

## **HINTS FROM A NEUTRAL 2.403 MEDIATOR (CASE EVALUATOR)**

**BY: MARTIN I. REISIG**

Reprinted with the permission of the

Oakland County Bar Association  
1760 S. Telegraph Rd., Suite 100  
Bloomfield Hills, MI 48302-0181

(248) 334-3400

Original Printing: LACHES, February 1999

The following observations, in outline form, will hopefully be helpful when preparing for your next mediation summary and presentation. This outline is divided into three parts: the mediation summary, other influences, and the hearing.

### **The Mediation Summary**

1) **Be Concise**

Mediators review approximately 40 mediation summaries for each mediation date. I typically set aside at least eight hours to review summaries prior to the hearing date. This means that on average, I spend 12 minutes per summary (assuming no snack breaks). This leaves little time for the reading of depositions, medical reports, attacks on counsel, etc. Some issues take time to develop; just don't overwhelm me with extraneous material. MCR 2.403(I) requires a "...concise summary setting forth that party's factual and legal position..."

2) **Structure**

The flow of a mediation summary should be straightforward. Example:

- Summary page (creative titles include "Short Version," "Case Capsule," "Overview," "Synopsis")
- Facts or background (in sub-sections for easy understanding)
- Liability (key case law)
- Damages (itemized)

3) **Summary Page**

A one-page outline is very helpful—I hate trying to figure out what I'm reading

and why. An example of a summary page from a defense memorandum:

Type of Case: Slip/Trip in parking lot  
Date of Loss: 00/00/00  
Alleged Injury: Tear to medial and lateral meniscus and bursitis  
Actual Injury: Bruise to right knee  
Liability: Negligible  
Damages: None proximately connected with plaintiff's alleged fall

4) Facts or Background

Use of subsections allows for easy and quick reading. An example of the subsections from a plaintiff's memorandum:

- John Doe (a sympathetic statement about the plaintiff)
- The Dangerous Intersection
- Gross Negligence of the City
- Was the Stop Sign Defective?
- Did Defendants Have Notice?
- Was John Doe Negligent?
- Who Was at Fault?

A very simple case may not require subsections, but use them when they can make the facts easier to understand.

5) Liability - Key Case Law

I think most writers under-use key cases in the liability section. A statement of liability pursuant to a leading case is helpful. This should not be a lengthy legal argument. If you think there is a key dispositive case, cite and briefly explain it. While case evaluators are not acting as judges, our evaluation involves an element of predicting what would happen at trial and how a jury will be instructed.

6) Damages—Money: How Much/How Little

In the damage section, tell the panel what you want and why. A breakdown of how you get to the number helps. Too many summaries skip this exercise. Dollar amounts have to be based on solid reasons—supply them. Do not rely on the wisdom of the panel to determine an award. Help the panel to reach and justify an amount.

In addition to an outline of the reasons for a dollar amount, I have been influenced by realistic comparisons to other cases in the same jurisdiction. Sources for comparative information include Michigan Lawyers Weekly and Jury Verdict Research, Inc. The goal for the proceeding is to encourage a settlement, but an outrageous request or offer lessens credibility with the panel and lessens your ability to influence the panel.

7) Attachments

Less is best. An inch or more of handwritten medical notes will likely go unread. If it is worth attaching a police report, medical record, letter or deposition answer, highlight the key words. Use a yellow highlighter on each mediator's copy.

8) Index or Tabs

Anything that helps us quickly get to the referenced attachment is appreciated. If it's worth attaching, it's worth putting an index tab on the document.

9) Color Photos

Is that a crack or a line on the sidewalk? If it's worth attaching a picture, use a color photo. If a picture is to indicate depth or size, use a ruler in the photo. A bad picture is not worth 1000 words.

10) Using Exhibits

When there is a key short exhibit, such as a one-page police report or a photo, place the exhibit within the body of the summary instead of at the end. This forces a mediator to review the critical exhibit immediately.

11) Medical Description

Assume that at least the neutral panel member does not have a medical license. For example, the following description does not help me evaluate the claimed damages: "...suffering from arthromyelgia, asymmetrical motor neuropathy, cephalgia, cervicalgia, displacement of meniscus, muscle spasm, myofacial pain dysfunction, myoneural disorder, otalgia, tinnitus, and trauma to the head and neck". What does this mean in the real world?

12) Police Reports

Don't assume that everybody can read this coded document. The vehicle is a "7." The party received an "A" injury. Are these good or bad? Explain that a "1" indicates the

least damage and a “7” the worst. Explain that an “A” is the worst non-fatal injury. Perhaps attach the “State of Michigan Traffic Crash Report Explanation Sheet” as support.

### **Other Influences**

#### 13) File on Time

In spite of the requirement to file summaries 14 days before the hearing, I’ve given up picking them up until three working days prior to the hearing. Too many summaries are not filed on time. I prefer to read all of the summaries on a case at the same time. Those who bring them the day of the hearing and think they’re gaining an edge by revising theirs to rebut the opposition are just hurting themselves. Unfairness to the other side is not a way to win points. If you want a summary to be seriously considered, get it in on time.

#### 14) The Doctor

The plaintiff’s summary or oral presentation may include, “Then plaintiff X was sent by the defense attorney to see Dr. Z who is yet to find a living person injured...”, while the defense brief or oral presentation refers to “infamous Dr. W who saw plaintiff X directly after his first meeting with his plaintiff attorney...” This factor of the predictability of medical findings probably has a greater impact on panel members than on jurors who are less aware of a particular doctor’s reputation.

Since many doctors want to avoid the legal system, there is a real dilemma for counsel. However, when a panel is aware of the credibility or lack of credibility of a doctor or institution, it often does influence the award.

#### 15) Insurance

Although the amount of insurance which a defendant has should be irrelevant, it does have a tremendous impact on panel awards. The goal of the case evaluation is to evaluate, but also to encourage settlements. The experienced plaintiff and defense counsel sitting as a mediator always want to know the insurance limits. MCR 2.403(J)(3) specifically allows this inquiry.

## **The Hearing**

### 16) Be Polite

Let the other side speak. You will have an equal opportunity. Almost all of these hearings are polite and civilized. Nobody is impressed or influenced by boorish behavior.

### 17) The Panel

I have been very pleased with the level of preparation shown by both the plaintiff and defense mediators. They are prepared for the hearing, and at times know the case better than the lawyer sent to “cover” the mediation for the party. Instead of being predictable advocates, it is often the plaintiff’s mediator who wonders why a case was filed or the defense mediator who thinks that more should be offered. When acting as mediators, attorneys take their role seriously.

### 18) What Will You Take/Give

After both presentations, there is usually a brief meeting with plaintiff counsel and then separately with defense counsel. Do not reveal prior settlement discussions to the panel unless both sides are in the room and agree to reveal the prior discussions.

It does not help the panel to help you if your demand or offer is unrealistic. My experience is that counsel’s offer or demand is usually within 50% of what they are actually expecting. For example, defendant is willing to pay \$15,000, so offers \$10,000; plaintiff would settle for \$10,000, but demands \$15,000. Occasionally plaintiff counsel asks for less—or defense counsel offers more—than the panel may have had in mind. Generally these unexpected offered amounts will be used in determining the award amount. The panel will assume that counsel has a better idea of the weaknesses or strengths of the case. Remember, our goal is to engender settlements.

### 19) The Lawyers

A few lawyers come to the hearings preceded by big reputations. Does this affect the award? No. I think what most affects the award is the summary and presentation which often demonstrate that the reputation is deserved. The better prepared and more reasonable counsel will have a greater impact on the panel.

### 20) The Award

My experience is that most of the time, the panel members evaluate the case for settlement purposes within a very close range, and then agree on a dollar amount. The parties' advocates may want more or less, but if the same lawyers were to give up their stake as advocates and become mediators, it is amazing how close the evaluations would likely be. When a mediation award seems grossly unfair, the reflective advocate should consider whether the cause was a sloppy summary and unprepared presentation. Give the case evaluators the information they need, and they will agree on an award which is likely to assist you in reaching a settlement.



Martin I. Reisig, of Birmingham, Michigan, acts as a 2.403 neutral case evaluator in Oakland and Wayne counties. He serves on the Michigan Supreme Court Dispute Resolution Task Force and as a facilitator for the Oakland County Facilitation Project and the Oakland Mediation Center. He is a past chairman of the Oakland County Bar Association Criminal Law Committee.