

January 2017

Resolve to Resolve in 2017

Here we are with a brand new year ahead and awash in our New Year's resolutions!

This year we should resolve to resolve more claims sooner. Unresolved claims of any sort are like unwanted pounds. There are well-known strategies for getting rid of them, but a certain level of discipline is required. Some of the ways for getting rid of claims are ridiculously simple. Pick up the phone. More information can be learned on the telephone than through discovery. Just telling the other side you are interested in resolving the case advances the dialogue. Open ended questions are what we use in mediation, but you can use them before mediation. Ask opposing counsel, "How do I resolve this case?" "What can I do to move this case toward resolution?" "What information do you need to mediate this case?"

One of my "go to" strategies as a litigator is to set the mediation 90-120 days in the future and then work in the interim to get the information I need. Setting the date for mediation well in advance gives everyone a target and, like any goal, helps provide focus. Set the date. But don't do like the old infomercial for a rotisserie oven and "set it and forget it." Once you set the date, schedule activity and calendar reminders 15, 30, 45 and 60 days prior to the mediation for communication with the client and opposing sides. I "schedule" mediation preparation on my calendar—which may include reviewing outstanding discovery or preparing a pre-mediation report to the client or carrier. Take this time to consider if any non-parties are necessary.

Brought to you by
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Approximately two weeks in advance of the mediation, send the pre-mediation letter or position statement to the opposing side and the mediator. Sending this any later is less than ideal. An early submittal gives the mediator an opportunity to chew on the problem and identify impediments to resolution. Not sending the mediation statement to the other side is a lost opportunity. It helps educate the litigants themselves on the potential weaknesses of the case and is your chance to communicate directly (unfiltered) to the other side. You can discuss all of the factors that should be considered during the negotiations. Do not assume the other attorney has routinely kept his or her clients abreast of the facts and developments. Your mediation statement is a way to educate. Contingency fee attorneys do not get paid to write letters to the clients; therefore, sending the mediation statement to opposing counsel is a good way to give an attorney with client-control problems a way to begin to manage what may be unrealistic expectations.

The pre-mediation submittal should not be a recitation of the pleadings and legal issues in the lawsuit. Mediators don't want to read your 50-page, nine-count complaint with exhibits. Your submittal to the mediator should be a discussion of the history of the case, the interests of the parties, the rough outline of a deal, and the practical impediments or needs that have to be overcome or met in order to reach resolution.

Do not tell the mediator there are "insurance coverage" issues; explain them. Do not expect the mediator to know what is significant in a 45-page report from a construction expert; provide the highlights. Outline for the mediator the gross parameters, or what I call "the anatomy," of the deal. Consider the non-economic terms that might be important to one side or the other.

If there are non-parties who need to be involved in the process, your pre-mediation submittal must be sent early and should also be sent to them. Communication is the only currency in mediation. Start communicating with opposing parties and the mediator sooner. Do not wait until you are

"ready" to mediate to start scheduling the mediation. Set the date in advance, and then work up the case in the weeks and months that follow. Setting the mediation early will potentially allow you to resolve cases sooner and eliminates last minute scheduling hassles that arise when trying to set mediation against a court imposed deadline.

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