Handout Materials

HEAVY HITTERS

MEDIATION TIPS & STRATEGIES FROM PLAINTIFF'S & DEFENSE PERSPECTIVE

ADR SERVICES, INC.

JOHN DRATH
ADR Services, Inc.

DORIS CHENG
Walkup, Melodia, Kelly & Schoenberger

P. CHRIS SCHELEY
Clapp, Moroney, Vucinich, Beeman, Scheley

PATTI FAMA
Pacific Specialty Insurance Company

CRAIG PETERS
Altair Law

AMEE MIKACICH
Hinshaw & Culbertson LLP

1 HOUR GENERAL MCLE CREDIT
$0 - NO CHARGE

DECEMBER 13, 2022
12 PM - 1 PM

Contents

1. Successful Mediations – From A to Z Outline
2. Pre-Mediation Telephone Call Tip Sheet
3. Mediation Tips From the Trenches by John Drath, ADR Services, Inc. (Plaintiff Magazine, September 2022)
4. Mediation Is Not the Only Way to Successfully Resolve Your Case: How to Recognize and Capitalize on Other Settlement Opportunities By: William B. Smith, Abramson Smith Waldsmith, San Francisco, California, Doris Cheng, Walkup Melodia Kelly & Schoenberger, San Francisco, California

Successful Mediations – From A to Z

Getting to the Table

- Timing
  - Consider pre-litigation
  - What do you need to know?
- Mediator Selection
- Pre-mediation settlement discussions; demand letters
- Preparation
  - Briefs
  - Client Prep
  - Pre-mediation calls (see attached pre-mediation call handout)
  - Acquiring Authority

At the table

- Opening demand, offer – where do I start?
  - How to evaluate on pl. side
  - How that is received on def. side
- Joint sessions, video presentations
- Multiple defendants, problems posed

Demonstration

Hypothetical Fact Pattern:

Personal Injury Dispute – Motorcycle v. Car.

A 38 year-old Plaintiff on his way to work was traveling westbound at a speed of 53 in a 45 mph zone of a two lane road. Defendant operating a Tesla was pulling out of a Starbuck's lot attempting to go east. Defendant said she saw the plaintiff but thought she had enough time to clear the westbound lane. The impact was to the left rear of the Tesla. Defendant's accident reconstruction expert concluded that the plaintiff could have slowed in time to avoid the accident had he been traveling the speed limit. Plaintiff's expert disagreed. Jury range before reduction for comparative is 1.5 – 2.5M.

Plaintiff's opening demand is 3.5, and the defendant's first offer is 100K. After several moves the parties are still far apart: The plaintiff is at 3.0M and the defendant is at 250K. Both sides are frustrated and feel the other side is not negotiating in good faith. The plaintiff's settlement target is 1.2-1.5M. The defendant's settlement target is 750-1M.

Post-Game

- Mediator's proposals
- Common problems that arise: non-monetary terms, confidentiality, lien issues

HEAVY HITTERS MEDIATION ROUNDTABLE
December 13, 2022

Doris Cheng
Walkup Melodia Kelly & Schoenberger
San Francisco

PRE-MEDIATION TELEPHONE CALL TIP SHEET

In order to maximize your mediator's effectiveness during the process, below are a few topics that are helpful to cover with the mediator.

1. Identify each person who will be present at the mediation;
2. How the parties came to the decision to attend mediation;
3. In multiparty cases, which party has taken the lead on the defense and/or which party has taken the lead for the plaintiffs;
4. How well did the parties know each other before this case;
5. How well did the attorneys know each other before this case;
6. How have the attorneys gotten along in litigation up to this point;
7. Identify any concerns about the client and attorney-client relationship;
8. Identify all insurance coverage and other sources of monetary contribution;
9. Find out about any prior settlement discussions that have occurred;
10. Identify any approaching deadlines (e.g. CMC, trial, etc.)

Mediation tips from the trenches

Better-informed parties enhance the chance of reaching a good settlement. “Surprise!” is a tactic best reserved for the courtroom

By John M. Drath

I first started doing mediations in the mid-nineties when the Contra Costa County Superior Court started the EASE program. Since that time much has changed, but in many ways very little has changed when it comes to successful mediation tactics. With mediations so ubiquitous, it is easy for busy attorneys to overlook some of the best practices. I offer the following refresher course along with one or two new notions.

Prepare the defense

I have made this point in previous articles, and I still hear plaintiff attorneys asking why they should do the defense attorney’s work. After all, isn’t that what they are being paid to do? Point taken. But you and your client want money and the defendant or insurance company has the money. You want them to understand the case from your point of view and, ideally, why it makes sense to settle the case in the range of your evaluation. Yes, your mediation brief provides everything the other side needs to know, but that is usually too late to have an impact on the

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

defense evaluation at mediation. Let me explain.

I was on the defense side until moving to a full-time mediation practice several years ago, and from my discussions with former colleagues the nature of the practice at least in terms of reporting to insurance companies has not changed. Although the timing may vary from company to company, most insurers want a comprehensive report from defense counsel 30 to 45 days before the mediation date. That report, based on the discovery to that point, covers liability, causation and damages. Typically, the attorney will review the strengths and weaknesses of liability, often assigning a percentage to the likelihood of a defense verdict as well as a range of comparative fault. If there are multiple defendants, percentages of liability are assigned to each of them.

Moving to causation and damages, the report will address which injuries were caused by the defendant, and which ones might be debatable. The attorney will outline the economic damages claimed, opine as to the damages which are supported and those which may be contested. A percentage is sometimes set forth as to the possibility of the contested damages being awarded. Next, the report will cover non-economic damages, again giving a range of verdicts. Finally, the reporter will set forth a range for settlement value. If there were any settlement discussions prior to writing that report, this information would be included.

The company wants this information well in advance of the mediation because settlement authority must be issued to the claims representative who will attend the mediation. Sometimes, particularly in a large case, this authority comes from a committee after reviewing the defense attorney's report along with any other information in the file. Or it may come from a supervisor, reviewing that same information. The point is that the claims representative at the mediation typically has limited ability to offer more than the authority he or she has, and if it is not enough to settle the case, then the focus turns to post-mediation remedies. While those may succeed, getting to resolution on the day of mediation when the decision makers are present and your client is in the right frame of mind is the preferred result.

But what if you could send your own report to the company addressing all the same issues in the defense report? Then the evaluators would have two reports to consider. Your report might well bring up evidence and arguments overlooked by defense counsel, damage claims that might have been missed or under-emphasized, compelling jury arguments that need to be considered. Actually, you can and should send that report in the form of a well-reasoned, factual and non-threatening demand letter that will arrive in time to be included in the pre-mediation review. That effectively eliminates any claim of surprise at the mediation and will require defense counsel to address your arguments and evidence.

Even before the demand letter is written, review your discovery responses to be certain that everything you will be relying on has been disclosed. If you have medical or other records that have not been sought by the defense but are important to your evaluation, send them with or without a request. No attorney wants to base an evaluation on incomplete or inaccurate information. Write defense counsel and ask if there is anything else the defense needs to prepare for the mediation.

Finally, you will hopefully have a good enough relationship to pick up the phone and have a candid discussion with your adversary about your mutual expectations at mediation. This discussion may or may not include specific offers but having made a demand, you should get some assurance that the defense is going to be realistic. Cases in which those conversations have taken place enjoy an extremely high settlement rate.

Prepare your client for used-car dickering

Mediation often results in an adjustment of expectations but if the adjustment is too severe, you will end up with an unhappy client. The plaintiff should not be hearing about liability and causation issues for the first time from the mediator, or about the costs involved in going to trial. Your client may not fully appreciate these issues going into mediation but might after hearing about them again from the mediator. It is much better to have a mediator reinforcing points you have already made than introducing them for the first time. Otherwise, the mediator will be viewed by your client as an advocate for the defense and will have less ability to assist you in settling the case.

Preparing your client for the mediation process too is helpful. It can be a slow and grinding event and is often unlike anything they have experienced before. They have been dealt a painful and perhaps disabling injury and the two attorneys act like they are dickering for a used car. A plaintiff forewarned is much less likely to find the process so offensive. Discuss your strategy with the client and the concept of mid-points. I always ask plaintiffs to have patience and to avoid taking offense at anything offered or argued by the other side, and I appreciate it when the plaintiff has already heard this from their attorney.

Prepare the mediator

Pre-mediation calls with the mediator are never a bad idea and, in some cases, essential. Mediators often initiate those calls, but you should not wait to be contacted if you have important information to convey, information that you cannot put in a brief or do not want to convey in your client's presence. This could entail any number of issues: a client control problem, whether to present offers in the client's presence, conversations with defense counsel, whether to have a joint session, etc. If you have never used this mediator, this is your opportunity

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

to get to know him or her and find out how they will approach the session.

Something old, something new: The joint session

Back in the last century when mediations were born, they invariably started with a joint session. Over time most mediators abandoned them. Like Ohio State Coach Woody Hayes felt about the forward pass in football, three things could result from a joint session and two of them are bad. At the very least, valuable negotiating time was lost. At worst, statements could be made that caused positions to harden or emotions to rise. Those possibilities still exist, but that does not mean that there is *never* a good reason to have a joint session.

At one end of the scale is a simple "meet and greet" which will tell you who is there for the defense, and sometimes importantly, who is not there. This can be nothing more than a round of introductions and an exchange of pleasantries. Moving up the advocacy scale, there may be some difference between the *Howell* numbers or wage-loss calculations that can be clarified. There may be damage issues or arguments that the defense is missing that can be raised in a non-confrontational style.

At the other end of the scale is a full presentation, possibly including accident reconstruction animation or a "day in the life" video. Done improperly or in the wrong case, there is the risk of a negative reaction. But, this is your one and only opportunity to directly address the decision makers in the defense room. If you have a strong case, one in which the defense has little to talk about, then this is one way to be sure that the decision makers hear what they need to hear.

There are a number of options to take into consideration when making a full presentation. Should your client be present? Depending on the case, you may not want to subject your client to a retelling of the facts and the injuries. At the very least you need to prepare them for the experience. How detailed should you be? Keeping in mind that the decision makers are (or should be) quite familiar with the case, then just highlighting the facts and damages that should cause concern for the defense is effective. Anything more than that dilutes the impact of the presentation. Finally, stick to arguments that are based on solid evidence. Presenting an accident reconstruction animation unsupported by clearly provable facts will undermine your credibility on the rest of your arguments.

A brief word about briefs

Ideally you have sent a detailed demand letter well in advance of mediation, so the main purpose of the brief is to educate the mediator about the case in a clear and concise manner. It should be sent far enough in advance of the mediation to give a busy mediator time to review it and, if warranted, have a pre-mediation call with you. Unless your case involves an unusual area of law, you should assume that the mediator is well acquainted with the usual tort concepts of standard of care, causation and damages. Too often I receive briefs full of discussions of general law which have been cut and pasted from some law and motion brief and, rightly or wrongly, suggests a lack of experience.

Exhibits too, should be given some thought. Often, we are sent voluminous exhibits: medical records, deposition transcripts, even discovery responses. Do not expect the mediator to read the entirety of those exhibits. In my case, I usually do not have the time and I do not want to charge the parties for taking that amount of time. What I do read are the specific portions referred to in the briefs or highlighted in the exhibits themselves. Make it easy for the mediator to follow the evidence supporting your arguments.

About that demand

A very successful plaintiff attorney said that the opening demand should be high but credible. But what constitutes credible? Obviously, that is a case-specific question, but there is one constant: A demand that includes overreaching damages will not be considered credible. Too often I see attorneys falling in love with causation arguments that are at best, thin. They fail to appreciate how those arguments are going to be received by a jury, and what effect that can have on the more solid damage claims. This is not lost on the defense, and it can temper their offers at mediation. It is one thing to include those damages in your brief, but keeping them in the equation beyond the first round or two is usually unproductive.

Acceptable or not, you want to know the highest number the defense would pay at mediation. You will never learn that if you stay at a level that you know is well outside a likely verdict range.

What are they prepared to pay?

While you want to know the highest amount the defense is willing to pay, it is also in your best interest to let the defense know at least the neighborhood of your settlement range. Why, you ask, if the defense will never get there? Well, I learned long ago to never say never in a mediation. I also know that a claims representative is more willing to get more authority if it will definitely settle the case. You do not want to come to your bottom line, and rightly so, without some assurance that it would be paid. One way to get there is to invite a mediator's proposal in your settlement range. If the mediator gets the sense that the defense might agree to that number, then that is one way to go. Practices vary among mediators, but for me it is a move of last resort, and a negotiated settlement is the preferred result.

So how to achieve that when, after several moves, the parties remain light years apart? Let's consider an example. You have a case that you feel has a jury range of $500,000 to $1,000,000. You have advised your client that you would recommend any settlement over $700,000. You started at $2,000,000, which the defense viewed as unreasonable. Four moves later you are at $1,800,000 and the defense just got to

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

$100,000. Both sides are frustrated, and the mediation is in jeopardy. The mediator opines that the defense might get to $500,000 but probably no higher. The defense is not making big moves because the mid-point ($950,000) is too high. You have hinted to the mediator where the case might settle, but your moves tell a different story. What to do?

You have two reasonable options. One is to make a big drop with a message that a move of like kind is expected. If indeed the defense evaluation is $500,000, the response may be disappointing. And it does not tell the defense your settlement range. Option two is to propose a bracket,[1] which would provide that information. Your bracket might be $350,000 and $1,300,000, the midpoint being $825,000. As the mediator, I would encourage the defense to propose their own bracket, assuming they are unwilling to accept yours. The defense bracket might be $250,000 and $700,000, which would reinforce what the mediator thought would be their range.

At this point you could respond with another bracket but that would lower your midpoint without leaving you much room to move. Or you can safely return to traditional back and forth negotiating, having informed the defense where you want to go. You could start at $1,300,000 and see how the defense responds. Is the case likely to settle that day? Probably not unless the defense was keeping a lot in reserve. However, if the mediator thinks your evaluation is more realistic, that allows him or her to work on the defense over the ensuing days, comfortable with the knowledge of what it would take to settle the case.

It often requires patience, and it is rarely a linear process. Negotiations can stutter and stall, and then get back on track. When it appears that an impasse has been reached, both sides may want to get a mediator's proposal. Regardless, you do not want to leave the mediation without knowing what the defense was prepared to pay.

Wrap up

Information is the currency of the mediation process. The better informed the parties, the greater the chance of reaching a good settlement. The element of surprise is a tactic best reserved for the courtroom. Making every effort to educate your adversary and the mediator will pay off in good results and satisfied clients.

Drath

John Drath is a mediator with ADR Services, Inc. in San Francisco, and has conducted over 700 mediations. With 40-plus years of experience defending personal injury and professional liability claims, he is a Certified Specialist in Legal Malpractice, a Fellow with the American College of Trial Attorneys, a member of ABOTA since 1983, and a past president of the Association of Defense Counsel of Northern California.

Endnote:

1 For anyone unfamiliar with this negotiating tool, the proposer is asking the other side to go to one number if the proposer goes to another. The midpoint of those two numbers is generally regarded as the number at which the proposer is willing to settle. It is a form of communication useful when there is a large gap separating the parties.

Copyright © 2022 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

Mediation Is Not the Only Way to Successfully Resolve Your Case: How to Recognize and Capitalize on Other Settlement Opportunities

By: William B. Smith, Abramson Smith Waldsmith, San Francisco, California
Doris Cheng, Walkup Melodia Kelly & Schoenberger, San Francisco, California

I. Introduction

Timing is critical when it comes to settlement. The key to successful resolution is figuring out when the time is right and then what to do in order to maximize the chances of a favorable settlement. The plaintiff's attorney has more control over this than you might expect. Sir Francis Bacon observed, "A wise man will make more opportunities than he finds." But many attorneys are programmed not to discuss settlement until they are in a formal mediation setting, and that is foolish. The following is an analysis of critical stages when maximum settlement can be achieved.

A. Prior To The Filing of the Case.

Claimants now have two years to file suit (unless the action involves a public entity or medical negligence). If the damages can be determined within this period, you may be able to resolve your case early, but an initial consideration is the amount of the insurance policy limits. In situations where the damages exceed the policy limits, a resolution may be very swift. But more often than not, the available policy limits are unknown, as California law does not require such disclosure prior to the filing of a lawsuit. Therefore, you have to use your wits to get this information from the insurance adjuster.

Adjusters routinely respond that they cannot disclose policy limits without authorization from the insured, and they often do not get it, nor do they even try to do it. Nevertheless, they always want information and favors from you as the plaintiff's lawyer. One technique to shift the paradigm is to bargain with the adjuster. For instance, consider sending copies of medical records and other evidence of damages in exchange for the policy limits information. Another consideration is permitting the adjuster to speak with your client (in your presence) in exchange for coverage information. However, never let an adjuster record your client. If the case does not settle, the defense would get "two bites of the apple" with a deposition during the litigation phase. Alternatively, consent to an early deposition with a stipulation that this is the only deposition that will ever be taken, and defendant waives any future deposition as part of any litigation.

Remember that an adjuster has a job to do, too, and if you can befriend the adjuster, it may go a long way either to get your case settled early or increase the reserve the insurance adjuster needs to settle the case later.

Along the vein of getting more bees with honey than vinegar, it is not beneficial to antagonize insurance adjusters needlessly. Relationships are paramount to facile resolutions. Adjusters, who have amiably resolved cases with you in the past, are more likely to settle with you early.

Sometimes you have the luxury of dealing with a very seasoned adjuster who may have worked on other cases you have handled. In these rare cases, consider having lunch with the adjuster to discuss the case informally. This type of situation often leads to favorable settlements and saves everyone a lot of time and money.

The bottom line is that you should keep an open mind about dealing with adjusters. Size them up and always try to get something for everything the adjuster requests. Treat them with respect and you may be surprised at what you are able to accomplish.

B. After A Key Deposition.

Once the lawsuit has been filed, the best way to settle a case is to treat it as if it is going to trial. Develop a habit of propounding form interrogatories, special interrogatories, requests for production and requests for admissions, and noticing depositions of the key witnesses, as soon as you receive the Answer to Complaint. You cannot sit back and hope for a favorable settlement without doing any work or spending any money. Conviction is worthless unless it is converted into conduct. You must convince your opponent that you are prepared to take the case to trial.

Also bear in mind that the defense firm has to bill something to justify its appearance in the case. By the amount of discovery conducted and the amount billed, the defense attorney must demonstrate that he or she has adequately evaluated the case before recommending settlement.

The reality is that cases do not settle until the key depositions are taken. The key depositions are of the defendant, any eyewitnesses, a police officer (if applicable) and the plaintiff. If the defense is taking its time noticing the deposition of the plaintiff, take the initiative and offer your plaintiff up for deposition, particularly if the value of your case is improved by the appearance of your client. It does not matter that your client is not a critical witness to liability. The defense recognizes that the value of a case may increase or decrease depending upon the believability and likeability of the plaintiff. In almost all cases, the defense cannot evaluate damages without meeting the plaintiff.

Do not miss an opportunity to sit down with a defense lawyer after a key deposition to discuss settlement. There is no harm in doing this and you would be surprised how often it leads to an early resolution. For example, your opponent may invite a demand or outline specific things that have to be done to resolve the case, such as a defense medical examination, additional critical depositions, streamlining of remaining discovery, or the informal production of damages evidence that may shortcut things. If you do not consider this approach you may be missing a great opportunity. It is not a sign of weakness to discuss resolution of your case at this stage.

Face to face encounters (and even telephone calls) are under-utilized in this electronic age, where emails substitute as meaningful dialogue. But so much more information is gained by being in another person's presence. Comments that people fear to put in writing may flow more freely in oral conversation, where words seem to disappear into the ether rather than embedded in someone’s hard drive. Without the fear of print and permanence, you may learn how the defense feels about the impression your client made; it may admit problems it has defending the case; and you can get a sense of how serious it is about trying your case. These bits of information are not easily obtained in a letter or an email. Face to face meetings are invaluable and often set the tone for settlement.

Your ability to engage civilly at deposition and during the discovery process will pay large dividends as the defense gauges whether and how to resolve your case. Most of the civility violations occur during discovery and frequently arise during depositions, so be sure to become familiar with the State Bar's Civility Guidelines published in July 2007. They are only “guidelines” thus far and are not rules of court, but the American Board of Trial Advocates and JAMS are making an effort to enact these as official rules of court. It goes without saying that if you do not treat your opponent with respect and dignity, he or she will not want to deal with you openly and honestly so the risks of early settlement will be reduced. No one wants to try to settle a case early with a jerk.

C. At or After A Court Hearing.

It used to be that everyone had to personally appear for a trial setting conference and/or case management conference. With the availability of telephone appearances, that has become a relic of the past. Nevertheless, such hearings are often a watershed moment for the parties to stop and take stock of where the case is going. It is another time for discussion of possible settlement.

If the parties do not appear personally for the hearing, create an opportunity by calling the opposing counsel immediately before or after the telephone appearance, when you know your opposing counsel is sitting in the office.

If the court hearing is in your favor (for example, a summary judgment motion or key discovery motion), treat this as another opportunity to discuss settlement.

The old saying “trial dates and an open courtroom settle cases” is still true. You may find that setting the trial date alone makes people more focused and ready to discuss resolution to save the time and money of expert depositions and trial preparation. However, you may have to wait until

you get closer to trial to be sure that a courtroom is available.

D. After The Key Discovery is Accomplished But Before Mediation

This is what we call informal mediation. It is not ordered; it is not supervised; and there are no briefs. You simply evaluate your case, get the proper authority and make a demand with a good letter with damages verification attached. This demand may or may not be accompanied by a CCP 998 statutory offer or policy limits demand to get the attention of your opponent. You want to use whatever "arrows" in your quiver to put pressure on your opponent to settle the case now and not at some distant future date.

Consider a demand letter that illustrates (visually and photographically) the liability issues, rebuts the defenses and identifies the injuries and damages clearly and completely. The demand letter should always have a reasonable deadline (at least 30 days) for a response. If a CCP 998 accompanies the demand letter, the deadline is statutory.

As to when you should use a CCP 998 offer, opinions vary. The advantages are that, if you beat it, you can claim prejudgment interest (CCP 3291) and post-offer costs (CCP 998 c(1) and can request expert costs. Bear in mind that expert costs are within the discretion of the trial court (CCP 998 c(1)). If you are making a policy limits demand and you have sufficient discovery to support the demand, send a CCP 998 offer.

A disadvantage of a CCP 998 demand is that if you make the amount low enough to insure you can beat it, you take out all of the water in your demand. It may be better to serve a CCP 998 offer after a mediation when you and your opponent have negotiated and you are now down to a demand that you would be willing to try the case against. If so, that should be your CCP 998 offer and you must remember that there are time limitations for getting one served. It must be served not less than ten days before trial or arbitration (CCP 998 (b)). If the offer is not accepted prior to trial or arbitration or within thirty days after it is made, whichever occurs first, it shall be deemed withdrawn. (CCP 998 (b)(2))

Should you make a policy limits demand? The answer is that it depends how realistic it is. If your case is likely to exceed the policy limits, you definitely should inform your opponent that the case is worth considerably more than the available policy limits and that a likely verdict will exceed those limits and expose the insured to personal liability. You should then demand the limits and add that you are sending along a second copy of the letter so it can be transmitted to the insured and any Cumis counsel. This will increase the chances that your offer will be discussed with the insured, who more likely than not will encourage his carrier to pay and be done with it, rather than be exposed to an excess verdict.

If a policy limits demand is made before filing a lawsuit, you should also request a copy of the insured's insurance declaration sheet and a declaration under penalty of perjury from the insured that the policy you know about is the only available policy of liability insurance and that the insured was not in the course and scope of employment at the time of the incident.

Policy limits demands get the attention of the defense because no one wants to risk a result outside the coverage limit. Excess verdicts reflect poorly on the evaluation and trial skills of defense counsel, as well as the judgment of the insurance adjuster; plus, excess verdicts may well create a bad faith cause of action with additional attorneys fees and liability exposure.

Informal mediation is becoming a “lost art.” Prior to mediations, the only formal vehicle for settlement was the court-conducted settlement conference scheduled just before trial. We now have bench/bar mediation panels, voluntary formal mediation and court ordered mediation. There are many other opportunities to resolve a case but too many lawyers overlook informal mediation. It requires person-to-person contact and a willingness to be candid. Again, in this internet age, it seems that few (lawyers and clients) have the conviction to make their word their bond. Many seem to want a mediation setting so that discussions can be held separately in a controlled environment where nothing that is said can be used against the other side.

Of course, formal mediation has protection under Evidence Code § 1119, which seems to be inviolate given recent cases. *See Rojas v. Superior Court* (2004) 33 Cal. 4th 407 (holding that the statute unqualifiedly bars disclosure of specified communications and writings associated with mediation absent a statutory exception); and *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal. App. 4th 865 (the confidentiality of statements made and materials used during the mediation continues after the mediation ends). However, you can accomplish the same result with a stipulation. Simply ask your opponent to agree to an informal attempt to resolve the case with the confidentiality of Evidence Code § 1119, and then cite that in all of your communications. This provides you with the statutory protection of mediation, but without the expense.

In the 1970's and 1980's, before the days of formal mediation, this is how many attorneys settled their cases. This was done by the attorneys agreeing to submit demands and then dealing directly with each other in negotiation by letter or telephone. The most effective method was a face-to-face meeting after a proper demand was made. A personal lunch was popular and resulted in many settlements.

Today, however, many insurance carriers simply do not trust their defense counsel as they once did. It is difficult for defense lawyers to get the authority they need to settle during lunch. Nevertheless, lunch may be a great prelude to future resolution, and both sides learn a lot in the informal setting. Give it a try.

E. After a Formal Mediation.

Mediation is an effective settlement tool, but not all cases settle during the first mediation session. Mediation fails for a number of reasons including incomplete discovery, a new issue, or the fact that it may have been too far from the trial date. A good mediator will follow up with the parties to make every effort to resolve the case.

Use your mediator's help to make the case ripe for further mediation or resolution. Do not be afraid to contact the mediator to ask for help or to explain problems that the mediator may be

helpful in resolving. The sooner you follow up on the things that made the mediation fail, the better the chances that it will be successful. Sometimes it takes time for one side to adjust and/or seriously evaluate a case.

F. After the Depositions of the Experts.

Some cases require expert testimony before they are ripe for resolution. Medical malpractice cases are an example and the same may be true of construction cases and products liability cases. Sometimes the parties will agree to the early disclosure of experts or to conduct an expert deposition prior to the time mandated under Code of Civil Procedure § 2034 in order to posture the case to settle. After a necessary expert deposition or series of depositions, the parties may be able to engage in meaningful informal mediation or re-engage in formal mediation. This is a great opportunity, especially if you have strong expert witnesses.

G. At the Court Supervised Mandatory Settlement Conference.

Of course, this is a logical time and place to settle your case. Trial courts generally assign the mandatory settlement conference within three weeks before trial. You have the pressure of a trial date, you know what your experts will say and you have an indication that your case will be assigned to a courtroom for trial. You need to develop a list of all of the reasons why it would be advantageous to the defense to settle the case rather than try it. This list could include an excess verdict, adverse publicity, increased attorneys fees and unrecoverable costs, exposure to your cost bill and possible expert fees, lack of an opportunity to request confidentiality, lack of an opportunity to structure any resolution, and the likelihood of losing.

If the parties are interested in resolution, an impediment at the mandatory settlement conference is whether you trust the neutral assigned to mediate your case. The Court has the power to assign a judge or referee. Consider whether there is a particular civil trial judge who has a reputation for resolving cases and request that judge. Frequently, the assignment is random, but many courts will accommodate specific requests.

As a general rule, avoid using the assigned trial judge as your settlement conference judge. If your case does not settle, the judge may be predisposed to ruling one way or another based on information gained in confidence.

Alternatively, you can agree to mediate in lieu of attending a mandatory settlement conference. This is an opportunity to flesh out the seriousness of your opponent's inclination to settle the case. Most defense attorneys and insurance representatives are willing to spend money on private mediation at this stage of the litigation in order to achieve resolution. Private mediation with a neutral whom the parties trust to finish the job is a better utilization of resources than appearing before an unknown settlement judge, who has no investment in whether the parties settle or try the case. Courts are amenable to releasing the parties from the mandatory settlement conference, if a mediation is set around the same time as the mandatory settlement conference.

If your case settles at the time of the mandatory settlement conference, be sure to state the terms

in open court with a court reporter present. The settlement is not enforceable under Code of Civil Procedure § 664.6 without the parties' specific consent. Therefore, when the agreement is made on the record, be sure that all parties agree to enforceability under Section 664.6. Also be sure that the parties (specifically each side's client) verbalize their consent to settlement on the record. The settlement is not enforceable without the express consent of the actual litigants. Agreement or stipulation between the attorneys or the parties' agent or representative is not sufficient. *See Levy v. Superior Court* (1995) Cal. 4th 578, 585; *Williams v. Saunders* (1997) 55 Cal. App. 4th 1158; *Davidson v. Superior Court* (1999) 70 Cal. App. 4th 514, 528; *Gauss v. GAF Corp*. (2002) 103 Cal. App. 4th 1110, 1113.

H. At Trial.

Do not overlook the chances of settling your case once you have been assigned to a trial department. Many cases settle with the assignment, after the jury is selected, or after opening statements. Recently, it seems that the defendant waits to the last possible moment to resolve large cases, taking advantage of everything it can until the opportunities run out. Your opponent is often betting on your resolve to try the case or your client's fears about going forward.

Remember that your mediator (if you have one) is always available to assist if the parties reach an impasse. Sometimes this can be accomplished after hours or over the weekend. Trial is unpredictable and you never know when you may be approached for settlement. Frequently, the largest hurdles to settlement during trial are the attorney's emotional investment and ego. You must always keep in mind the best interests of your client. Remember that the major advantages of settlement are still present, e.g. there will be no appeal, costs can be kept down and you can structure a settlement. You still have control over the result, whereas in the hands of a jury, you have no control over the outcome.

Critical moments for settlement during trial are: (1) after the jury is impaneled; (2) following opening statement; (3) after the testimony of a key witness; and (4) before closing argument. After the jury is impaneled, both sides have an idea of whether the jury is favorable or not. There is more information about the major unknown associated with trials - who are the finders of fact. The opening statement reveals the compelling nature of each sides "story." Where the parties may not have envisioned how the other side intended to tie together all of the information, they now can , because the opening statement, if done well, weaves the facts together in such a way that garners sympathy and righteousness. Sometimes, the lynchpin in a case is the untested appearance of a key witness before twelve strangers. Once that variable has been eliminated, settlement is less elusive. Certainly, by the time the case is ready for closing argument, each side has seen everything that the jury has seen and assessed the risk of an unfavorable verdict. Nothing drives action like fear.

I. After Trial.

Even if you get a good verdict, the case is not over. There will be a motion for new trial and efforts to settle the case. You have to assess the chances of a new trial motion and the benefits of post-trial interest which beats any investment you can get today.

Again, your client may be better off settling the case after a verdict to avoid a retrial, to avoid an appeal and to gain control over how the funds are paid.

J. During an Appeal.

If there is an appeal, the appellate courts have an early mediation program and your case can be settled there. The mediation panel is made up of seasoned mediators and they have a good record of resolving cases for all of the reason stated for settling a case during or after trial. The barrier on appeal is that one party got a judgment, and the mediator has to break through this to get the parties to be realistic about settlement. The establishment of harmful precedent, the avoidance of delay, the avoidance of a retrial and the avoidance of appellate lawyer fees, among other things, may motivate resolution at this stage.

Again, it is wise to approach your opponent to discuss informal resolution listing all of the advantages for that.

II. Conclusion

Private mediation is a tremendous development for plaintiffs' lawyers. It is a far better alternative dispute resolution tool than court-ordered arbitration and mandatory settlement conferences shortly before trial. It brings final resolution, and usually, at a much earlier stage which saves fees and costs. However, too many lawyers use mediation as a crutch and wait until the formal hearing to be creative about settlement.

If you approach your cases aggressively and seriously with your eye on a trial, you will settle many more cases than you try. Discussion of settlement with this approach is not a sign of weakness. On the contrary, it is a sign of industry and skillful lawyering. Thomas Edison said, "Opportunity is missed by most people because it is dressed in overalls and looks like work." Look for settlement opportunities at each stage in the development of your case and capitalize on them.