HAPLESS HARVEST

MEDIATION

PRE-PRELIMINARY CONFERENCE

Defense Counsel's Information
In Preparation for Preliminary Conference with Mediator

You are a well-respected young lawyer in a well-known insurance defense firm. You regularly represent clients insured by Total Insurance Company, who pays your fees and any liabilities covered by its insurance policy. Your firm handles all claims against Total Insurance's business policy holders in the local area. Though other defense law firms would no doubt like a piece of that business, the Total Insurance representative you work with remains extremely loyal to you and your firm.

The plaintiff's lawyer in this case is from a small litigation firm that does only plaintiff's work. While you've never worked with this lawyer before, you have found others in that firm to be unnecessarily wrapped up in their clients' stories, without any helpful skepticism and unattractively rabid about defendant businesses. When this case goes to mediation, you think it will be important for the Total Insurance representative sees that you have no tolerance for that attitude.

Your perspective and analysis of this case are summarized in the documents titled: "General Information and "Information for Defense Counsel" attached to this one.

You and the plaintiff's lawyer made an effort to negotiate directly to settle the case. It's fair to say that did not go well. By the end, you were only able to agree upon trying mediation, and to work through the City Bar Association (CBA) mediation panel process. Based upon the type of case, the CBA administrator suggested three possible mediators; all had good reputations. You graciously agreed to use the mediator for whom the plaintiff's lawyer expressed a preference. Though you didn't say so, that mediator would have been your choice too. You could see the mediator had had an unusually balanced legal practice history - some plaintiff's and some defense work. More important to you was a conversation with a law school classmate who said the mediator was not afraid to "call the law as he sees it." Not surprising , you notice on his c.v. that he has also taught tort law from time to time. This is important given the legal issues in the case; you want the mediator to see (and to say) that the plaintiff has a legal problem that is likely to knock the case out on summary judgment.

Once the CBA confirmed the appointment and conflict check, the mediator contacted you and opposing counsel via email to set up a preliminary conference.

In his email, the mediator mentioned that the CBA had provided him with a copy of the complaint and answer filed in the case (filed approximately nine months ago). Thus, he is familiar with the central issues in the litigation.

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What the mediator does not know at this point is just how difficult your attempted negotiations with opposing counsel were and how little progress was made. The problem is evident from the complaint in this little slip-and-fall case, where the prayer for relief demands a ridiculous $1 million, naming all the usual suspects: medical and other expenses for (what you believe was unnecessary or unrelated surgery), lost income, damages for pain and suffering, loss of income earning capacity, and loss of quality of life and future enjoyment. Heck, the plaintiff sprained a knee – no broken bones, no concussion, no loss of consciousness.

When you asked for a dollar demand to start the negotiations, he refused. You responded, with some annoyance: "Oh come on, your client is asking for money so it's your job to ask for a number." Plaintiff's counsel didn't budge, saying: "The complaint speaks for us, in black and white; we are seeking a million dollars."

Based on what you know about anchoring in negotiation, you decided to send the signal right away that the ballpark universe for settlement in this case is at the low end, just like any slip-and-fall.
You said you fully recognized that Mr. Hapless had hurt a knee. You then commented," all that pain and yet no break, not even a torn ligament….So, in what universe is a slip-and-fall a million-dollar case? Not in any universe I know. These negotiations have to be in a reality zone or they are not worth my time."

You again asked the plaintiff's lawyer for a reasonable demand, explaining that you needed a ball park sense of where the plaintiff was and that the Total Insurance representative would want to know the plaintiff's opening demand. You were really annoyed when the plaintiff's lawyer again insisted on standing on the ridiculous number in the complaint, and you let him know it. You explained that you really couldn't respond to that, you needed a serious number to start the negotiation. If they would make a good faith demand, you promised to respond with a good faith offer.

You were further frustrated when plaintiff's lawyer intimated that you had asked him to violate his attorney-client privilege by asking for a signal as to the ballpark where his client would settle the case. "Okay, okay," you said with an exasperated sigh, "I'm getting paid for my time: I can wait and litigate but for my client's sake, I'd rather settle sooner than later. That has to be better for Mr. Hapless too – to avoid litigation risk and get paid earlier."

Not surprisingly, the negotiations did not progress much further. The plaintiff's lawyer said only that they would take less than a million, but it would take a lot to compensate the plaintiff for the back and knee injury – lost salary, medical expenses, and lost income potential and real pain and suffering. Fine: he was anchoring high. You told him you saw this as a nuisance value case, at most a simple knee injury. Moreover, a quick trip back to law school would confirm that a judge will knock it out on summary judgment.

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Frankly, you were glad the interaction was over, and that in the future the mediator would be a buffer between you. You want to minimize direct dealings with this guy. You know your client would feel the same way, and more so.

Prepare for your preliminary conference with the mediator. You know the mediator will use it as an opportunity to meet both attorneys and learn about prior negotiations and the issues in dispute.

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