



Speed Dating and Other Creative Tools for Mediation

By Joseph Epstein, Esq., with Lynne S. Bassis, Esq.

I. Introduction

With the high transactional costs and risks associated with the prosecution of less severe personal injury cases, we have some suggestions for personal injury lawyers. It is our hope that use of these techniques – Bird Watching, Data Dumping, Dunking Your Donut, Green Eggs and Ham, Lien Massages, and Speed Dating – will help with pre-litigation and early dispute resolution. Hold on to your laptops, here we go.

II. Bird Watching

Bird watching involves combining patience with unique stillness. It requires careful listening with eyes that see with deep appreciation. The same skills are required in the midst of the turmoil and tension that is at the center of mediation. Skillful negotiators and mediators find an inner core of peacefulness that allows them to be patient. Centering allows them to listen carefully to what is said and what is left unsaid. They do so with a calmness that is calming to others. These special attributes of the bird watcher allow for refreshingly revealing and non-partisan dialogue that triggers an open and candid case discussion. If parties have utilized the tools of Data Dumping, Lien Massage, Speed Dating, and Green Eggs & Ham, all that is left is for negotiators and mediators to utilize their bird watching skills to lead participants past impasse breaking to case closure.

III. Data Dumping

Data Dumping is the honoring of both the letter and the spirit of the discovery rules, which encourage professionalism and cooperation among counsel and parties, to facilitate disclosure and discovery. We suggest that plaintiff's counsel provide adjusters and defense counsel with full disclosure of accident, medical, and employment information, and with medical, and employment releases, if necessary. Defense counsel should reciprocate this transparency by sharing their mediation statement and any negative information. Before mediation, each side should contact their mediator if it fears that the discovery disclosures have been incomplete. Mediators can then urge counsel to lift the veil of secrecy sufficiently to allow for early dispute resolution. Keep in mind that oftentimes it is the perception of secrecy that is damaging to early dispute resolution, rather than the actual withholding of information that, many times, the other side already knows.

We find that counsel often neglect to fully and completely disclose the identity of co-workers, supervisors or family members who possess relevant information. If counsel attends mediation with only verbal representations of what he or she believes a witness will say, opponents will view those statements with skepticism. Witness statements and/or affidavits, however, are persuasive in providing the other side with a more complete perspective of the case. Translation: cost savings.

IV. Dunking Your Donut

Green Eggs & Ham (noted below), or that comfort food - of jelly, powdered sugar or cinnamon donuts - is meant to be eaten early. Attorneys who data dump and serve Green Eggs & Ham can also provide donuts to dunk with an early morning cup of mediation "Joe." In the tight economy, all concerned look forward to that early morning breakfast also know as "early dispute resolution." Early dispute resolution has the advantages of transaction cost savings and early closure for all.¹

V. Green Eggs and Ham

Alluding to Dr. Seuss' children's book, mediation statements are the "green eggs and ham" of mediation. The advocate's written submission should be an attention grabbing, humorous (if possible), candid, clear, concise and persuasive in its theme. It is our view that these statements can serve the function of educating the partisan partners of the opposing side, including an advocate's own client, as well as harried and hassled mediators.²

VI. Lien Massage

Just like a soothing massage at a spa, a lien massage (also known as lien resolution or lien reduction) can be soothing if the parties plan for it. Savvy negotiators look at hospital liens, health care provider liens, injury finance liens and workers compensation liens, and determine whether they can use the “make nice doctrine” of working collaboratively with the lien holder. If so, they identify the best time for the application of this salve. The timing depends on factors such as the size of the lien and whether it is perfected. Timing also depends on the strength of the underlying case, relationships and fairness. Another technique is a harder message of reality testing, risk analysis and firm lien reduction demands.

VII. Speed Dating

Not unlike the speed dating scene where, after brief introductions and a few minutes of interaction where people make judgments about their next moves, so too in the small personal injury case, parties can make quick judgments about what to do next. With Speed Dating, also known as FasTrac Mediation (service mark pending), we ask that people move quickly into the Zone of Reasonableness and not hang out at the outer extremes of the negotiation continuum, risking impasse. It is a disservice to the mediation process for a plaintiff to fail to learn what a defendant is willing to pay and similarly, it is a disservice for a defendant to fail to learn what it would take to settle the case. A detour that will guard against this stall is the “3 & 3 plus 1” approach. Each side gets three moves. The “plus 1” move is the mediator’s number. With realistic expectations and transparency, Speed Dating or FasTrac Mediation (service mark pending) has proven to be efficient and cost effective. To add to the efficiency of this process, adjusters and defense counsel provide their releases in advance of mediation and issue settlement checks within 10 days.

VII. Conclusion

Effective and efficient mediation of less complex personal injury cases requires, among other things, creativity. In these cases we suggest that advocates (counsel and adjusters) use “Bird Watching” (patience, listening, and stillness), “Data Dumping” (full disclosure), “Dunk Your Donut” (early dispute resolution), Green Eggs & Ham” (attention grabbing shared mediation statements), “Lien Massage” (dealing with liens), and “Speed Dating” (thrice and done) so they can save transactional cost and allow participants to go on their way.

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Endnotes

¹ See generally, Joe Epstein with Susan Epstein, Pre-litigation and Early Dispute Resolution, TRIAL TALK, Apr/May 2007, at 23-25.

² See generally, Joe Epstein, Green Eggs & Ham And Other Creative Strategies For Effective Mediation, TRIAL TALK, Dec/Jan 2005 at 31-32.