AGNEW BRUSAVICH

SERIOUS INJURY LAWYERS

A Mediation Primer for the Plaintiff's Attorney

Making your case stand out to the other side, and what to do when they ask you to dance.

By: Bruce Brusavich

Make the Defense Ask to Mediate

Obtaining a great resolution of a client's case is usually the result of a perfectly executed mediation plan that started when you first met your client. By mapping out a strategic, effective and aggressive plan to prepare your case for trial from the very beginning, you can increase the likelihood that the defense will ask you to go to mediation. The defense lawyer, adjuster or risk manager will have one hundred or so files that they are working on at any given time. By making your case stand out with aggressive and thoughtful discovery, the chances are they will want to give your case the attention it deserves and try to resolve it at mediation.

Mediation Starts with Your First Meeting with the Client

The first meeting with your client not only provides you the opportunity to understand the facts and circumstances of what happened (liability), but allows you to begin to understand what the incident has done to your client. In my experience, everyone has something special about them and by getting to know who your client was and how the event has changed their day-to-day life, goals and aspirations, gives you the ability to consider how you would present the loss to a judge, jury or mediator.

Family, friends and co-workers can also be very fertile sources on compelling testimony as to the impact an event has had on your client's life. Pursuing these kinds of witnesses early and consistently through the case preparation can significantly contribute to the factual support for a significant non-economic damage loss claim.

Gather Evidence as Soon as You Can Before It Is Too Late

The number of surveillance cameras that are now in our society is remarkable. One

recent article reported that each one of us is filmed several hundred times a day on various surveillance cameras. If there is any potential for the incident involving your client to have been captured on tape, immediately have the area canvassed for security or surveillance cameras. Bank ATM's, building security cameras, bus or taxi cameras and anything else that may possibly have captured the scene of your client's incident should be obtained.

Social Media

It is now common practice for defense counsel to look for the plaintiff on social media sites or to compel discovery of plaintiff's social media postings. It is imperative at the very first meeting with the client to explain the importance of staying off the social media. They also need to understand that photographs and stories posted by friends regarding the incident becomes part of the public domain and will be potentially discoverable by the defense. If they insist on using social media, they must understand that they need to assume that the defendant, the judge and jury will see anything they say and any pictures they post on the site. Someone in your office needs to monitor your client's social media activities throughout the pendency of the litigation to prevent surprises.

Mediation Briefs

I believe mediation briefs are extremely important and should never be confidential. In fact, I like to provide multiple copies of the brief to the defense to facilitate the easy transmission of copies to the decision-makers. It is unrealistic to think that you will get the top dollar from the defendant or the defendant's insurance carrier if you have not provided all the information necessary to get them to see the full value of your case. That is not to say that you put everything in the mediation brief. Sometimes holding back key information or putting that information in a separate and confidential brief for the mediator is appropriate. But overall, a mediation brief should reflect the confidence you have in your case and your client. The brief should be refined until it is brief and concise while covering the facts, the law and the damages. Key exhibits should be attached as well as any key excerpts from depositions or discovery.

Consider a mediation video, which can cover liability, damages or both. "Documentary" style presentations can be powerful in conveying the case jurors will see. It can be a sound investment, despite the cost of $20,000 or more.

The First Demand

The first demand is important to mediation strategy. The first demand should be high but credible. A demand that is too excessive will usually lead to an inappropriately low first offer in personal injury cases. The demand that is in the “high, but credible” range tells the other side that you believe in your client's case and will be looking for a high-value resolution while giving you some room to negotiate. Starting off with a demand that is clearly excessive will also put you in the position of having to make substantial drops in your demand if you want to settle the case. In my view, a plaintiff's lawyer who

does that lacks credibility.

The first demand should be given to the defense well in advance of the mediation to allow the other side to do whatever they have to do to evaluate the demand and get prepared for mediation. Showing up to the mediation without having made a first demand is rarely productive and will always prolong the process. Giving them a first demand well ahead of the mediation will also put the burden on the other side to make the next move.

If you have not already taken advantage of *Code of Civil Procedure* Section 998, then your demand should be in the form of an Offer to Compromise. Bring into play the benefits of pre-judgment interest and the potential recovery of expert costs. Be sure your demand complies with applicable case law on serving demands per plaintiff to individual defendants in personal injury cases, unless liability is joint and several. *Steinfeid v. Foote-Goldman*(1996) 50 Cal.App.4th 1542. All heirs may join in a 998 offer to a defendant in wrongful death cases.

Client Preparation for the Mediation

Of course, the client should be dressed and groomed for mediation as if they were going to trial. Although I have only had a couple of mediators try to talk to the client directly about what they want in settlement, I always prepare the client to respond to any questions from the mediator about what they want out of the case by advising the mediator that they have confidence in their lawyer and that they are relying upon the advice of counsel with respect to any settlement.

I think it is important to have your clients prepared to talk to the mediator, and to the defense if you feel they are capable, on the issue of damages. This is especially true if there is something unique or compelling about how the incident has impacted the plaintiff. It may be that the loss of a job meant more to the plaintiff than just the loss of income. Workplaces are very often the social core of a plaintiff's life that when they lose it they are unable to get out and socialize with their co-workers.

Case Liens

These days, you need to start gathering information on your medical, Medicare, Medi-Cal, ERISA and any other liens. Get an early start and a good understanding as to what the liens are and the extent to which they are negotiable, if at all. Many ERISA liens are drafted in such a way as they have a first right of recovery on all proceeds. You need to have a good enough understanding as to your client's lien obligations in order to intelligently ballpark your client's net recovery throughout the entire mediation process. You will also need to negotiate with the defense as to how most of these liens will get resolved if the case settles.

Have the Right Experts - Early If Possible

Your experience may allow you to work up the case without the early retention of experts. However, the early retention of experts can confirm that you are on the right track in working up the case and can help refine your contentions that will lead the defense to want to go to mediation. Once at mediation, your experts can help advocate your client's position and can have a substantial impact on the settlement amount. Utilizing your expert's work up during mediation can maintain the confidentiality of your expert and preclude premature formal discovery of your expert while telling the other side that you have spent the money to get prepared to try the lawsuit. An expert can help prepare you with demonstrative evidence for the mediation. Very often the expert has done work on other cases, which lends itself to the facts and circumstances of your case. Some of the most effective mediation presentations I had included a multi-media presentation by one of my experts at the mediation.

Mediator Selection

I like to utilize a mediator suggested by the defense, although I won't necessarily accept anyone. I review the mediator's experience and, in particular, see if they have taken the time and effort to attend quality mediation training. A mediator who is taking training tells me that they are interested in being a good mediator. Many trial judges move into mediation thinking their qualifications as a trial judge entitle them to be a mediator. These former trial judges, especially with no mediation training, can be some of the worst mediators. These are the mediators that often come to a snap judgment as to the "value" of the case, and such an opinion communicated to both sides too early can doom the mediation session.

Check with your colleagues before agreeing to a mediator and get the latest on their experienceand skill set. Read the jury verdicts and settlements to see which mediators are getting good results for plaintiffs. Note the types of cases that they seem to be getting the best results on. Some mediators are better at a particular type or types of cases. Prepare files on mediators and have someone file these settlement reports in the mediator's file.

Pre-mediation Conference with the Mediator

Very few mediators bother talking to the lawyers before the mediation. I strongly urge you to request a brief telephone conference with your mediator before the mediation. If the mediator likes to have a joint call before the mediation, I would still encourage you to have a separate phone conference. During the call, you can convey any information you think might be important concerning the case, personalities of defense counsel involved, problems you believe the defense will have with clients, witnesses, etc.

Request that the mediator ask the defense to bring a settlement agreement to the mediation that only requires the insertion of the agreed-upon settlement amount. This way, instead of signing a mediation agreement promising to sign a settlement agreement, all parties can sign the settlement agreement at the mediation with funding

promised in 15 days or so.

Starting the Mediation

Very few mediators begin mediations these days in a joint session. Upon arrival at the mediation, the parties are typically put into separate rooms, and the mediator will start very often with whoever is there first. Show up early and request the first meeting with the mediator. I believe this is your best opportunity to prime the mediator on strong points of your case and to provide any last minute information you have obtained concerning settlement possibilities before the mediation.

If appropriate, consider asking for a joint session early on in mediation. This is your opportunity to speak directly to the decision-makers on the other side, which very often is a much better way of communicating than having your positions filtered through defense counsel or the mediator.

The Mediator Is Not Necessarily Your Friend

A good mediator settles cases. To get there, the mediator is going to have to push the hardest where they sense a weakness. I never give the mediator my true bottom line out of a concern that they will think, if necessary, they can push beyond that point in order to get the case settled.

Confidential Does Not Necessarily Mean Confidential

While the case law is pretty clear that mediation confidentiality is very broad and a party cannot directly use what was said in mediation, it is difficult to prevent discovery to be conducted on what has been learned in mediation. So, therefore, be circumspect with respect to what you disclose, realizing that it may be difficult to avoid the defense using that information if the mediation does not resolve.

Control the Pace of the Mediation

Be thoughtful of every response to a new offer or counter. Even if you have full client authority to negotiate, take the time with your client to contemplate your next move. The mediator should think your demand reductions are meeting client resistance and your ability to keep dropping is limited. The defense should have to wait longer and longer for your counters as you near the end game of the mediation, wondering if you are having difficulty going any lower with your demands.

Be aware of the midpoint between your next demand and the last offer. The defense and mediators often assume your final number is going to be at that midpoint. Change up your counter-demands with odd numbers rather than rounded off drops in a predictable pattern.

Always ask the mediator what is going on in the other room. Has the money person made any phone calls for authority? Is the money person familiar with the file or were they just assigned the matter? Are they a senior adjuster? Does the mediator have any

experience with this adjuster? How much experience does the mediator have with defense counsel? How much experience does the mediator have with this carrier or corporate defendant? If the mediator has experience with anyone involved with the defense, what is the track record on resolutions? How long does it usually take to get to the defense bottom number with these players? All of this information will help you evaluate the situation and if you are at or near the defendant's final position.

Concluding an Unsuccessful Mediation

It is not uncommon for a case not to settle at the first mediation. If that is going to be the case, consider what you would like to happen next. If trial is your choice, then there is nothing else to do. If you would like to continue pursuing the option of a settlement, spend time with the mediator to discuss what she/he believes the sticking points were and what the defense needs to re-evaluate. Can you agree on doing something the other side wants, such as a defense medical examination? Or a second defense medical examination in a separate medical field? Would you consider allowing the early deposition of a liability expert? Is there a claim you are making that the defense is not buying that you can provide additional proof on the issue. Get the other side to make a concession if you agree to do something or prove something. In other words, before you walk away from an unsuccessful mediation, is there anything you can help put in place to continue the process if that is what you want to do. Consider a revised C.C.P. § 998 Offer to Compromise for your last communicated demand. Case law now gives effect to any Offer to Compromise that is exceeded by the judgment.

Concluding a Successful Mediation

How many cases have you settled at mediation only to find out that it takes weeks or months to get the matter completely resolved? If you cannot actually sign the settlement agreement at the end of the mediation, enter into a written agreement that the settlement agreement will be prepared within 7 days or so. Get a commitment as to when the money will be paid after a signed settlement agreement is tendered. Give the defense your firm's W-9 at the mediation. Specify how the liens are going to be resolved and who, for example, is going to pay CMS to satisfy the Medicare lien. If you have agreed upon a Medicare set-aside, agree upon how that number will be determined and have that spelled out in the mediation agreement, if not the settlement agreement.

If the defendant insists on having a good faith determination, have it agreed as to whether the defense will simply file an application for good faith or if you want a motion filed. Either way, get a commitment as to when the application will be filed or when the motion would be heard.

Likewise, if there are any other conditions, get them worked out in the mediation agreement if not the settlement agreement so you can get closure on your client's case as soon as possible.

Conclusion

Maximizing the effectiveness of mediation begins early when you are retained by your client. A thoughtful, consistent and aggressive discovery and investigative plan will put you in the position of getting full value of the claim at mediation. It will also put your client's case on the list of the defense counsel and/or the defendant's adjuster as a case that should go to mediation. Once mediation is on the table, the selection of the mediator with a pre-conference discussion and the submission of a well drafted mediation brief and/or video can position your client's case for maximum recovery.