


Personal Injury Mediation - Make it Count

By Terrie Gay, Esq. & Joseph Epstein, Esq.

I. Introduction

Once upon a time, insurance companies authorized claim adjusters to evaluate and negotiate most bodily injury claims without anyone looking over their shoulders. Any number of plaintiff and defense attorneys may have fond memories of those days! But, in today's world, whether the case is valued at $10,000 or $100,000, many adjusters have little to no personal settlement authority with which to resolve claims. In fact, companies now require insurance adjusters to adhere to protracted evaluation processes before they make any settlement offers at all. It should come as no surprise that these evaluation "processes" are the same for cases scheduled for **mediation**. But, by taking a practical, down-to-business approach that includes working with the adjuster, **both** sides can maximize the outcome of their clients' mediation experience. One thing is certain, whether you represent the plaintiff or the defendant, mediation is not possible without the adjuster. So, with that in mind, what can **you** do to **make mediation count**?

II. Setting the Stage

Once the parties have agreed to mediate, they must select a mediator and a date for mediation that is reasonably far out. This can be time-consuming because the attorneys, the plaintiff **and** the insurance adjuster must all agree on a mediator and then find a date for mediation that works for everyone involved.

All parties want a mediator that will get the case settled. All participants want a mediator who will listen carefully to each side, discuss the strengths and weaknesses with each party and encourage compromise when it makes sense to do so. All parties want a "neutral" who is known for "not taking sides" or simply "carrying money."

Factors that may influence your selection of a mediator are:

- The size and type of case (soft tissue vs. catastrophic injuries),
- The mediator's knowledge of the type of case (TBI vs. whiplash),
- The mediator's knowledge of the venue,
- The mediator's gender (client may be more comfortable with one over the other),
- Your familiarity with the mediator and
- The mediator's availability.

At times, you will choose a mediator that might be your second or third choice, in order to secure agreement among the parties and get a timely mediation date scheduled. Therefore, both counsel and the adjusters should maintain a list of acceptable mediators.

III. Due Diligence

You have a mediator and a date for mediation. What is next? Establishing a timeline is your next action; creating a trigger or series of triggers that prompts you to begin preparing for mediation between 60-90 days before the event. At this interval, plaintiff's counsel should begin to review the case to make sure all relevant medical, causation and wage documentation have been secured that will support the client's position on damages. For example, if a narrative report has been promised but not yet delivered to opposing counsel, then get the document(s). Do not delay.

Plaintiff's counsel should also be checking into lien management. If medical providers have filed liens that the plaintiff needs to address before mediation, counsel should start having exploratory conversations with those providers now. It is important to know **before** mediation which providers are willing to discount their bills and by how much. If providers are willing to accept an amount predicated on a sliding scale, e.g. based on how much the defense offers, arrange to have those providers available by phone on the date of mediation. Alternatively, retain a lien reduction company to handle this for you. Be ready.

Defense counsel should follow the same basic timeline. Do not wait to the last minute to review your file. Start preparing for mediation 60 - 90 days before mediation. If you find you are missing critical documents, contact

opposing counsel and ask for them now. Do not delay. As you receive documents, make sure you provide them to your adjuster as quickly as possible.

The adjuster assigned to your case will submit the claim for settlement authority once you have provided all the information supporting the damages claims. In many companies, the adjuster must request settlement authority up to as much as two to three weeks before mediation to ensure the file is back with authority in time for the settlement conference. This is the "process" with various companies. It is what it is, and you need to allow time for it. Remember, the larger the claim the more time required for evaluation.

IV. Use a Checklist

Most of us work more efficiently when we use checklists. As a supplement to the above timeline, consider using this pre-mediation checklist to guide you as you prepare for mediation.

Pre-mediation Checklist[1]

1. Have you taken the necessary depositions? ☐
2. Have you exchanged the necessary expert and medical reports? ☐
3. Have you provided the necessary medical and other economic specials? ☐
4. Have you arranged to have all necessary parties at/or available for mediation? ☐
5. Have you exchanged pre-mediation demands and offers? ☐
6. Have you put Medicare and Medicaid on notice and received a "conditional payment" letter? Have other liens reduced or released their claims, or will lien holders be available at mediation? ☐
7. Have you exchanged and emailed "non-confidential" mediation statements to the other side and the mediator? ☐
8. Have counsel prepared their respective clients for mediation? ☐
   a. Has plaintiff counsel obtained informed input from the plaintiff? ☐
   b. Has the adjuster evaluated the case and obtained authority? ☐
9. Have counsel alerted the mediator to any special circumstances? ☐
10. Have you filed required motions well in advance of mediation? ☐

V. Remember your Clients

Preparing for mediation is about more than securing documents and ticking items off a checklist. It is very important to remember the clients. Clients are individuals who usually are not lawyers or employed by the insurance industry. They may be apprehensive or afraid of the mediation process. Most clients have never been involved in mediation before and they do not know what to expect. Therefore, it is vital that counsel educate their clients about the process; let them know ahead of time what will happen. Tell them about their role at mediation.

Insureds (defendants) will often call their adjusters for information and reassurance about the mediation process so its imperative the adjuster and defense counsel work together to stay in sync and deliver the same messages.

VI. Mediation Goal

All parties to mediation have the same goal, right? All parties want mediation that produces a settlement or resolution. Plaintiff and counsel want to persuade the insurance adjuster to offer his/her BEST money at mediation. Defense counsel and the adjuster want to get the case settled within the authority that the company has placed on the claim file.

For the adjuster to secure his/her BEST money on the file, you must provide all relevant documents supporting the plaintiff's damages. Not providing all records and bills in advance of mediation invites mediation failure. It is not any better to provide a partial set of records before mediation, and the rest on the day of mediation. This is called "data dumping" because you are dumping records (data) on the adjuster at the last minute - at mediation - that the adjuster has not used in evaluating the case. Data dumping often leads to failure because the evaluation process with many insurance companies cannot accommodate spur-of-the-moment changes to a case assessment. When you "data dump," you rarely enhance your client's position and you most certainly will not get the adjuster's BEST money.

VII. Mediation Statements

I am the mediator. Think of me as the "man behind the curtain" whose job is to secure a mutually acceptable settlement of the case. As the mediator, I have what may appear to be two contradictory objectives:

- How can I help the plaintiff get the adjuster's BEST offer?
- How can I help defense counsel and the adjuster settle the matter for the authority on the file?

In truth, the "value" of most cases will frequently overlap between the parties. More often than not, the adjuster's BEST offer is within the plaintiff's settlement range. Still, to help your mediator advocate for both sides, counsel should submit pre-mediation statements at least a week ahead of the scheduled date and use these statements as tools of persuasion to advance their case.

What should be included in a good statement? To start with, mediators want to know what you think about your case. Tell mediators your strengths and weaknesses as they relate to liability, causation and damages. For instance, tell us whether the defense disputes liability. If the case is in suit and the defendant has not admitted negligence, send the police report, photographs of the vehicle and any additional exhibits that will be helpful in discussing the comparative fault issue.

The same goes for causation and damages. If there are causation questions, summarize your evidence related to causation. Provide mediators with a summary of damages that are related to the case. Attach all key reports, records or opinion letters that are helpful.

Tell your mediator if there have been any pre-mediation offers and demands and the policy limits in play. If plaintiff counsel has not yet discussed "money" with his/her client, now is the time to have that focused conversation about an acceptable settlement range. Talk to your client about:

- A best day in court;
- A worst day in court;
- A settlement offer the client cannot leave on the table.

Defense counsel should have a similar settlement-range conversation with the adjuster prior to mediation. If the adjuster values the case at or near policy limits, and that valuation could potentially expose the defendant-insured's assets, defense counsel should arrange to have the client and the adjuster present at mediation. This is true whether the value of the case is based solely on economics or a combination of damages and aggravated liability.[2]

If something is a secret, tell your mediator. He or she needs to know what has and has not been communicated or shared with the other side, such as IME reports or surveillance.

As mentioned above, your statements can be more than just a recitation of basic facts, figures and timelines. If truth be told, mediators expect your statements to include specific words designed to persuade them toward your side of the case.

Think about this! When the parties submit statements, both sides have immediately created **two** opportunities to work with the mediator before the scheduled mediation date. First, by providing a statement, each side has a chance to "position" their case strategically before meeting in formal session. Secondly, after the mediator has received and reviewed all statements, he or she may call you or you may call the mediator. This is an opening for you to tell your mediator something about your client or the case that you did not wish to include in your written statement. This is a second chance for you to emphasize positive points of your case. Seize the opportunity!

VIII. Make Mediation Count

Mediation is no fairytale and it takes all participants to make mediation count and produce that "happily-ever-after" ending. Both sides have the opportunity to secure a better mediation result for their respective clients by preparing for mediation sooner, rather than later. Help the adjuster secure the BEST money on the case by providing all relevant medical, causation and wage records and bills in advance of mediation and do not "data dump." Adhere to a timeline and use a checklist. Give the adjuster at least two to three weeks to secure settlement authority. Educate clients about the process and talk about the money. Know ahead of time what amount lien holders are willing to accept in full satisfaction of their bills. Prepare and submit sound mediation statements and do not hesitate to talk to the mediator about any "unwritten" issues with your client or your case. By being proactive and creative, you will obtain a better mediation result. ▲▲▲

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Endnotes:

[1] Joe Epstein, *Data Dumping and Other Problems in Mediation*, Trial Talk (April/May 2013).

[2] If the case involves a punitive damages assertion, the defendant may also have personal counsel in attendance at mediation.