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An introduction to mediating an auto case

WHICH CASES SHOULD YOU MEDIATE, AND HOW DO YOU PREPARE FOR MEDIATION?

You have successfully signed up one of your first personal-injury cases. That case just so happens to be a car crash. Now that you have signed up the case, filed suit, and conducted some discovery, is it time to mediate? After all, mediation is often the quickest way to resolve the case and for a reasonable number without the uncertainty of proceeding to trial. Often, you see lawyers just propose mediation as if they were checking off a box. But the question all lawyers should be asking is whether the case is even ready for mediation. If not, why waste the time, effort, and expense of mediating? This article discusses the various stages of a case and when and under what circumstances the plaintiff's lawyer should propose or agree to mediation. This article then discusses some tips, strategies, and mindsets for ensuring a successful mediation experience.

Are you even ready to mediate?

We have heard it a thousand times: *Preparation is key*. In terms of mediation, preparation truly is key as there are certain things we can do as plaintiff's lawyers to gain leverage during the negotiations in instances where we otherwise would have none. Each case is different and should be evaluated on its merits. What might be right for one case may not be right for another. What I mean by that is, if you have a case where all your client did was physical therapy, then it does not really make much sense for you to take 10+ depositions before requesting mediation as you will be upside down in terms of costs and case value, which will make the case almost impossible to settle.

If your client had surgery and you believe liability is reasonably clear, then maybe the case *requires* 10+ depositions to present your case adequately and persuasively to the defense lawyer, claims adjuster, and mediator.

Imagine this scenario: You have signed up a straightforward rear-ender where your client alleges that she was injured when she was rear-ended by an Amazon driver on the 405 on the way home from work. You have sued the driver individually in addition to Amazon, the corporation. As a result of the crash, your client has obtained injections and has a recommendation for surgery but has not had it yet. What pre-mediation preparation and information gathering should you be doing in this type of case to make sure that you are ready for mediation?

1. **What insurance coverage is available?** Is there excess insurance in addition to the underlying policy? You have a client who needs, and likely will have, surgery. That means the potential for obtaining a result at trial could reasonably exceed the $1 million in underlying coverage, for example. Knowing whether there is excess coverage can be used to your advantage. You could potentially use the excess carrier as leverage to put additional pressure on the underlying carrier to tender the underlying $1 million in coverage if that is your goal. Even if the excess and underlying insurance policies were issued by the same company (i.e., Farmers issued both policies), the underlying policy and the excess policy are being handled by two different claims managers who report to different people and have different goals for each fiscal year.
2. **Have you deposed the defendant driver?** I think this goes without saying, but if you have already taken the time, money, and effort to file your lawsuit, then you should be deposing the driver before you agree to mediate. More likely than not, any written discovery responses you have received will have shown a propensity to waffle on whether liability is admitted. The deposition may provide key admissions relevant to liability that you can use at mediation should the written responses consist of nothing more than boilerplate objections devoid of any substance.
3. **Have you deposed a PMK?** Even if liability is clear to you, it may not be as clear to the defendant or their lawyers. Deposing a company representative on topics such as policies and procedures, driver safety, and/or driver training could provide valuable, corporate admissions relevant to the issue of liability.
4. **Have you ordered *all* of your client's medical records, bills, and diagnostic film studies?** As plaintiff's lawyers, we have developed bad habits of just calling up the facilities, sending our client's authorization, and then requesting "all medical records and bills." Often, what we receive in return is a piecemeal collection of the client's medical records and bills. If the defense is doing what they are supposed to be doing, they likely have already subpoenaed all of your client's medical records, bills, and diagnostic films dating back to the dawn of time. If they have, then you too must order copies of everything. The last thing you want is to show up and find that you are missing the one visit when your client admitted to the doctor (and not you) that they had been involved in a similar crash a week before the crash for which you filed suit.
5. **Has your client been deposed, and have they done a DME?** Look, we all know what defense doctors are going to say – that everything is pre-existing and degenerative, and that there is nothing on the films or exams that can be objectively correlated to an acute, traumatic event. Regardless, it is better for the deposition and DME to go forward beforehand because it prevents the defense from bowing out at mediation early under the guise of "we need our doctor to have a look." If you know who the defense doctor is, and the DME is done, then you can search the CAALA listserve archives for depositions of the doctor to determine how many times they have testified for the defense and for the firm that you are up against. While not determinative of a positive outcome, it

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can help in persuading the mediator to discount the defense's position.

6. **Have you sent a CCP 998 demand offer before proposing mediation?** I always send a 998 before I propose mediation. The reason is simple: I want to send it at a time I know they will not accept it so I can start the clock on pre-judgment interest and expert fees and costs to use as leverage (Editor's note: Be certain to read the article in this issue on the new CCP section 999 regarding reasonable offers.)

7. The 998 offer can also serve as a basis for arguing that the policy is open at mediation if you find yourself in a situation where there is only so much in coverage, but your damages clearly exceed the policy. But more importantly, the purpose of the 998 is to give you extra leverage and bargaining chips later, at the end of the mediation to propose a "solution" of saving tens of thousands (if not hundreds of thousands) of dollars later in pre-judgment interest and expert fees and costs by resolving the case now at mediation rather than after trial by way of a multi-million-dollar verdict.

8. **Have you obtained unequivocal denials to your RFAs?** Requests for admission are a powerful tool if you use them properly. Typically, what happens is that the plaintiff sends RFAs regarding liability, causation, and damages, and then the defense either outright objects, or instead of admitting negligence, "admits that the front of defendant's vehicle made contact with the rear of plaintiff's vehicle." The code states that, as a prerequisite to obtaining a cost-of-proof award post-trial for having to prove matters at trial that have been unreasonably denied in discovery, you must first move to compel if the defendant does not give you unequivocal denials to your client's RFAs.

Even if it appears that liability is reasonably clear, and even if you know that the defense likely would admit liability on the eve of trial anyway, you may find yourself with an out-of-state insurance adjuster that does not know about California's costs of proof and statutory award of attorney's fees. When you think about the life of a case, i.e., all the emails, phone calls, discovery, law and motion, depositions, expert discovery, and ultimately trial, you're talking about hundreds of hours of work you can claim as statutory attorney's fees above and beyond your standard contingency agreement with the client. I have old court orders from my previous cases where judges awarded five and six figures in statutory attorney's fees that I show to the mediator as a "solution" (i.e., leverage) to spending money needlessly later on down the road by agreeing to resolve the case now. Those arguments do not mean very much if you do not have unequivocal denials. Hence, the reason you need to do the legwork beforehand. If you have them – and better yet, have them after filing a motion to compel – you show that you are setting up the case in a specific way to maximize value down the road in the event the defense does not want to be reasonable and resolve the case now.

9. **Have any doctors or damages witnesses been deposed?** My rule of thumb is that, if it will bring value to the case, I will take the lead and do the work – even if it means incurring additional costs or deposing witnesses that are typically only noticed by the defense. I have noticed the depositions of my clients' friends, coworkers, bosses, treating physicians, etc., in anticipation of mediation where the defense lawyer sometimes is asleep at the wheel.

The reason for doing so is that my audience is not just the defense lawyer, but rather, the adjuster as well. I will clip the videotaped testimony of these witnesses and ask the mediator to show them if, for example, the defense argues that my client is not as injured as they let on, or if they see something in a medical record that in reality was laid to rest at the deposition of the treating doctor that I deposed.

9. **Do you know your case inside and out?** There is nothing more satisfying than having a well-reasoned, immediate response for the mediator when she asks a very specific question that the defense is using as the foundation of their entire case. There is truly no substitute for knowing your case inside and out. The quicker you provide a response with substance and not just bravado, the quicker you establish yourself as the smartest and most prepared attorney of the day. This will aid you in resolving the case.

Now that you are ready to mediate, who do you use?

I am a firm believer that you should mediate with whomever the defense suggests, provided you have not personally had a poor experience with that mediator. CAALA is a great resource for information, but just because someone else had a bad experience with a particular mediator does not mean that they will be bad for *your* case.

My belief is that, if the defense is happy and feels all warm and fuzzy inside, then I am happy. You must be confident in your craft and your ability to be persuasive. If you can do that while simultaneously armed with the knowledge of each and every fact of your case, you will be able to persuade the mediator to fight for your client in the other room. The fact that the defense has already asked that this mediator be used, coupled with you arming the mediator with well-reasoned, lucid positions, means your chances of resolving the case closer to your number become more realistic.

Should you contact the mediator before the mediation?

Absolutely. Pick up the phone and give them a call. Be likeable. Talk about the most pressing issues in the case and precondition the mediator as to what they can expect to see not only from your side of the aisle but from the defense as well. You would be surprised how far this can take you in the actual mediation, and it will make you look good and prepared in front of your client.

How much information should you include in the brief?

Always remember that "less is more." The last thing you want to do is

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overwhelm the mediator with 20+ pages, single spaced. I rarely go over eight pages, double-spaced on pleading paper. You want to begin with a short, concise mediation summary – i.e., *Here are the issues, this is where the pressure points are, this is what I am trying to accomplish at today's mediation, etc*.

By framing the issues up front, you educate the mediator as to what really matters, and you set yourself up to get to the numbers quicker rather than wasting half the day arguing over evidence that does not move the needle towards resolution. After that, include your liability and damages sections. For liability, if you have any special jury instructions that you could ask for at trial, include those issues in addition to the CACI instructions. If you have a client with pre-existing injuries, embrace those issues and argue why you still win by highlighting the CACI instruction on point.

Another point regarding damages is the law concerning reasonable value. I am always surprised by how little the defense truly understands about what is and is not admissible at trial with respect to proving past and future medical bills. The classic example is when your client had Medi-Cal or Medicare but treated exclusively on a lien. The defense will argue that your damages are limited to what Medi-Cal or Medicare would have paid for the treatment, but the *Pebley* case controls, and under those facts, what Medi-Cal and Medicare would have paid for the treatment (or will pay) is irrelevant in terms of what is reasonable value for lien-based services in the community where your client treated.

Competitive vs. cooperative negotiation styles

Understanding the difference between competitive and cooperative negotiation styles is important to a successful mediation. While competitive negotiations often result in win-lose or lose-lose outcomes, cooperative negotiations foster a mutual problem-solving approach that can lead to win-win resolutions. Competitive negotiation is characterized by a mental and verbal sparring session, where parties engage in aggressive tactics to secure their interests. However, this approach often leads to a predetermined outcome, where one party wins at the expense of the other, resulting in an imbalanced resolution.

A purely competitive approach can hinder effective communication and collaboration between the parties. Focusing solely on asserting positions and defending interests may prevent the exploration of creative solutions and compromise. In other words, the more emotionally attached a party is to their position, the harder they will bargain to achieve it. This emotional investment can cloud judgment and impair the ability to objectively assess the merits of alternative solutions. Losing sight of the bigger picture can impede the resolution process.

A cooperative negotiation style encourages parties to adopt a collaborative and solution-oriented mindset. By shifting the focus from individual victories to shared problem-solving, parties can explore options that maximize benefits for all involved. Cooperative negotiations prioritize fostering relationships and long-term deals. This approach recognizes that these cases often involve ongoing interactions between counsel on other cases. Building a foundation of trust and cooperation can lead to more satisfactory and sustainable resolutions now and in the future.

Cooperative negotiation emphasizes understanding the underlying interests of each party. By identifying the motivations, concerns, and needs that drive their positions, it becomes easier to find creative solutions that address the root causes of the dispute. This focus on "what is right" rather than "who is right" promotes a more comprehensive and mutually beneficial resolution. Cooperative negotiation opens the door to win-win outcomes, where both parties can achieve their primary objectives to a satisfactory degree. By actively engaging in a cooperative exchange of ideas, information, and interests, parties can develop creative solutions that meet their respective needs while fostering a sense of fairness and cooperation.

Be mindful of "the 3 Ps" and do not be afraid to walk if necessary

Above all, remember and be mindful of "the 3 Ps" – preparation, patience, and positivity. If you are prepared, remain patient, and exude positivity and an eagerness to resolve your case for fair value, then you will have far more success at resolving your cases at mediation. That being said, I can say without hesitation that there is nothing more satisfying than walking out of the mediation and marching on towards trial if the defense is not negotiating in good faith. Not every case needs to be resolved at mediation, but it is nice when it happens.

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