Prepare for trial, settle for top dollar at mediation

If you do not prepare and set up the case for trial, you cannot settle it for full value — or may not settle it at all

By Laura F. Sedrish

We have all heard the stories of defense attorneys being ill prepared at mediation and having no intention and/or authority to settle, which is a waste of time, money and effort for everyone. Often this happens when the plaintiff's lawyer has not had a substantive conversation with the defense attorney before the mediation about the merits of the case, the defense's position, and that they will have authority to settle – for real value – at the mediation. Without this the mediation will certainly be a bust – and a huge frustration for the client, who may start thinking that you are not prepared and have not been working diligently on their case.

I do my best to avoid these situations, not only for fear of a potential malpractice claim but because we are the ones singly tasked with helping the client. If we fail them, they have nowhere to go (except to another lawyer, who will likely not be our biggest advocates when *they* settle the case).

When I get a new case, my staff and I prepare the case so as to best position it for trial, which is the key to getting top dollar at mediation. One of my favorite tenets is, "prepare for trial; you will settle it."

If you do not prepare for and set the case up for trial, you will never be able to settle it for good value. If you do nothing and think you will settle it at mediation, you will never settle it and you will be under-prepared for trial.

Preliminary intake of the file

When you get a new case, draft a short summary of the case, and then compile a list of all the things that are outstanding on the file, recording all deadlines, medical records and bills you do not have, evidence that you need (e.g., a copy of the police report), and upcoming court appearances (if already in litigation). This will help you put an overall strategy together regarding the case, like what depositions you need to notice and what written discovery you need to send. Sometimes it will be appropriate to look at the jury instructions that are applicable to the case to help you put together a framework for what you ultimately need to prove. If there are medical records or bills that are incomplete, make a list of them and get them ordered right away. Ensure that you have the loss of earnings history in the file, e.g., the last five years of W2's and pay stubs closest in proximity to the incident, and ask the client for these documents at the outset if you do not have them.

If you have not already met the client, set up a face-to-face meeting at the beginning. In addition to putting a face to a name, you will learn more about his/her personal background, medical history, and present medical complaints, and it gives you the opportunity to explain the litigation process and what the client, who is typically litigation averse and/or unsavvy, should expect. Encouraging an early personal relationship will foster a bond with the client and help develop his/her trust in you, which is critical to successfully settling the case at mediation. In fact, you must discuss their expectations regarding case value before the mediation even takes place.

Although you need to stay positive about their case lest the client feels abandoned or not supported, you cannot discuss only the great aspects of their case with them, thereby setting unreasonable expectations of case value. I manage their expectations by selectively discussing the vulnerabilities and shortcomings of their case well before mediation. I inform them of the pros and cons of settling, and always make it clear that they are in control of the process. Settling is their sole and final decision, based on all known factors and the overall risk assessment, which has been made clear to them – starting well before the date of the mediation.

Doing a thorough preliminary intake and developing this personal relationship is so important because you need to know your client, what the case is about, what has been done, and what needs to be done, in order to resolve it in a timely fashion.

Ensure the client is following up with medical treatment

If the client needs additional medical care and you are in a position to assist them with this, do this without delay. *Any* gaps in medical treatment are used heavily against plaintiffs, so it is critical to help the client figure out the best way to procure treatment, if necessary, and encourage your client to set up follow-up appointments with treaters.

I typically suggest they follow up with the doctors they would normally have gone to had there been no potential claim; however, if that person has no insurance or no regular provider, assist them in finding the appropriate care on lien. My recommendation is you offer several choices and have the client ultimately choose the medical provider, to best deter the defense argument of attorney-driven medical care; also have

the client arrange for the appointments themselves, if at all possible.

Plaintiffs who have credible, consistent treatment throughout the litigation, instead of a rushed, last-minute appointment (with perhaps a surgical recommendation) merely a day or two before a mediation, will more likely be able to resolve their cases at a mediation for value. Prepare for trial – settle it at mediation.

Develop an action plan for experts

When you first get the file, think about what experts you might need later on, e.g., an accident reconstructionist, vocational rehabilitation expert, life care planner, and/or economist. Obviously, some experts will not need to be determined until the case gets further along, or after the initial designation exchange (such as a biomechanical expert – I do not like spending money on that person unless I have to). Make sure that the experts you know you will need are hired *early*, to ensure the defendant does not get to them first. For example, some defense firms are now routinely hiring the experts my firm typically uses, once they see our firm's name on the file. They cannot do this if we get to the expert first.

File the complaint and send out written discovery as soon as possible

Higher value cases that typically go to mediation will likely not be settled pre-litigation. Therefore, you must file the complaint (with a statement of damages) as soon as possible and get litigation underway. The rules allow plaintiffs to initiate discovery before the defendant actually responds to the complaint, but my experience is that it is ideal for a defense attorney to be first assigned to your case and the defendant answers or otherwise responds before initiating aggressive discovery. If the defendant does not timely answer but has been properly served with the complaint and statement of damages, then initiate the default procedure without delay. However, assuming there is a response, do not wait to serve your initial sets of discovery. I have all written discovery drafted and ready to go, so as soon as we know who to send the discovery to it gets served without delay. This drives the case forward, so the plaintiff has sufficient information to apply pressure on the defendant early (or, to the contrary, educates the plaintiff early as to the weaknesses of his/her case), to push the case towards resolution. Without sufficient information, the case cannot be resolved for top dollar at mediation.

Provide meaningful discovery responses

Produce everything defense will need to evaluate your case. Do not riddle your client's discovery responses with boilerplate or frivolous objections. Do not engage in non-productive discovery disputes, which only serve to antagonize the defense attorney, and delay the progress of your case and eventually a fruitful outcome. Defense needs and is entitled to complete discovery responses with all pertinent information included. Produce all medical records, reports, and bills. Produce all lien information. Produce all loss of earnings records. Produce all photographs and all other documents that will increase the value of your case. I am baffled anytime I hear a defense attorney is forced to file a motion to compel simple discovery to which they are clearly entitled and need to evaluate their case. Motions to compel uncontroversial discovery responses should never be necessary. Produce any and all documents they may need to evaluate your case with respect to special and general damages. Do not withhold documents, thinking there will be an "aha" moment at the mediation if the documents are exchanged then. *The time to produce documents relevant to any aspect of damages is well before the mediation takes place.* Without this information, the defense will be unable to set a mediation, let alone obtain settlement authority for a number that is fair for your client.

This means if there is a life-care plan or economist report – give it to them before the expert designation. If there are expert and/or medical reports that you feel might help them with the valuation of the case – give it to them now. Offer a key expert's deposition before you have to per the Civil Code of California. Anything that will increase the value of your case – e.g., future medical treatment recommendations, loss of earnings analyses, etc. – should be provided to the defense well in advance of the mediation so they can incorporate these values in their memo to their carrier to obtain adequate settlement authority in advance of the mediation. Settlement authority is often decided by committee and/or regional/group supervisor consent at scheduled, designated meetings before a mediation. Seldom will the defense be able to obtain a significant deviation from the pre-allocated settlement authority at the mediation itself, which is why you want to ensure the defense has all the important information well in advance of the mediation so they can provide this information to their carrier for evaluation.

Offer plaintiff's deposition and defense medical exam

Offer the plaintiff for deposition the earliest defense will take it; offer that your client will submit to a medical examination. I often offer to shorten time for the medical examination so the defense has all the information they need to evaluate the case as soon as possible, to perhaps fit in a cancellation slot without having to wait on a doctor's already booked schedule. The sooner the defense has your client's deposition, medical examination, and all meaningful responses to discovery, and the sooner the required depositions have been taken, the sooner your case is ready for mediation.

Stay informed regarding the progress of the case

Go through your case list on a weekly basis, and literally educate yourself as to status. For example, stay informed as to:

how is the client feeling, where he/she is treating, continue to follow/assist with medical care, ascertain whether the defendant's and/or other required key witness' deposition(s) has been actually set as requested, confirm that the plaintiff's deposition has been set and completed, confirm that the defense medical examination has been completed, and check to see if the defendant's discovery responses were timely received. Any delay regarding any of these things can delay the timely resolution of your case. The defense has no real incentive to move the case forward; they simply have to react. The failure by plaintiff's counsel to follow-through on any step benefits the defense. Defense will delay and delay if left to their own devices. It is *your job* to drive the case forward.

Consider an aggressive litigation strategy

Plaintiffs' attorneys would like to save costs whenever possible. However, you need to ensure you have applied enough pressure on the defense. File the complaint, send out discovery promptly, and file motions to compel and other dispositive motions. Take all the key witness depositions before the mediation, as you would if preparing for trial. You need to make sure that if there are any depositions that might need to be taken to lock in liability or damages (or, on the contrary, assist your client in reducing his/her expectations as to the merits/value of his/her case), those are completed *before* the mediation. Without these key witnesses, the defendant may not have enough information to sell their case to their carrier and get authority for top dollar.

In addition, although I do not engage in nonsensical discovery disputes, I routinely file motions to compel written discovery. If the defendant does not provide a substantive unqualified admission and includes improper objections to a request for admission, for example, or fails to provide responsive documents (like withholding scene photos from the day of the incident or surveillance video), I routinely file motions to compel, requesting sanctions. Filing these motions and staying ahead of the defendant applies pressure on them to settle the case. Filing these motions shows that the plaintiff is serious and will not back down. I also often file motions to compel right before the mediation, so there is some pressure on the defense attorney to settle the case so they do not have to do more work on the file.

Also consider filing motions for summary adjudication on seminal issues before the defendant files their own motion for summary adjudication/judgment. I have settled several cases simply by filing such a motion preemptively, predicting the defendant will be filing the contra motion we will be opposing. Having two opposing motions on file on the same issue applies pressure on the defendant, making it less likely the judge will grant their motion, and drives the case to a productive mediation.

Communicate with the defense

As soon as you understand a case well enough to discuss it, call the defense attorney. Ask them what *they* need to evaluate the case (and in your mind, expedite settlement). Devise a discovery plan mutually beneficial to the both of you. Your aggressiveness and attention to the case will drive the case forward and encourage that person to take interest in the case. If there is a case management conference (CMC) set for the case, make sure you speak with the defense attorney prior to the CMC, as required by the Code, or at the very least, appear personally and meet that person after the CMC and make a personal introduction. If you personally appear, you will have the opportunity to discuss aspects of the case, what is needed to be done, and whatever outstanding issues are of interest to the defendant and *they* feel are necessary to be addressed to bring prompt resolution to the case (you may also introduce mediation at that time, if appropriate). I utilize the CMC as a way to move the case forward to resolution, and I try to personally appear whenever possible. Defense attorneys are not our enemies. *With appropriate attention, defense attorneys are our best allies in moving the case to prompt resolution for our clients.*

In addition, have discussions regarding your evaluation of case value with the defense attorney before the mediation. You should try to confirm that whoever has proper authority will actually be available and/or attend the mediation personally (e.g., the excess carrier, the adjuster, etc.). Before the mediation, I always discuss what I think the case is worth from my perspective – so the defense is not blindsided at the mediation and is prepared for the plaintiff's demand. Set expectations so the defense attorney knows where you are going before you get to the mediation. Do not demand an unreasonably high number – you are going to lose credibility and you will curtail defense's willingness to settle for reasonable value – or give inconsistent demands. I usually feel the defense out prior to mediation, suggest where I will be going as far as numbers, and take their temperature to better assess what I might need to do in order to obtain the value I want in the case.

Give the defense everything it needs to evaluate the case

Do not set an early mediation that is premature. Before a mediation, like a trial, the plaintiff must have had his/her deposition taken, the defendant's deposition and key witness depositions must have been taken as necessary, and the appropriate defense medical examination must have been completed. Ensure that defense has all medical reports, all necessary loss of earnings information, and *all the information they need – at least two weeks before mediation* – the earlier the better.

Remember: The defense must have all the information so they can speak to their clients/insurance adjusters and obtain the proper authority before the mediation. If they do not have the information they need at least two weeks before the mediation, they will not have the time to educate their carrier, write their report, and get the proper monetary

authority to settle your case for full value (or what you believe to be full value).

I also always call the defense attorney or email them and ask them if there is anything else I can give them to help them value my case, resolve any questions they may have, or make the mediation more successful. I want to ensure they have absolutely everything they need to evaluate my case to its fullest value, and if they do not have something, at least I know in advance.

If the defendant does not have this information before mediation, the case will not settle for top value, let alone settle at all, and you will be ill-prepared for trial. This one-on-one communication also allows me to develop more of a personal relationship with the defense, and not an adversarial one. At the end of the day, both sides are looking to resolve their cases and lighten their workload.

A good working relationship with the defense attorney furthers this mutual goal. Professional courtesy goes a long way in establishing long-term good relationships with defense attorneys, who are most certainly going to see you again on a different, future case.

Conclusion

Know your case and your client well from the start; provide meaningful discovery responses and produce without delay everything relevant to damages and liability; produce your client for deposition and his/her medical examination early on; keep tabs on the case every step of the way, including tracking your client's medical care; hire the right experts from the outset and pursue an aggressive litigation strategy. By preparing your case for trial, you will likely settle it at mediation.


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