Posted on: February 15, 2012

PREPARATION FOR NEGOTIATION

“Pro Pace Para Bellum” “If You Want Peace, Prepare for War”

February 15, 2012

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Obviously, thorough preparation is the key to effective negotiation. But what constitutes thorough preparation? I would like to share a few thoughts on things I have learned about negotiation through many years of practice and through having acted as a mediator in over 400 personal injury cases.

1. Pick the Time to Negotiate

I do not believe that you can negotiate effectively until you have gathered all of the evidence that you intend to present at trial. By this I mean that you should have assembled all of the medical reports and clinical records, conducted interviews with all the lay witnesses you intend to call, including employers; and assembled all the documents in a format suitable for submission in a brief of documents at trial.

Nothing sounds weaker during the course of mediation than for counsel to say, “well, we don’t have the evidence on this point yet, but we’re going to get it”.

In my view, rather than simply referring vaguely to what the witness might say, it is preferable to read from a signed witness statement or even show the statement to the opposing party.

2. Prepare Your Client

I believe that before embarking on a negotiation, you should discuss thoroughly with your client what you intend your opening demand to be, and why you are making that demand. You should also discuss thoroughly the weaknesses in your case and what you will do to try to counteract defence arguments. Finally, you should thoroughly discuss with your client where you want to end up in the mediation.

If your client is not fully aware of all of these things, he or she may believe that you are expecting to receive an acceptance of your initial offer. Your client must understand that this rarely occurs.

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For face-to-face negotiations, you should also prepare your client to participate by answering questions from you and anticipating questions from the defence. The defence will be trying to size your client up to see if he or she will make a good witness. The more your client appears credible during the negotiation, the greater your chances of achieving a just settlement.

3. Organize Your File Thoroughly

Ideally, you would know the file so throughly that you would rarely even have to refer to it in conducting the negotiation. A person who used to teach negotiation skills to adjusters once told me that he always told them to go into negotiations and "leave their file in their briefcase". That way they can effectively demonstrate their thorough knowledge of the file and thereby intimidate plaintiff's counsel.

Given the amount of paper normally generated in today's personal injury files, that advice, though still helpful is no longer really practical. Realistically, you should have your file properly tabbed and highlighted so that you can refer to excerpts from the reports and records quickly and confidently.

Just as opposing counsel is sizing up your client to see if he or she will be an effective witness, they are sizing you up to see if you will be an effective advocate at trial. If you demonstrate to opposing counsel that you are willing to take the time to thoroughly prepare your file for mediation, opposing counsel will be convinced that you will be well prepared for trial.

4. Bring the Case Law

I always hear counsel say, "the cases would suggest an award of at least $100,000 for this type of injury". I may then ask in caucus, "what cases support an award of at least $100,000?". Counsel invariably says, "well, I don't like to get into case laws at mediations". What counsel is really saying is, "I didn't bother to look at the case law, but I kind of have a gut feeling there might be a case out there somewhere that once gave $100,000 for this type of injury".

That approach isn't convincing. If you have cases to support your proposition, show them to the other side. Chances are they won't have any cases to support their proposition. Their weak response will inevitably be, "well, I don't like to discuss cases at mediations", followed by "well sure, you could find a few cases to support $100,000, but I could find lots of cases to support $30,000". My question then is, "well, if you could have, why didn't you?".

5. Present Evidence Not Your Opinion

When preparing to negotiate, think in terms of what evidence you can call to support the position you will be

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taking. Many times I hear counsel say, “I think my case is worth at least $100,000”. It doesn’t really matter what counsel thinks. What does matter is what evidence they have that will make a Judge or Judge and Jury believe a case is worth a certain amount.

It’s like the old days when you were in school and your math teacher used to tell you to “show your work”. Giving the right answer (i.e. that your case is worth $100,000) is only part of the test. What is important is to show the other side exactly what evidence has caused you to come to the conclusion that your case is worth $100,000 and will inevitably cause the other side or a Judge or Jury to come to the same conclusion.

6. Anticipate the Other Side’s Arguments and be Prepared to Deal With Them

When preparing a case, it always helps to look at it from the other side’s point of view and try to prepare the arguments on both sides. This exercise helps in two ways. First, it enables you to thoroughly “bullet proof” your case. Secondly, if the other side fails to recognize some of the issues which you have identified, you will be more confident that they have not thoroughly prepared for the negotiation.

In every case, there will be pieces of information which you believe the other side has which you would like to have. Prepare questions which will enable you to get the information you need from the other side. Also, prepare questions which will assist you in probing the extent of the other side’s knowledge of the case. For example, simple questions like, “have you spoken to anyone at my client’s place of work?”, or “have you discussed Dr. A’s opinion with our doctor, Dr. B?”. It will help you greatly in determining how much preparation the other side has done.

7. Get Their Attention Early

Well in advance of any face-to face meeting, I suggest that you send a detailed proposal to the other side with a substantial amount of supporting material. You don’t want to give the other side everything before negotiations commence because you want to have some cards to play during the course of the negotiation or mediation. However, by letting the other side know in some detail exactly what you are looking for, you can enable the other side to avoid “sticker shock”.

If a party shows up at a mediation expecting that the claim will be $50,000 and you come in and ask for $500,000, it will be much more difficult to persuade them of the validity of your position. By letting them know well in advance what you want, they will have time to get over what may be their initial reaction of shock.

8. Give to Get

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Prepare to make concessions but try not to make concessions without getting a concession from the other side. Before going into a negotiation, you should identify certain points or issues which may be weaker than others and which you may be willing to yield on. However, you should always try to get a concession in return.

For example, when discussing special damages, you may say, “well, I recognize my client would need a new mattress and box spring in any event and that we may not properly be able to claim the entire cost of this fancy bed, however, surely you would recognize that the superior mattress will likely reduce her pain and suffering and you would pay the difference between the cost of the superior mattress and the regular mattress”.

I hope that you will find some of the ideas expressed here to be useful.

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