Mediating the catastrophic injury

An in-depth look at the key ADR issues and a valuable overview of the primary factors to be considered

By Mayra Fornos

My perspective on catastrophic injuries and medical matters, in general, is a product of personal experience. I married at age 22 and barely four months into the marriage, my husband suffered a surfing accident that rendered him a quadriplegic. An incomplete C-5/6 spinal cord injury resulted in him being regarded as a "super quad" and considered lucky because he could push his manual wheelchair.

Undaunted by this unexpected and overwhelming experience, but propelled by its issues and challenges, several years after his accident we entered law school together, which resulted in us establishing our own practice predicated on our first-hand experience in navigating both the considerable short-term and long-term ramifications of living with a life-altering injury.

We obsessively studied every aspect of the topic, from its daily issues, ever-changing medical complications and the legal landscape affecting not only ourselves, but others similarly affected. We parlayed our front row seat in dealing with life-altering challenges into a legal practice helping and guiding the similarly injured as well as counseling various lawyers involved with these matters.

My husband's passing 23 years after his injury has only elevated my ongoing presence in this space, to where I now find myself working as a dedicated mediator focusing, *inter alia*, on resultant disputes involving catastrophic injuries. It is my deepest desire to assist counsel on both sides in fostering an understanding of the intricacies of mediating these devastating and complex cases to a successful resolution.

Timing is important

Early mediations may be useful in many instances, but with a catastrophic-injury case, a premature mediation may be

a lost opportunity. A catastrophic injury is permanent or long-term by definition, often life-threatening, and without exception, life-altering, resulting in the injured person no longer able to care for himself or herself in the performance of the activities of daily life. Catastrophic-injury cases may involve multiple defendants, disputes not only of liability, but also causation and comparative negligence, with multi-faceted levels of damages.

The decision about *when* to mediate is very important, considering the time required to obtain all necessary employment and usually voluminous medical records, but also written discovery, as well as depositions or interviews of liability and damages witnesses, including doctors, nurses, caregivers, therapists, and employers. Depositions should include not only the client, but also family, friends, and co-workers, many of whom can provide the basis for conclusive opinions regarding the client's future medical care, lost earnings and pain and suffering. Time should also be spent preparing the client about what to expect in the mediation process.

Assessing the use of experts

Experts are not needed in every case. However, catastrophic-injury cases usually involve disputes and opinions that will require the retention of multiple experts in a variety of fields.

Early assessments of whether an expert would be needed for mediation can be beneficial, saving cost, time, and other resources. It is important to assess early as to whether or not to involve experts, especially when accident reconstruction is needed as well as the time required to calculate the extensive issues influencing past and future damages. Selection of experts early in the process will provide the necessary time for them to review the evidence and conduct their inspections, evaluations, and testing and where needed, to work with other experts or to utilize their results. Your experts can be especially useful in helping to evaluate the other side's case and prepare for mediation.

Selecting the mediator

Lawyers have different views regarding the selection process for a mediator for a particular case. One strategy is to let the defendants select the mediator, the thinking being defendants would be more likely persuaded by a person they have proposed. That strategy may not always work if the mediator does not have experience with catastrophic-injury cases. Selecting a mediator with such experience will undoubtedly be beneficial. It is always best to identify a mediator who will understand *not only* the liability and causation issues, but one who will also understand the complex and multi-levels of damages, and of great importance, the prospect of additional damages in the *future*.

Because of the numerous issues typically involved, the case may require more than one session. If there are multiple defendants, an option is to mediate initially with one or two key parties, scheduling later sessions with others. Even when able to proceed with the mediation with all parties involved, more likely than not, multiple sessions will be required. The mediator's availability for multiple sessions is an important factor to consider at the onset.

Presenting the client's life story for the mediation – The mediation brief

The roadmap

A comprehensive mediation brief should be submitted to the mediator well in advance of the scheduled mediation. It should fully present all the key issues concerning liability, causation, and past and future damages, including a summary with highlights of the key points from experts and supporting documents and reports. This brief should not only explain the case but also constructively dismantle the other side's perspective as much as possible. If there is a key case or statute at issue, these should be cited and explained as to relevancy.

The brief should also arm the mediator with ideas about possible solutions to the sticking points that might get in the way of a final settlement. The mediator should be educated about how the dynamics evolved, the major obstacles that have blocked resolution to date, along with possible solutions together with any explanation as to the benefits of any settlement proposal. It is important to describe the risks that might result due to the failure of the parties to reach an agreement.

The brief is a roadmap that will help the mediator be as effective as possible and better able to help the parties reach a successful resolution. These cases are normally mega-dollar cases often involving major risks for one or all sides if they don't come to an agreement and end up in trial.

Confidential briefs

Many lawyers question the wisdom of submitting a confidential brief to only the mediator rather than to produce a brief to all parties. This is a strategic decision.

It is also a strategic decision as to whether or not to share exhibits or expert reports with all parties or even the mediator. Attaching exhibits or expert reports to a shared mediation brief, such as a Life Care Plan, may be beneficial in your case, or alternatively, can be summarized with key points in the brief itself. Access to all summarized reports and exhibits during the mediation is advantageous so that specific portions can be pointed out when necessary.

Consider the hybrid brief, shared with all parties that address the facts and legal principles with key evidentiary highlights to be shared, with other portions submitted confidentially to the mediator, such as any "smoking gun" evidence, a summary of expert opinions that might best not yet be shared with the other side, or rebuttal evidence that can be strategically revealed as deemed necessary.

If a confidential brief is submitted, the audience will only be the mediator. Submission of a shared brief – or a hybrid brief as mentioned above, is recommended for most instances. The shared brief will be seen by the decision-makers that could foster a more fertile environment for all sides to know what is on the table, and in doing so, better promote negotiations and settlement.

Overview of damages in the brief

An overview of the plaintiff's damages – past *and* future – should be summarized in the mediation brief. Chronologies and bullet points are impactful – upfront and to the point. Rely on your experts and highlight any critical reports, medical records, and vocational and employment documents.

The brief should include a description of the type and cost of past and future medical and psychological treatments as well as prescription drugs, equipment, physical therapy, occupational therapy and rehabilitation, past and future lost earnings along with lost earning capacity, loss of ability to provide household services, and physical pain, mental suffering and emotional distress, and loss of consortium concerns if applicable.

Also, the brief should be used to present a detailed medical timeline, including medical diagnosis and prognosis, along with a summary of all past medical care and expenses, including costs incurred, even if not paid, including any family or spouse who has or is providing caregiving or nursing services. (*Hanif v Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 644-645.)

The mediation hearing session

Who should attend the mediation?

Those involved might be not only the plaintiff but his or her guardian ad litem, other guardians, conservator, or a person who has been assigned power of attorney. Additionally, the defendants' insurance adjusters and representatives with full resolution authority. If insurance is involved, the mediator will want access to the adjuster and coverage counsel regarding those issues.

Considering Zoom or other platforms for remote mediations and options for a hybrid mediation are available for some to attend remotely, and others to be physically present at the mediation. If the client plaintiff is unable to travel due to mobility restrictions or medical reasons, appearing remotely may be a solution that allows the client to be both present and fully involved in the process, along with necessary family members. Experts who have to travel from out of the area or state to attend a mediation may be better made available to appear remotely.

All persons who have authority to resolve the case need to be present and able to actively participate in the mediation remotely or in person. The parties should agree beforehand to include all representatives with authority in any conclusion of a settlement. If, however, those persons with authority are not present in person, they can appear remotely or will need to be reachable throughout the process.

Having the decision-makers present at the mediation is essential for approving and signing any settlement agreements. If any decision-maker appears remotely, it should be clarified beforehand how those persons would execute the necessary settlement agreements. For example, ADR Services, Inc. provides access through DocuSign to execute the settlement documents remotely.

Preparing the client

Settlements can be life-changing decisions for clients. Prepare the client for the mediation and the intricacies of the negotiation process. It is essential that they understand that mediation involves a different type of advocacy. Lawyers are trained to be adversarial while litigating or trying their cases, but in mediation, there needs to be a shift in mindset… from an adversarial "fight and combat mentality" to that of a "collaborative and resolution tone," where a bargaining process ensues involving concessions, reciprocity, and patience. All are essential ingredients in achieving resolution.

The process requires working with all stakeholders to come to a mutually beneficial outcome. Clients need to be guided at a comfortable pace so that they can know what to expect, and what a settlement might look like – the transition from litigation to a focus on the future. Taking the time to prepare the client for mediation, not litigation, will help with managing expectations during the process, and will help in moving towards resolution.

Mediations are confidential, but…

Mediation works because key elements can be kept confidential. California's mediation confidentiality (Evid. Code, §§ 1119 et seq.) is broad and includes the information and documents submitted during mediation, all communications during the process as well as the information the mediator keeps to himself or herself. What a party directly submits and provides confidentially at a mediation remains confidential and cannot be used later should mediation fail. (Evid. Code, § 1126; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, *Foxgate Homeowners' Assn. v. Bramalea California, Inc*. (2001) 26 Cal.4th 1. See also, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118 [prohibiting judicially crafted exceptions.].) However, as many lawyers have pointed out over the years, the reality is that it is sometimes difficult to completely stop or avoid discovery regarding what is learned at a mediation.

When working with experts, it is important they understand the confidentiality provision of mediations. Consider the use of mediation confidentiality agreements with your experts, citing Evidence Code section 1119. A recommendable approach is to mark all materials developed and shared for mediation as "Confidential – Mediation Privilege."

Allowing mediation information to be used as trial evidence

Along the same line, evidence specifically prepared for the mediation

may not thereafter be admissible at trial. (*Rojas, supra*.) When there is such evidence, it is advisable to have a written agreement with opposing counsel that both sides can present any and all evidence and documents to the mediator without either party later insisting that the documentary evidence was confidential and therefore not admissible at trial. A good example would be a "Day in the Life" film presented during the mediation, or any other document or evidence prepared and used at the mediation.

Liability

In catastrophic-injury cases, the plaintiff's past and future damages often become the focus. Liability issues should not take a back seat to damages. In the brief, the liability facts should be addressed along with a summary of the essential liability records, including any police reports, 911 calls, toxicology reports, cellphone records, notices to defendants of prior incidents or existence of dangerous conditions, witness statements and relevant deposition testimony, and accident reconstructionist and biomechanics reports and opinions.

The use of visual aids can be very powerful, such as the presenting of video exhibits or computer simulations, accident reconstructions and bio-mechanics illustrating how the accident forces caused the traumatic injury. Diagrams, and any relevant charts or graphs, can be very compelling, particularly if mounted on foam board. Attaching copies to a brief is an option, but a powerful display of your demonstrative evidence at mediation is an effective way of presenting your case.

Damages

Presentation of damages should include all damages, with specificity, including, for example, the cost now and those anticipated in the future: house cleaning, gardening, drivers, babysitters, pet sitters, errand assistants, work assistants, tuition, and book costs for education for retraining. The demonstrative evidence must be brought to the mediation session, including "Day in the Life" and "Day in the *Future* Life" videos to show the mediator and, possibly the other side.

Past medical and wage loss

By the time the mediation session is conducted, the plaintiff's past medical damages and expenses, along with wage loss documentation should have been obtained, including having interviewed or deposed all necessary doctors, specialists, nurses, caregivers, and health care providers.

Presentation of future damages

Future medical treatment and care, including any surgeries, is often aggressively contested. Many defendants dispute whether or not a plaintiff might actually need certain medical care or assistance or would need to undergo any additional surgeries. Discussing future damages for a person living with a catastrophic injury should also include not only a summary of the plaintiff's future medical needs, but also a presentation of how the plaintiff living with a spinal cord injury or traumatic head injury, for example, not only lives today with the daily physical pain, mental suffering, and emotional distress, but *also* in the future. Although a spinal cord injury can occur in seconds, the physical, mental, and emotional consequences of spinal cord injuries can progress slowly well into the future.

Life-care plans

A life-care plan (LCP) will provide invaluable information to the mediator as well as to the other side. An LCP provides a comprehensive assessment and analysis of the plaintiff's current and future medical needs and conditions, and all associated costs because of the catastrophic injury. The LCP should address the need for 24/7 home health care and caregivers, physical therapists, counseling, or long-term rehabilitation or residential care. And, with in-home care, the modifications necessary to the plaintiff's home and automobile, and the identification and description of all needed medical equipment and supplies. The LCP should also address any education and vocational training that have been, and will be, provided to the plaintiff.

Day in the life videos (present and future)

A "*Present*-Day in the Life" video is a powerful exhibit to educate the mediator about the client; what his or her life was before the incident and after. Even more impactful is a "*Future*-Day in the Life" video, which can effectively demonstrate what a day in the future might look like to the client.

The presentation of likely future damages in catastrophic-injury cases is of critical importance. Many plaintiffs' attorneys fail to properly educate the opposing side and the mediator of the *additional "catastrophic injuries and conditions" their client will very likely suffer five, 10, 20 years post the initial injury*, involving physical deterioration, future medical complications, long-term consequences of injuries, and future emotional distress, trauma, and physical pain.

The additional catastrophic injuries and conditions that are a result of the original injury can include progressive muscular atrophy, thinning of skin resulting in pressure sores, often requiring extended hospitalization and sometimes necessitating skin grafts and flap surgeries, significant reduction of bladder capacity, recurring bladder infections and irritation from continuous catheterization, involuntary spasticity, autonomic dysreflexia, blood pressure instability, loss of bone density, digestion issues, significant muscle and joint pain and severe depression. These additional "catastrophic conditions stack onto the original catastrophic injury, many times repeating throughout the plaintiff's lifetime. It is therefore of paramount importance to painstakingly illustrate the ongoing effects of the original injury, which will often help the other side and the mediator understand the rationale behind the future damages number you are demanding.

The use of visuals to show what will most likely occur to your client after his/her catastrophic life-altering injury is

powerful. It therefore goes without saying that a well-thought-out "*Day in the Future Life*" video and/or an illustrative/animated PowerPoint can persuasively illustrate the future catastrophic afflictions your client will most likely suffer years after their initial injury.

Future lost earnings/lost earning capacity

The valuation of future wage loss or loss of earning capacity is a necessary process of realistically determining the plaintiff's ability to support him- or herself in the future. Evidence of the plaintiff's loss of earning capacity damages for compensation purposes (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 891) should be presented, and will usually require expert opinion testimony.

It is often useful to work with a vocational specialist, in addition to an economist, to present the present-day value of lost future earnings or loss of earning capacity at mediation. The issue is not what the plaintiff *would* have earned in the future, but what *could* have been earned, applying the reasonable probability standard (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 893, 897) and should be a focus of the presentation of these future damages.

Medical liens and prior settlement discussions

Medical liens will most likely be an issue in a catastrophic-injury case. To better facilitate settlement discussions, both sides and the mediator should be apprised, either in the mediation brief or at the mediation, of all outstanding medical liens. Both sides should work together to address or reduce the medical liens before the mediation, if possible. The brief should include a summary of all liens, including the identity of all lienholders, the current amounts of the liens and each lienholder's position concerning compromising those liens. Additionally, the brief should also provide the mediator with a succinct history of prior settlement efforts, any settlement discussions and specific demands or offers, including any Code of Civil Procedure section 998 offers or demands.

Use of structured settlements and special needs trusts

Before the mediation, a client discussion should happen as to whether a structured settlement would be acceptable, and if so, under what terms. For example, whether a structured settlement would include a large initial payment, any additional amounts for extraordinary expenses, payment increases (or decreases) over time, or any penalties for delayed payments.

If the client is entitled to government benefits or may be eligible for such benefits in the future (for example, disability benefits or Medi-Cal), *before* the mediation, it should be explored as to whether or not the client will need a special needs trust to address any possible settlement so he or she will be able to apply for or continue to receive any governmental benefits, and if so, the terms of such a trust. If a special needs trust is needed, the person who will prepare that trust should be selected and available at the mediation.

In summary

Since most civil cases do settle before trial, mediation may be the closest a client gets to having his or her day in court. Though mediating a catastrophic-injury case is time intensive and requires extensive early preparation, the benefits which accrue to a successful resolution in lieu of a trial will always be the less stressful, less costly, and likely most satisfying outcome.


Fornos

Mayra Fornos, Esq. is a mediator with ADR Services, Inc. *Before she began her ADR career, she had a three-decade career as a trial lawyer and businesswoman. Ms. Fornos has expertise in the fields of catastrophic personal injury, including spinal cord injuries and TBIs, vehicular accidents, premises liability, products liability, employment cases, sexual abuse, elder and dependent adult care abuse, medical malpractice, the Americans with Disabilities Act (ADA), family law and business disputes. Ms. Fornos can be reached at mfornos@adrservices.com.*