Do it right – do it once – get it settled

By Michael D. Ranahan and Michael G. Ornstil

INTRODUCTION

Multiple mediation sessions in the same personal injury case have become commonplace in recent years. This trend frustrates both counsel and parties, and increases the amount of time and money spent. There are actions counsel can take to maximize the possibility of a productive and successful mediation, and minimize the chance of needing multiple sessions. Whereas the majority of suggested actions are taken before the mediation, there are steps that can be taken during and after mediation to increase the likelihood of settlement. The list of actions discussed in this article is not intended to be an exhaustive one. However, our experience indicates that if the suggested pre-mediation, mediation, or post-mediation actions are taken, you will increase the chance of settling your client's case in one session.

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PRE-MEDIATION

Communicate With Opposing Counsel

The single most effective thing you can do prior to a mediation to ensure its success is also the simplest thing we do as attorneys – talk to one another. Prior to scheduling the mediation, or a few weeks before the mediation takes place, you should check in with each other to gauge the likelihood of a productive mediation. If I'm plaintiff's counsel, the first question I would ask defense counsel is, "Are you going to have the claims adjuster or the true decision-maker at the mediation?" If the answer is "yes," that's encouraging. If a "no" answer is received, that should lead to a discussion of whether it is possible to get the decision-maker at the mediation and if not possible, whether it makes sense to go forward with the mediation. If I am defense counsel, my first question would be, "Do you have a demand for me now and if not now, can you get me one well in advance of the mediation?" As discussed in detail below, obtaining an early demand is critical to getting cases settled at mediation and it is wise to get a commitment as to when a demand will be provided.

During pre-mediation conversations, counsel can and should explore, without debating the issues or discussing case value, whether the case is truly ripe for mediation. They can discuss whether each side believes it has the information needed to evaluate the case. Maybe you learn that there is a key witness who needs to be deposed prior to mediating, or one party is waiting to receive a medical or consultant's report. You can discuss whether there are any known impediments to settlement. If yes, you can defer the mediation. If no, you can report back to your respective clients that the other side indicated it is ready to be serious about mediating.

For some reason we have moved away from picking up the phone and talking to our opponent. Perhaps we have so many means of electronic communication that we have stopped really talking with each other. Or maybe we rely on the mediator to initiate a pre-mediation call and if the mediator does not take the initiative, it does not happen. A 15-minute phone call can be very illuminating in determining whether a case is truly ready to mediate, and whether the mediation is likely to result in meaningful settlement negotiations.

Mediation Timing

Selecting the right time for mediation is one of the keys to getting cases settled at mediation. If you mediate too early, you risk the case not settling due to the lack of information. Mediating too far along in a case and you risk the case not settling because the parties have become emotionally and financially invested in taking the case to trial.

When is the ideal time to mediate? There are no set rules or guidelines to tell you when to mediate, and each case is different. Generally you want to strike the delicate balance between mediating early enough

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when the parties have not spent large sums of money, yet late enough that each side has sufficient information to make a proper evaluation and risk assessment of the case. We believe that early mediations, coupled with the parties being proactive in exchanging information, even voluntarily, provide the best opportunities to settle at mediation.

Dealing with Liens

In almost every personal injury case there is a lien that needs to be dealt with. It could be a medical lien or a lien by the worker's compensation carrier. These lien holders can be integral to negotiations as they impact plaintiff's ultimate net recovery. Dealing with lien holders in advance of the mediation and getting an idea of what kind of deal can be struck can significantly enhance settlement prospects. It is frustrating for plaintiff and defendant to have their negotiations stalled by having no sense of what needs to be paid on the medical liens or to the worker's compensation carrier. Conversely, when you enter mediation with a good sense of what it will take to satisfy the liens, negotiations between plaintiff and defendant can move forward unencumbered by uncertainty of what plaintiff's net recovery will be.

In this day of Medicare liens and unresponsive medical lien holders, it is not a simple matter to get a pre-mediation read on where these liens can be compromised, and that is why it is incumbent to contact lien holders well in advance of the mediation. It may be the case that you only get a general idea of what the lien holders will accept, but that's better than no idea.

Early Exchange of Thorough Briefs

It is critically important to the settlement process that parties exchange briefs, and do so in sufficient time prior to the mediation such that the information contained in them can be digested, discussed, debated, and most important, acted upon. From the plaintiff's perspective, the mediation brief is important to give to the defense because it should contain the plaintiff's liability and damages analysis, and also include a settlement demand. It cannot be overstated how important it is to provide the defense with a pre-mediation settlement demand. The vast majority of personal injury cases have an insurance carrier involved and it is common knowledge that carriers need time to evaluate settlement demands and determine the amount of authority placed on the case. Receiving a settlement demand at the mediation, or just days before it, particularly in cases with a six-figure or more value, gives the carrier insufficient time to discuss the case internally and make its decisions. Simply stated, late demands minimize the prospects of settlement. The bigger the case, the more lead time should be given between service of the mediation brief and the mediation date. A mediation brief containing a settlement demand, and the basis for it, served weeks before the mediation, will serve all parties well.

From the defense perspective, it is equally important to advise the plaintiff of its position on the issues of the case in advance of the mediation. Is liability disputed? Are there issues of comparative fault? Is there a statute of limitations issue or other affirmative defenses? Where does the defense stand on injuries and damages? How about insurance coverage or collectability issues? These are all critically important to the settlement value of a case and the mediation is neither the time nor place for the plaintiff to be first informed of where the defense stands. Plaintiff's counsel needs to educate their client in terms of the strengths and weaknesses of the case and the risks involved in not settling. The defense mediation brief provides plaintiff's counsel with information needed to form the basis of an informed conversation with the client. In addition, a timely-served defense brief provides plaintiff's counsel an opportunity to address the issues raised by defendant so a legitimate debate can take place at the mediation. Conversely, if a critical issue is raised for the first time during mediation, there may be no ability to meaningfully respond to it and settlement negotiations may have to be put on hold while that issue is further explored.

We receive confidential mediation briefs all the time. While we recognize that there is information best kept confidential, in the typical personal injury case most everything should be out in the open. Confidential briefs should be the exception rather than the rule. If confidential information needs to be imparted to the mediator, that is best done by serving two mediation briefs – one brief served on your opponent and the mediator, and a separate "mediator's eyes only" brief.

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Communicate With Mediator

To ensure a productive mediation, *ex parte* contact between counsel and the mediator is not only permitted, but strongly encouraged. Not all mediators take the initiative to check in with counsel before the mediation. But mediators are happy to field calls from counsel or set up a call if requested. There are some cases where a pre-mediation call is simply unnecessary, but there are also cases where a brief

conversation with the mediator could go a long way. For instance, if there is a client control issue, it would be wise to let the mediator know in advance. If there is a hot button issue in the case that needs to be handled with finesse, it is wise to alert the mediator. And if there is confidential information that may affect the case value or negotiations, the mediator can be made aware of this. Many of these matters can be covered in a separate confidential mediation brief, but it is equally effective to discuss them over the phone and obtain the mediator's feedback, reaction and suggestions on how best to proceed.

MEDIATION

Avoid Surprises

As seen from the discussion above, many of the steps to ensuring a successful mediation are measures taken well in advance. But there are several things you can do during the mediation that go a long way towards settlement. First, if there are terms that need to be included as part of a deal, they should be brought up for discussion early in the mediation. Mediators loathe the "oh, by the way, we need …" settlement term thrown in at the end as you write up what you thought were the settlement terms. These so-called "throw-in" terms take the form of a demand for confidentiality, or a request for payment within a very short time, or including Medicare as a payee on the settlement draft, etc. There are times when such terms are actual deal-breakers for one side or the other. If they are important enough to insist upon at the end of negotiations, they should be brought up early. If, for instance, a defendant is going to insist upon confidentiality, they should mention that at the outset and even bring a sample confidentiality provision that would be acceptable. Likewise, if plaintiff's counsel is adamant about not agreeing to any confidentiality provision, that should be mentioned early in the negotiation process – even if defendant has yet to raise the subject.

What would be wrong with defense counsel, at the beginning of a mediation, providing plaintiff's counsel with a copy of the settlement agreement (obviously with the settlement amount left blank) they would want plaintiff to execute if settlement is reached? This is not a sign of weakness or presumptuous, and would provide plaintiff's counsel with the opportunity to review it during the course of the day and raise objections, if any.

Be Flexible and Patient

During mediation, counsel can increase the likelihood of reaching settlement by being patient and flexible with the negotiation process. Negotiations can sometimes be slow and even tortuous with "ambitious" (high) early demands and "modest" (low) initial offers. We all know that the meaningful numbers are the ones at the end of the day, not the beginning. But some attorneys and their clients get impatient and frustrated with the slow negotiation dance and negotiations can break down. Let the mediator continue to work the numbers and trust the process.

With this said, there are times when negotiations are best served by deviating from the traditional demand-offer exchange. The mediator may ask you to do something a bit different in order to speed up the process, determine if the case is settleable, or break an impasse. Such requests can take the form of asking you to make a big move if the other side makes a big move, throwing out a bracket, or considering a mediator's proposal. You should enter mediations expecting that you may receive such a request and be prepared, flexible and creative.

POST-MEDIATION

Despite best efforts and intentions, some cases do not settle at mediation, even though all or most of the steps outlined above have been followed. The critical next step is to figure out why a settlement was not reached. You can and should tap the mediator's brain and solicit the mediator's thoughts on why the case did not resolve. This can be done at the end of the mediation with the goal of formulating a plan to focus on the issues separating the parties. Alternatively, each counsel can contact the mediator individually following the mediation, and while it is fresh in their minds, to obtain the mediator's insights.

A mediation is obviously successful when it ends with a settlement. But a mediation is also successful in the absence of a settlement if the parties leave the mediation with a good understanding of where they agree and disagree, and a good understanding of what prevented the case from settling. It is also successful if they come out of the mediation with a plan that will maintain any settlement momentum created at the mediation.

Lastly, most mediators want every one of their cases to ultimately settle. Take advantage of mediators' willingness to stay involved by keeping them informed of developments and asking them to pick up where the negotiations left off.

CONCLUSION

The measures outlined above are not unusual and should not come as a surprise. Distilled to the basics, we urge counsel to communicate with each other, lien holders and the mediator in advance of the mediation. Communicating with these individuals should confirm that the case is ready to mediate and that the parties have enough information to negotiate productively. While the actions outlined do not guarantee settlement, they certainly improve the odds of settling the dispute at the first and only mediation. ■