MAKING THE MOST OF YOUR MEDIATION

By Charlotte Venner,
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Mediation is a "hard cost" for your client, so it behooves you to do everything necessary to get the value out of that investment. The way carriers approach and use mediation has changed over the last decade, and you need to understand this in order to be successful in your mediations. At the heart of preparing to be successful at mediation is making sure that the defense fully understands your case and that you have the right parties and the right pocket books present to pay on your claims. This article addresses concerns I see, primarily in plaintiff counsel's presentation of personal injury cases, but many of these points also apply to the defense.

Get a good handle on basic coverage law

One area of law I often see woefully ignored to the detriment of a plaintiff's case is insurance coverage law. Make sure you have researched all possible sources of insurance coverage for your case long before you get to mediation. A plaintiff attorney's most valuable contact may be that friend from law school who became a coverage lawyer**.** Frugal insurance customers are obtaining discounted insurance policies to save on their cash flow, with the end result being that an injured claimant may not have the resources available from the third party's carrier to compensate them for all of their damages. Insurance companies have revised their policies to exclude coverage for many items that in the past provided indemnity dollars to fund a settlement. In such cases, knowing how to analyze the potential sources of insurance coverage for your client's loss is critical.

You may be able to pull in another auto, personal or employer's fleet uninsured/underinsured coverage (UM/UIM), or a homeowner's or umbrella or other liability policy. The following are a few examples: Take the case of two adult brothers involved in a serious single car accident in which the passenger brother was gravely injured. The accident was the fault of the driver-brother who only had a $15/30K policy. The injured adult brother did not have a license or own a car and thus had no policy of insurance in his name. But because the injured adult brother was living in the parents' home, and was thus a "member of the household," an astute plaintiff's attorney was able to access the parents' large UIM policy and obtained an additional $485K for his client.

Another example: a drunk driver causes his plaintiff passenger to sustain massive injuries. The drunk driver's carrier tendered her 50K auto policy immediately and the driver had no assets. However, the driver had obtained the car as part of a divorce settlement, and the car was still listed! A $1 million policy paid out.

Example #2: an employee is seriously injured in a company car. Workers Compensation (WC) pays out and the WC case is resolved (C&R'd). The employer had UM/UIM on their fleet cars and so after the $350K setoff for the WC benefits paid, the UM/UIM policy paid the balance of the $1 million policy.

Likewise, UM/UIM policies may be used in both bicycle accidents and pedestrian cases. And if the facts support negligent entrustment, a homeowner's policy may kick in.

Another area you must know well is the law of "course and scope" of employment. For example, a group of painters stop at the park after work and share a few beers with their supervisor. On the way home, one of the workers kills someone due to his intoxicated driving. After a lot of haggling and denying coverage initially, the insurance carrier finally recognized that even though they had left the worksite and were on free time, the driver could be found to be in course and scope and so the large commercial policy paid out.

Many of your cases may not rise to the million-dollar financial loss level. However, knowing the ins and outs of insurance coverage may be equally meaningful in the small exposure case where a few thousand dollars can make the difference between a workable settlement and forcing you to try a case. Plaintiff's attorneys often overlook commercial Med Pay money, especially in premises liability cases. Several times a year I see that Commercial (or Auto) Medical Payments money was available, had the medical bills been incurred or submitted for payment within set time periods. The timelines are critical and vary with the policy. You are not going to want to get into mediation and learn that your client could have had that Tesla 3 MRI, regardless of the position taken by their HMO or workers comp carrier, or that a significant part of your lien could have been direct paid without a credit being asserted on the indemnity payout on the claim, if you had inquired about a medical payments provision in the policy.

Prepare the other side for mediation

Getting the other side prepared to engage meaningfully in settlement discussions may be more important than getting yourself prepared! It should go without saying that you need to allow adequate time for your case to be heard and reacted to. Nevertheless several times a month, I see significant demands dropped on defense counsel and carriers shortly before a long scheduled mediation. This almost completely ensures you are not going to get the full value out of your mediation session. As a rule of thumb, the more money you are demanding, the longer time you should give the other side in advance of the mediation to obtain their authority.

In this regard, "day in the life" videos, fancy (but sometimes expensive) power point presentations and accident reconstruction animations can be very effective, if you get them to the attorney and their carrier in a digital format at least a month before the mediation so that your investment has the time to be viewed and have an impact on the people who are really making the decisions about how much will be paid in a case. The reality of the structure of most of insurance companies today is that the most impact a high technology investment tool has on a mediation is to secure a settlement in the

upper range of an authority level that was requested by the defense attorney weeks before the mediation.

In most cases, the defense attorney must prepare a detailed pre-mediation report requesting a range of authority on the case, often weeks before the mediation. The range of authority given to the defense attorney is based on this report. Although it is rare that an adjuster will give their defense attorney the upper range of the authority the defense requested, when the adjuster ultimately agrees to pay "more that they came with" to settle the case, it is usually a number within that upper range requested by the defense attorney weeks before. The mediator is seldom truly causing a full re-appraisal of the case. Rather, the mediator is supporting arguments justifying the highest number in the range of authority requested weeks prior. Thus, if you have not provided the defense attorney with a well-documented basis for them to request an adequate range of authority far in advance of the mediation, you are jeopardizing the best result for your client. Such a case will then only settle if the defense attorney is made to look like s/he either undervalued the case, did not adequately prepare the defense, or at the least, inadequately or untimely reported on the case. So…pick up the phone and ask the other side what they need to evaluate the case, what defenses you need to address and how soon before the mediation s/he will need to submit the pre-mediation report for authority.

Getting yourself ready for mediation

Ensuring that the other side is ready to come to the mediation and actively participate in meaningful settlement negotiations means you have evaluated your case from the defense position. Any good plaintiff's attorney can argue her client's case, but a great attorney has given a significant thought to the kind of defenses and maneuvers that will be used to devalue their case. Start with jury instructions and make sure you know what points you need to prove and that your evidence is admissible. Have you taken into consideration the effect of an "empty chair" (a potentially at fault player not joined in the action, or one who has already settled out) and can you actively manage that at the mediation? Are there any immunities you need to overcome? For example, your client's accident happens in an area designated as a trail. Will the public entity assert trail immunity (Gov't Code Section 831.4(b))? Did your client get injured on private property being used for recreation (Civil Code Section 846, CACI 1010)? Anticipate what defenses they will raise and explain why they are not viable.

Make sure you have updated the defense with the treating physician's current diagnosis and prognosis. Dropping the fact that your client may need surgery on the carrier in a brief you serve 5 days before mediation almost guarantees an unsuccessful session. Make every effort to have a written opinion regarding medical causation part of your submittal. And of course, provide the other side with evidence documenting your client's claim for damages, including all treatment bills and any out of pocket expenses being claimed so these special damages can be considered when the case is reviewed for authority.

Don't just provide a statement of your client's income or business losses, but anticipate defenses to them and address that in your submittal. Be prepared to overcome a defense that the claimed income loss is speculative. Show you can justify the claims by producing documents supporting your client's profit and loss statements and balance sheets.

Lastly, prove to the other side that you can tell a compelling story, graphically detailing what the client has been through and how this accident has changed his/her life. Integrate photographs, diagrams and med-legal illustrations to impress upon the defendant that you can move a jury to understand the gravity of the injury your client suffered. Tell the story of what your client's life was like before and after the accident, by integrating old photos, the statements of friends, family or co-workers into your narrative.

Have you asked the hard questions?

Have you asked the hard questions about your client and your case before the mediation? Verify your client's assertion of no prior relevant medical history by reviewing past records. Remind your client that insurance companies have indices on past claims and that it will not help things if they come to mediation with past case records of accidents involving injuries to the same part of their body that they denied or failed to mention under oath. And do not discount the possibility of *sub rosa video on your client.*

Make sure you understand what procedures your client has undergone and know both the medical and legal significance of those procedures. For example, has your client gone through, or are they being recommended for, a medical procedure that may be scrutinized by the defense bar as not generally accepted in the medical community, not accepted by the medical insurance billing code system, or which involves treatment in excess of norms? Does a planned or past procedure, or a particular medical provider, risk pushing your case into a special fraud investigation unit of an insurance company? Have the diagnostic criteria for the condition in dispute been met? Have you checked out the legal, criminal and professional backgrounds of your critical medical providers?

Contact the lien holders and make all efforts to have immediate access to them during the mediation, so you can adequately evaluate your client's net. Involvement of Medicare or Medi-Cal lien rights means months of notice prior to the mediation to know the claim for reimbursement. If there is a WC action pending, make sure you understand the status of it and any obstacle it will pose to settlement. In this regard, work with the WC lien holder and understand the status of C&Rs or any credits for future medicals being asserted in a parallel workers compensation case. Consider that the defense may want to buy the WC lien in order to assert the full value as a credit against your case.

The right players must attend the mediation

Making sure the right players come to a mediation may be as important as preparing the other side for settlement discussions. In today's commercial insurance marketplace, many companies are assuming self-insured retentions, or buying more limited policies, and so have a say in the outcome of a mediation. Thus, you need to determine whether there is a self-insured retention, and if it is a wasting SIR being eaten up by defense costs. Have you been assured in writing that someone with authority to bind the company in the SIR will be personally present at the mediation making indemnity decisions? Know what role any Third Party Administrator (TPA) will play in the decision to pay out indemnity dollars and if it is a company principal who has the ultimate authority to bind under the SIR. In some cases a principal may have a consent clause in the insurance policy.

If you plan to have additional layers or sources of coverage contribute to a mediated settlement, be sure they are present at the mediation and have been adequately briefed on their exposure. The same issue applies when you expect the insured to contribute personally to a settlement, as where punitive damages are alleged, for example in a DUI, or an obvious excess exposure case. Also, if you think the risks on balance justify accepting the underlying policy limit in exchange for a release, having the excess party actively participate in the negotiations may work to your advantage to put pressure on the primary policy to put their policy on the table.

If, after a thorough review of all the players and relationships that may provide additional layers of coverage, you find the defendant is not adequately insured and lacks sufficient assets to justify an excess judgment, give the defense counsel a heads-up that you want them to bring to the mediation a declaration attaching documentation of "no assets". Then, be prepared to compare that to any declarations or testimony that may have been offered in any recent bankruptcy or divorce proceedings.

Mediation is a journey

In the end, remember that the mediation process is a journey. You have prepared for it to be successful by ensuring that the other side has everything far enough in advance to fully evaluate the case and reassess the purported defenses. If, despite your best efforts, the case does not settle, be sure to use the mediator to establish a game plan so all the parties can get done what they need to get done in order to get adequate authority to settle the case. Table your frustration when, even after timely providing the other side with everything necessary for them to be prepared and countering their arguments, they do not come with enough authority to settle your case. In my experience, both as an in-house defense attorney for a major carrier and as a mediator, many times the claims office is just waiting to see if the neutral mediator felt their positions compelling, before they would take that back to committee and obtain the necessary additional authority. Leave the other side a position to retreat to, and in so

doing, leave the door open to further negotiations! Many cases that do not settle at the initial mediation do go on to settle through follow-up phone calls through your mediator.

Charlotte Venner is an experienced AV rated attorney-mediator, having mediated over eighteen hundred cases to closure, involving personal injury, wrongful death, property damage, construction, real estate, probate, insurance and employment disputes. She is accomplished at analyzing litigation strategies and possesses strong conflict resolution and leadership skills. Ms. Venner brings to the table a fluency in complex medical causation and damage issues, accident reconstruction, insurance and coverage, real estate, construction, as well as employment law. In 2010, Ms. Venner was awarded the Distinguished Mediator of the Year Award by the San Francisco Trial Lawyers Association and was selected to Northern California Super Lawyers (Mediators) in 2004 and 2005.