Mindful Mediation: Navigating the Path to Recovery (Part 1)

Subro Sessions Podcast

Matt: Thank you Ed, and to our listeners, devoted fans and the one or two close family members of mine who promised me they would tune in, let me say, welcome to the White and Williams Subro Sessions and today's session, *Mindful Mediation: Navigating the Path to Recovery*. My name is Matt Ferrie, I'm a partner in the White and Williams Subrogation Department.

And now we'll hear from my friends, colleagues and co-hosts.

Gus: Hello everyone, Gus Sara here from White and Williams Subrogation Department. I am proudly counsel in the Subrogation Department.

Lian: Hi, I'm Lian Skaf, I'm also counsel in the subrogation department at White and Williams

Matt: So Gus, Lian, and I were very excited when we found out that we were going to start doing podcasting. Gus, Lian, and I have done subrogation articles together.

We've done subrogation webinars together. We've done virtual subrogation presentations together, and we've done in-person subrogation presentations together. We're definitely interested in adding podcasting to the mediums that we use to discuss subrogation topics and strategies. One of our goals with this is for our audience to come away thinking that discussing subrogation can be not only informative and interesting, but also fun, entertaining.

So for this session, as well as part two of mindful mediation, which we're going to do next, we decided to do a point counterpoint format. One of us is going to present a hypothetical situation that can come up in a mediation. One of us is going to present a position in terms of how to react to that situation,and another one of us is going to present a counterpoint to the first position and like most mediations and like most cases, one size does not fit all. And that's why you want experienced and smart subrogation council advising you. But it's important to consider the strategies that we're going to mention, because it may just fit your case.

Should we get started, Lian?

Lian: Absolutely. Okay. So I get the honor of presenting the first hypothetical here that my two colleagues are going to spar over. I know that. Matt here, dabbles in boxing, and I'm pretty confident that Gus does not. So Matt odds on favorite, but you never know, could get an underdog victory here so.

Matt: The odds are against him.

Gus: I put gloves on once.

Lian: And I'm gonna do my best to referee, so here's the hypothetical. So, as we all know as attorneys and professionals here, all states have different rules and all courtrooms and all states tend to have different rules as well. So same goes for mediation, whether it's set by council or the mediators, or in conjunction with everyone, there's different rules for different mediations.

So in hypothetical number one, we have defense counsel, who's proposing that all the parties share their mediation memorandum with one another prior to the mediation. All right, Gus, you're up first.

Gus: So I'm going to take the position of pro. I am pro sharing memorandums, because I think most of the time, in my experience, it's been a very effective strategy, especially in those circumstances where your case is strong.

If you are confident in your liability theory, you're confident in your expert and your damages are well-supported, then really there's nothing to hide. And a memorandum, can be used to highlight your strengths while there is a positive trend towards early mediations. In my experiences, mediations typically occur during litigation and, and after some discovery was conducted.

So there may be new favorable facts, that you would want to shine light on. If factual developments are potentially harmful, the memorandum then serves as an opportunity to address those facts and gives the attorney and attempt to diffuse them. So it's a really great strategy, even if, facts that come out in discovery are good or if they're bad, it gives, it gives the opportunity for the attorney to put their own spin. If I do share a memorandum, then I often request that the defense attorney give their clients the opportunity to review it. And I specifically shoot them an email or send them a letter, and I say, I would greatly appreciate it.

If your client can review, if you can have your client review this memorandum as well, especially if they're attending the mediation. So that they understand our position, without the defense attorney's spin on it. A shared memorandum should look different than an ex parte version. So if, you know, I don't include the fatal weaknesses that I would sometimes admit to the mediator and I don't put actual settlement ranges, and I address those issues in a separate, confidential memorandum, to the mediator directly. Also all submissions, including, liability reports, I always state that they're for mediation purposes only. So big fan of sharing the memorandum, and in most instances.

Lian: All right Gus some good points, Matt.

Matt: I think I may have spoken too soon. I think Gus might have gotten me by technical knockout on this one. Unfortunately, this is one of the hypothetical where I don't think the counterpoint is all that strong, and should always be evaluated on a case by case basis. But, generally speaking, you want to take advantage of any opportunity to directly communicate your position in writing to the decision-maker, on the other side. That being said, there are some factors that you should always consider. For one, the stage of the proceedings, if it's pre-litigation or early in litigation, there's often little downside to providing a mediation memo to the adverse party. However, if you feel that you have made your position

abundantly clear, whether it's through an expert report, motion practice, whatever may have may have developed in a lengthy litigation, a mediation, a mediation member of the adverse carrier, maybe redundant, or perhaps more importantly, maybe a non-optimal use of your time, on that particular case.

Another thing to consider is the strengths of the case may best be articulated in person. The facts and the circumstances may be such that a written summary actually does not present the case in its best light. An example of this may be when the defendant or an important defense witness has come across very poorly in his or her deposition, and that may be much better communicated in person.

Another factor to consider is how much you communicate in the mediation memo if you're going to send it. While some candor in articulating both the strengths and weaknesses of your case, I feel will go a long way in facilitating a productive mediation.

A mediation memo to the adverse party is not the time to present a laundry list of everything that is wrong with your case. You want the defense attorney when he's done reading your mediation memo, to think that you have fairly presented a strong case, you don't want him to think you're going to end it by saying, I'm sorry for wasting your time.

Please give me $5,000 and I'll go away. Similarly, if you do provide a mediation memo to the adverse party, you want to be mindful of the ongoing balance between providing enough information that the adverse party recognizes their exposure, but not so much information that they can begin to develop defenses, they had not previously considered evaluated. This is not to say hide the ball on the most important positions in your case only that you don't necessarily want to give away every argument, particularly if you don't feel that this mediation is going to be productive.

Lian: I wish I had a wrong button to hit several times, but good job.

Matt: I think the boxing commission may be taking a look at you Lian. Let's agree to disagree.

Lian: All right, hypothetical number two, I'll pass the baton to Matt.

Matt: So this is a situation that we come across all the time, and that is that defense counsel wants the plaintiff to either make a pre-mediation demand, which is lower then it's total payment or make the first move in the mediation, if there has been no prior movement regarding settlement discussions. So in terms of our point, we're going to start with Lian, what you think, Lian?

Lian: Well, you know what I mean? It obviously depends on the circumstances of the case, like, you know, most things we're going to discuss here today.

But, you know, generally speaking, all mediations have one thing in common is that, and it's that all parties need to come into it with good faith, good faith that they're really trying to settle this. So, you know, we expect defense counsel to come ready to settle. And, you know, I think making the first move gives them a clear sign that we're coming in there doing the same.

If they don't reciprocate and they don't come up, you know, either matching you or what you think is a good faith, counter, then, you know, pretty quickly whether or not the settlement is really possible here. And, you know, you kind of know, look, I put us out there it, it wasn't responded to properly, let's move on. I also think making the first move can often curry favor with the mediator. I mean, the mediator's goal there is to try and get this case settled as quickly as possible, and I think making the first move further that goal, you know, it's good to capitalize to use this also when you're later trying to convince the mediator to lean hard on defendant or their defense counsel to put up some money to say, hey look, you know, we started off here, we made the first step, you know, let's get them to kind of, to throw in some money at the end. You know, especially when you have the defendant, the client there, I think it's good to show them that, you know, you're not some unreasonable ambulance chasing attorney, that defense counsel may have made you out to be. You know, it's good for you to make the first step set the tone for the mediation and, you know, show that client that you're reasonable, and that you're agreeable and they can work with you.

You know, that could help later in the day in the mediation when things get tight. And even if you don't settle, if things, if you're pre-suit, you can help you. Once you're in litigation, if you're in litigation, it can help you as things go on, just so they know they're dealing with a reasonable person on the other side.

You know, if later pressed by a judge, let's say that the mediation we're talking about is with a private mediator. Sometimes, either at a pre-trial conference or before you'll get into a settlement conference with the judge and you know, he'll want to know the history of your mediation, what counsel did, what they didn't do.

I think it's good to be able to tell a judge, listen, we made a first move, we lowered our initial demand, we're acting in good faith. I think you can also have the benefit of lowering your demand while surrendering some damages that you might not necessarily really expect to recover anyway. I mean, this could be in the form of depreciation or interest that, you know, you might make, the argument is recoverable if you're at trial, but really it's just a chip you're going to use a mediation anyway. So, you know, you're showing some good faith and you're not really surrendering all that much. I think also, you know, your client agreeing to make the first move kind of gets them in the right positive frame of mind, too, in that, you know, we're here to try and settle this. We're here to move the chains and, and do our part, and hopefully defense counsel will do theirs, and, you know, we'll get to, a settlement by the end of the day.

Matt: Lian making some points with the judges so far Gus when you think?

Gus: Did he though?

I think that was a very eloquent, admirable. Presentation of your position, but I respectfully disagree with everything you've said.

Why bid against yourself? The cases going to mediation either because the defendant was unwilling to even engage in settlement negotiations, or negotiations were attempted and

failed. Even if prior negotiations were attempted, there is usually a clean slate the mediation. So, if the defendant is starting at zero shouldn't, the plaintiff start at a hundred?

The mere fact that the defendant agreed to mediation does not in itself warrant a discount. Sorry, not sorry.

There are other ways to get in the mediators good graces. I have never had a mediator get upset with me or my client for not dropping the demand prior to the mediation. The plaintiff's good faith agreement to participate means the plaintiff will compromise at the mediation, but not beforehand.

I would expect that by the time the mediation comes around, defense counsel knows me well enough, and should know that I'm reasonable without having to come to a mediation with a reduced demand. I find that I'm usually in a mediation because the defendants were the ones not being reasonable. Call me bias, but that's usually my take of the situation.

I'm often waiting for them to show a sign of reasonableness, not the other way around. Even if there are portions of your demand that are not legally recoverable, why not wait until the mediation to negotiate on those portions as well? You may agree to reducing your demand first while at the mediation, but there's usually little benefit to drop your demand before the mediation.

Matt: Lian do you have something in response to that?

Lian: Yeah, I just want to say, I think the only thing we really learned here is that I'm a nice guy and Gus is not, Gus is not here to make friends.

Gus: I'm okay with that. I'm okay with that.

Matt: Honestly, I might have to call it, I'm going to call it a majority draw. That means there's three judges and two of them decided it was a draw. I'm not going to tell you, I'm not gonna say what the third judge thought.

Gus: I don't remember asking you Matt, but moving on to a hypothetical three. So we're at the mediation and the mediator proposes that all defendants stay in one room, and that all plaintiffs stay in one room. And obviously, this is a case in this hypothetical where there are multiple plaintiffs and multiple defendants. Pros and cons to keeping everyone on one side of the V, in the same room. We're going to start with Matt.

Matt: I'm generally going to be in favor on this one, of keeping all of the plaintiffs in one room, at least to start a mediation. Generally speaking, a united front among plaintiffs has obvious benefits in terms of how seriously a defendant or defendants are going to be taking their exposure.

Additionally, to the extent that it's not already obtained, it's an opportunity to learn additional and, or, potentially better, arguments then those we've already developed through our investigation. Personally, I think it's a poor attorney who thinks that he can never learn anything new about how to present a case, or can never learn anything new about his own case.

And I think it's always a good opportunity, especially if you're working with a co-counsel or other plaintiff's counsel whom you respect and also has a good feel for the case, to try to understand what their viewpoint is and see if they have some points regarding this case you had not considered, or perhaps had dismissed too easily.

Another point is you can better understand the settlement expectations of the other plaintiffs, and you're in a better position to ensure that your client is getting a fair share. If you're in the same room with the other plaintiffs. And if a combined offer is being made, or at least you have some understanding of how that offer is intended to be split up amongst the plaintiffs, it may also make the mediation progress more smoothly, more efficiently, and more quickly.

There's just generally an inherent momentum that comes along in moving the mediation forward when people are not constantly in their own breakout rooms and no, one's there to kind of call them out and say, guys, come on, what are you doing here? Why are we fighting over this? Let's try to get this done.

That being said, I think there is another important point to make is sometimes you start a mediation with all plaintiffs in the same room, and you know, at some point you realize it's not working out. Every so often you'll come across one plaintiff who chances are he or she, the attorney, is the one who did the least amount of investigation, has the least effective expert, and for some reason it's being the least reasonable in trying to settle the case. So to me, it's kind of like Dolphin said in Roadhouse, you know, you know where he said, I want you to be nice until it's time not to be nice. It's kinda like, I want you to be United until it's time not to be united.

Gus: Lian's in the corner.

Lian: Like all of our topics, you know, there are arguments and good ones to be made on both sides. But, this is I guess, where I go from nice guy to Heal. This is, this is Hulk Hogan into Hollywood Hogan here. So we're doing, are we in the same room? Look, I'm all for comradery. Comradery is important, we got all be friends here, but so is zealously representing your client.

We all remember that right? From law school. So in these cases, a lot of times, one of the biggest issues is damages proofs. You know, your co-plaintiffs are gonna have different damages than yours. Some are going to be inflated, some are not going to be as supported as yours, and that can mean arguing against, you know, recovery that's not going to be divided equally. And, you know, in those circumstances, you want to present your case to the mediator, outside the presence of your co-counsel. You know, you don't want to be disparaging their damage proofs in front of them. And you also maybe don't want them to know you're making that argument to the mediator.

I think also just, you know, more generally speaking, not all clients value cases the same, you know, a co-plaintiff might think they have a strong case that they will turn away a decent offer in mediation, and your client might say, it's not as strong and they might want to take it. You know whether or not you can actually get that to work, and without a global resolution

with defense counsel is another story, but it's certainly something I think, worth trying. And I think a lot of times to do that, you'd probably have to be in different rooms. Sometimes, you know, a client is also maybe more likely to be open with a mediator, when other co-plaintiffs aren't in the room with them, you know, it may not be the specific facts of this case or not.

You know, we're all dealing with insurance companies and clients that run into each other all the time, over and over again in different contexts. So whether it's some prior history you don't know about, or just their general comfort level, your client, you know, may be able to talk bottom lines a little bit better directly with the mediator without a different representative in the room.

From a personal point of view, having the room to yourself as you know, a good idea, a good chance when the media is not around to bond with your client. I mean, that's some good face-time right there. And you know, for both of you, maybe it's just a good chance to get some work done when the mediator's not around.

Gus: A nice person would say that that was a draw, but I'm going Lian. I completely agree with those points. So, we're on to wrapping this up. This has been a lot of fun and I hope Matt's family members agree.

Matt: I'm pretty sure they're not tuning it.

Gus: Well, you know, at least your family was nice enough to lie to you and say they would.

So as we've learned, no two mediations are alike. The details of your mediation may lend itself to its own unique strategy, but hopefully some of the points here can be helpful in deciding how best to proceed. Some of these strategies may also depend on the style of the mediator. So it is helpful to know the mediator, at least to have an understanding of the mediator's style.

When a mediator is recommended that I'm not aware of, I send an email out to the group to see if anyone could shed any insight on that mediator style. Some mediators obtain a very good grasp of the facts and articulate each party's strengths while some are less aggressive and leave it to the attorneys to make those points.

The style of the mediator is definitely an important consideration.

I'll just add also, I think it's important to talk with your adversaries counsel, if you have the opportunity to speak with clients, at the beginning, or even during a lunch break about topics, other than your case. You know, show them you're a good person. Set an amicable tone so that all the participants feel like, you know, you're working toward the same goal here without really needing to get into specifics of the facts just generally speaking, you know, if the mediation is unsuccessful, don't assume settlement's impossible. Sometimes it may just take a few more days for the parties to contemplate or a few more phone calls to get things done.

Matt: My general philosophy is that any mediation is hardly ever a waste of time. In my experience, defense attorneys typically have a mindset to litigate the case longer than it needs to be litigated.

Before thinking about a resolution, a mediation provides the opportunity for the adverse party to shift their thinking towards resolution. Even if the mediation is unsuccessful that day, you and the client typically come away from the mediation with a better understanding of the adverse party, the defense arguments, and the likelihood of future settlement.

So I would say, almost always, if there's an opportunity to mediate, you should give it a shot. And that is going to conclude Subro Sessions *Mindful Mediation: Navigating the Path to Recovery*, session one, please tune in for session two.