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Persuasion and Settlement Techniques at Mediation

DIANA SANTA MARIA is the founding and managing partner of the Law Offices of Diana Santa Maria, P.A. in Ft. Lauderdale, Florida and is a graduate of the University of Miami (B.A. with honors, 1981) and the University of Miami School of Law (J.D. 1984).

Since being admitted to The Florida Bar in 1985, she has devoted her practice to the representation of persons injured as a result of the negligence of others. From 1985 until 1991 she practiced with the law firm of Sheldon J. Schlesinger, P.A. in Fort Lauderdale, Florida, in the areas of Plaintiff=s Personal Injury, Medical Malpractice and Wrongful Death, both on the trial and appellate levels. In 1991 Ms. Santa Maria formed her own practice specializing in Plaintiff=s Personal Injury and Wrongful Death. She is a member of the American Board of Trial Advocates, a *Sustaining Member* of the Association of Trial Lawyers of America and she is AAV@ rated by the Martindale-Hubbell Law Directory.

An Eagle patron, Diana has served as a Director on the Academy of Florida Trial Lawyers Board of Directors since 1996. She served on the Academy=s Long Range Planning Committee from 1999 - 2000. She also served as Chair of the Continuing Legal Education Committee from 1999 - 2001 and as Chair of the Allies Committee from 2001-2002. She has been the recipient of various awards given by the Academy including the ***AMost Valuable Player@ Staff Appreciation Award*** in 1997 and again in 2000, the Legislative Leadership ***AShoe Leather@ Award (October 1997)***, the ***AAbove and Beyond the Call of Duty@ Award (June 1999)***, the ***AWings of Justice@ Award (June 2000)*** and the ***ABronze Eagle@ Award (June 2001)***. She also serves as an officer and director for the Coalition for Family Safety, and is a Flag Trustee.

Diana has been listed in *Who=s Who in American Law*, *The International Who=s Who of Professionals*, and *Outstanding Young Women of America*. She has lectured and written on numerous legal areas within her specialty, to include **Seven Steps to Effective Mediation** published in the June, 1997 TRIAL magazine. This year Diana was re-appointed by the president of the Florida Bar to continue her service as an attorney member of the Florida Bar=s Citizens Forum. She also serves as a member of the Florida Bar=s Grievance Committee for the 17th Judicial Circuit. She is listed in the Martindale Hubbell Bar Register of Preeminent Attorneys and is a member of the Million Dollar Advocate=s Forum. ₂

Diana has served on the Board of Directors for ASPIRA of Florida, Inc. and has been Chair of ASPIRA of Broward, a non-profit community based youth organization dedicated to the leadership and educational development of minority youth.

MEDIATION STRATEGY AND TIPS¹

I. PREPARE FOR THE MEDIATION PROCESS:

Just as in trial, *thorough preparation is the single most important factor for a successful mediation*. Prepare for mediation as if the client=s entire case lies in the balance; more often than not, it does. Many insurance companies wait for mediation to decide whether they are going to pay large amounts of money to avoid a larger exposure. Your presentation at the mediation illustrates to the adjuster how your case is likely to be presented at trial. Unless you demonstrate a strong likelihood of winning a large verdict, most insurance companies at this stage of the case will stake their bets at trial.

Particularly in a heavily litigated case, you want to document and organize every significant element of the case (liability, causation and damages), just as you would for trial. Catalogue and index every video tape, every deposition, every potential demonstrative exhibit or piece of evidence. Ensure that every document developed in the case is immediately and readily accessible at any point in the mediation to specifically rebut the broad brush arguments made by the defense, the same as you would for trial. Maintain well organized storage for all these documents, and for all potential mediation exhibits.

A. BEGIN PREPARING AS SOON AS THE CLIENT IS SIGNED UP

You want to begin preparing for the mediation as you would for the trial from the inception of the case. Every case which involves an injury or loss has its own uniquely poignant characteristics. The key to a successful mediation is to prepare the case with the goal of documenting those poignant points of liability and/or damages at every opportunity. This is the drama and intensity of your case which you need to help create as a FOCAL POINT for the mediation.

- < Video tape valuable evidence such as the plaintiff undergoing physical therapy. You may later use this evidence at the mediation as well as at trial.
- < Where loss of services claims on behalf of minor children whose parents have sustained permanent disabling injuries are brought, consider video taping an interview of the child discussing how the parent=s injury has affected him or her; showing this at a mediation can be very effective.

¹ *Seven Steps to Effective Mediation* is reprinted with permission of TRIAL (June 1997), Copyright the Association of Trial Lawyers of America.

- < **Video tape important discovery depositions, such as that of the Defendant and expert and other important witnesses in the case such as an eye witness in a contested liability case. You may later show excerpts of these at the mediation. These can be extremely effective when the Defendant or other Defense witnesses make points for you. Video taping certain key experts of your own will allow you to demonstrate how your experts will testify at trial on any contested issues.**

- < **Video tape an interview of the client discussing their pain and suffering and the changes in their life as a result of their injury or loss;**

- < **Ask your client to gather home movies, old pictures, trophies, plaques, newspaper clippings of prior achievements in order to prepare a portfolio of who your client was before the accident or loss; in the wrongful death case gather family pictures, home movies, special events memorabilia involving the decedent to illustrate their life before their death.**

B. MAINTAIN THE PROPER ATTITUDE TOWARDS THE PROCESS

Do not take mediation lightly. In cases where there is a court ordered mediation before trial, as your client's lawyer you have a duty to maximize the potential for settlement of their case for a fair and substantial value, without incurring the costs and risks attendant to a full blown trial. View mediation as an opportunity to prepare yourself and your client for trial.

1. SELECT YOUR MEDIATOR CAREFULLY.

Agreeing to a particular mediator to mediate your case can be as important as selecting a juror to sit on the jury.. Check out prospective mediators with your colleagues, and ensure that no mediator is used who is not highly recommended by a trustworthy source.

2. PREPARE YOUR CLIENT FOR THE MEDIATION PROCESS.

- < **Make sure your client(s) understands the purpose of mediation, as well as the gamesmanship involved. If your client is well-informed about the process, they will be more relaxed and will make a better appearance.**

- < **Remind your client(s) that you need them just as much as they need you to make an effective presentation at mediation.**

- < **Make sure they don't come to the mediation table angry at the other side or**

with Aan attitude@. Explain to them that this can only hurt their case by presenting them in an unfavorable light.

- < Make sure they come appropriately attired to your office well before the mediation so that there is enough time to discuss strategy with them before the mediation.

- < Make sure you have calculated the total of all outstanding medical bills, any outstanding liens and costs in the case well in advance of the date for mediation so that you and your client will know just how much it will take to net to your client the amount both agree will settle the case.

- ☐ If you know that the defense is bringing a structured settlement company , bring your own structure person as well. This person may be able to sit through some of the mediator=s discussions with the defense and give you feedback on the chances of obtaining the amount you want to settle for.

II. PREPARE THE MEDIATOR

Prepare a thorough and complete Mediation Overview (see Sample provided) for the mediator which addresses every important element of the case (liability, causation, damages). Also, provide the mediator with an Economic Loss report from your economist and, where applicable, a Life Care Plan from a Vocational Rehabilitation Expert.

III. THE MEDIATION

A. MAKE YOUR STRENGTHS THE FOCAL POINT OF THE MEDIATION

Do not hold back on maximizing the presentation of the strengths in your case (particularly in the area of damages).

- < Blow up photos of extensive damage to Plaintiff=s vehicle;

- < Blow up photos of Plaintiff=s injuries;

- < Create positive prints and blow up x-rays showing fractures, plates, screws, pins, etc. . . .

- < Blow up key documents, medical records, etc. . . .

Even if the case does not settle, you will be able to use all these exhibits at trial.

< **Consider creating a video-tape presentation which shows the highlights and the strengths of your case, including excerpts of the video-depositions of key witnesses, incorporate home videos and photos of your client before their accident, include interviews of before and after witnesses.**

B. ADDRESS, BUT DOWN-PLAY YOUR WEAKNESSES

It is generally better for you to bring up and address any weaknesses in your case; preferably before the other side does. Unless your trial strategy indicates otherwise, consider explaining why these weaknesses are not significant and (without giving everything away) show (in a general way) how you intend to handle these matters at trial. Be sure, however, to address and not hide from any perceived weaknesses in your case and demonstrate why these are not significant and why they should not detract from the issues at hand.

**MEDIATION OVERVIEW
(Sample for Negligence Case)**

BACKGROUND AND BIOGRAPHICAL INFORMATION

Plaintiff=s Name:

Age on date of accident:

Present Age:

Date of Accident or Loss:

Plaintiff=s Employment and Earnings on D\A:

LIABILITY

How and where did the Crash\Incident occur:

The Defendant(s) are liable because:

The Defendant(s) Defenses are:

Why the Defendant(s) Defenses Fail:

CAUSATION & DAMAGES

PLAINTIFF=S INJURIES AND DISABILITIES

List each injury, complaint & disability.

INJURIES:

<

<

As a result of these injuries, THE PLAINTIFF suffers from the following:

ACCOMPANYING DISABILITIES:

<

<

DOCTORS= ASSESSMENTS OF PLAINTIFF

List each doctor who has examined or treated the Plaintiff (categorize them by specialty & include all IME doctors). In 2-3 sentences summarize the Doctor=s assessment of the injury, together with any disability rating and prognosis for future care.

< NEUROLOGISTS AND NEUROSURGEONS

< NEUROPSYCHOLOGISTS

< ENT

< ORTHOPEDISTS

< GYNECOLOGY AND OBSTETRICS

< FAMILY PHYSICIAN

PAST MEDICAL BILLS, OUT OF POCKET & EARNINGS LOSSES

MEDICAL BILLS

(List each and every medical bill)

< **DOCTORS\HOSPITAL** **TOTAL BILL** **OUTSTANDING AMOUNT**

<

<

<

< TOTAL BILLS = \$ _____

< TOTAL OUTSTANDING = \$ _____

OUT OF POCKET EXPENSES

(List all out-of-pocket expenses, e.g. housekeeper, travel, etc.)

<

<

TOTAL OUT OF POCKET EXPENSES = \$ _____

PAST WAGE LOSS

(Compare pre-morbid earnings to earnings since d\|a to arrive at)

PAST WAGE LOSS = \$ _____

***TOTAL ECONOMIC LOSSES (PAST)* \$ _____**

FUTURE ECONOMIC LOSSES

FUTURE MEDICAL COSTS & CARE

Refer here to Economist=s report and\|or Life Care Plan which incorporates treating doctors= opinions re: future medical needs.

FUTURE MEDICAL COSTS = \$ _____ (Future Value)

\$ _____ (Present Value)

LOST EARNINGS AND EARNING CAPACITY LOSSES:

Refer here to your Economist=s and\|or Vocational Rehabilitation Expert=s report for future lost earnings or earning capacity losses .

FUTURE LOST EARNINGS CAPACITY =\$ _____ (Future Value)

\$ _____ (Present Value)

***TOTAL ECONOMIC LOSSES (FUTURE)* \$ _____ (Future Value)**

\$ _____ (Present Value)

PLAINTIFF=S PRE-TRIAL DEMAND FOR ECONOMIC AND NON-ECONOMIC DAMAGES=

= \$ _____

Defendant/s Ins. Coverage Limits = \$ _____