

Litigation Strategies for Neutralizing Anger:
The Plaintiff's Perspective

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Strafford Live CLE Webinars
March 9, 2022

Preparing the Plaintiff for Mediation

- ▶ **Thoroughly prepare your client for a tough day ahead.** Mediation is an inherently exhausting and emotional process.
- ▶ **You do this all the time; they don't.** Remember that mediation is likely a foreign process to your client. Take the time to explain mediation to your client in detail, even though mediation is routine to you as counsel.
- ▶ **Lower expectations.** A defendant's first offer is almost always a lowball offer. Prepare your client accordingly.
- ▶ **Enter mediation with a game plan.** Exhaustion clouds decision-making. Come in with a realistic bottom-line in mind so that your client is prepared to draw the line. If your case involves a contingency arrangement or some reduction in fees, ensure you are on the same page as your client regarding how any settlement payment will be divided.

Preparing the Plaintiff for Mediation

- ▶ **Divide up the tasks.** Have the client speak about her emotional distress and counsel speak about monetary compensation. In this way, the plaintiff does not come across as greedy.
- ▶ **Do not bombard your client with the pitfalls of litigation during mediation.** Yes, the mediator may discuss the harsh realities of litigation with your client. But, if your client's case is pre-suit, you should give your client a detailed explanation of the litigation process and the time/expenses involved well in advance of mediation, to allow your client time to process the costs and benefits of moving forward.

Preparing the Plaintiff for Mediation

- ▶ **Defendants' allegations should not be taken as personal attacks.** Especially in employment cases, the defendant will often make untrue or exaggerated allegations about the plaintiff's job performance and professionalism. Prepare your client for these attacks and tell her that they are, first and foremost, a litigation strategy, not personal. Discrimination by its very nature is not personal; it is animus against a class based on a protected characteristic.

Preparing the Plaintiff for Mediation

- ▶ **Consider having a therapist on call, if the case is emotionally-charged.** For certain types of cases, such as those involving sexual assault or wrongful death, counsel is simply not qualified to assist the client in managing anger and emotion. If you are mediating a case of this nature, consider encouraging your client to have a treating mental health provider available via phone during the mediation. If appropriate, and with the client's consent, speak with the treating therapist to help the therapist understand the legal challenges that your client will be facing.

Preparing the Plaintiff for Mediation

- ▶ **Avoid “too many cooks in the kitchen.”** Be very cautious about having clients’ spouses, partners, or parents attend the mediation. Their anger may fuel the plaintiff’s anger and emotions.
- ▶ **Know the players on the other side.** Ask the mediator, in advance, who will be representing the defendant at mediation. Sometimes, the alleged bad actors are also the decisionmakers on settlement. If those individuals are involved in mediation, the process may be a lost cause. Better to know and prepare for that reality ahead of time, and to make the mediator aware of the dynamics at play.

Managing Anger in Mediation

- ▶ **Forego opening statements.** Usually, there is nothing gained by opening statements when the parties already know each other's perspectives on the case. This process will only further inflame the parties' anger.
- ▶ **Let the mediator be the "bad cop."** Allow the mediator to explain the "danger points" about the case to your client. The client may be more receptive to criticism from an objective party rather than from you, her advocate.

Managing Anger in Mediation

- ▶ **Maintain a calm demeanor, as counsel.** Nothing will be gained if counsel is just as angry as the client. Be the level-headed voice for your client.
 - Use the preparation period to explain to her that you understand her anger and injuries, but as her attorney, you need to provide her with reasonable judgments about moving forward.
- ▶ **Let your client vent with you and not the mediator.** Give your client the time and space to express anger and emotion to you, and empathize with your client. But tell your client to manage emotions in front of the mediator, to show the mediator that your client will be a strong advocate for herself at trial.
- ▶ **Encourage your client to request breaks.** Sometimes, a five-minute cooldown period makes all the difference.

Managing Anger in Trial

- ▶ **Encourage your client to present in a sympathetic manner, and not be angry while showing hurt and distrust.** Jurors tend not to like plaintiffs who present as vengeful. Instead, the plaintiff should set forth the facts in a calm manner, but not be afraid to show emotion when describing emotional injuries. Explain to your clients that they must be their own advocates while on the stand, and that they should not get angry or defensive with defense counsel on cross-examination. It is better to answer questions sincerely and take an attitude that defense counsel does not understand the facts.
- ▶ **Pause, when needed.** Especially during cross-examination, opposing counsel's questions may evoke an emotional response from your client. Tell your client to pause and think through her responses before answering.

Managing Anger in Trial

- ▶ **Counsel should maintain composure.** Avoid displaying anger or frustration toward opposing counsel, and before the judge.
- ▶ **Take time to debrief with your client.** As a plaintiff, sitting in court and watching a defendant tarnish your character for days on end, without the ability to defend yourself on the spot, is difficult. Keep your client in the loop on how you plan to respond to attacks from the defendant, whether it be during cross-examination, rebuttal testimony, or closing argument, so your client understands how you are addressing issues effectively as her advocate.

Managing Anger in Trial

- ▶ **Let the defendant's witnesses show anger.** If the defendant's witnesses become agitated or angry when presented with facts that prove their wrongdoing, stay calm but continue your line of questioning. Let the jurors draw conclusions based on the witnesses' over-defensiveness or anger.
 - The calmer the counsel questioning the witness, the angrier defendants and witnesses become on the stand. Due to biases held by some defendants, they can become especially angry when the counsel questioning the witness is a woman or a person of color.