money to settle the case. After spending an entire day worried, stressed, and bored, you must be willing to walk away. The defense counsel expects to wear you out. You must resist the temptation to settle the case for less fair value. Finally, you must understand and appreciate that sometimes the true cost of justice involves going to trial.

18 The Miranda warning is a criminal law concept, not a civil law concept. When one is facing criminal charges they have a Fifth Amendment privilege against self-incrimination. See Miranda v. Arizona, 384 US 436 (1966). That right does not exist in criminal lawsuits.

CHAPTER 13

EMOTIONAL RESPONSES TO UNEXPECTED LOSS.

A sudden and unexpected death is the most stressful experience that anyone must endure.

Common feelings include: guilt, depression, anger, bitterness, and anxiety. Some even feel some sense of relief. Others feel suicidal. Almost every aspect of one's life is impacted.

For many of our clients, the feelings of guilt are particularly strong. "If only …" is a strong theme in these wrongful death cases. If only I had gone to a different doctor, if only I was driving more cautiously, if only … . Many times, our clients also suffer from post-traumatic stress disorder, in which they personally experience significant fear and anxiety.

Worse, in many of these actions, the defendants focus upon identifying all the possible things that the decedent or the loved ones might have done wrong. The defendants will seize on just about anything that they can to diminish their responsibility and they will stoop to any level. In cases of children killed or injured,