

# **Mediation of Tort Damages**

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# **Contract Damages / Tort Damages**

## **Mediation of Tort Damages**

### **I. Mediation Generally**

#### **A. What is Mediation?**

Mediation is a type of negotiation which is supervised and facilitated by a neutral third party. In the last fifteen years or so, Mediation has increasingly been used in disputes between multiple parties. Before Mediation was widely used by litigants, a significant portion of cases did not settle until reaching "the courthouse doors," if they settled at all. Some attorneys thought it was a sign of weakness to be the first to contact the opposing party with a reasonable settlement offer. The "fear factor" failed to set in with clients (and attorneys) until the Sword of Damocles of the trial was imminent. Mediation was and is a way to get all parties to the negotiating table well before the case is going to be tried.

#### **B. Why Mediate?**

##### **1. In Most Cases: We Have To Mediate**

We must mediate North Carolina State Superior Court cases. North Carolina General Statutes § 7A-38.1 states: "The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated

settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.”<sup>1</sup>

2. With Mediated Settlement Conferences, Most Cases Settle Sooner

Mediated settlement conferences are a good idea even when the parties are not forced there. If the parties and the lawyers are unable to talk, then it can be helpful to have a respected mediator step in and do the things the lawyers are unwilling and/or unable to do. A mediator can help jump start the entire negotiation process, put it on life support or, in the appropriate case, let negotiations die.

People often need their day in court. For some, mediation is a good substitute in the sense that at mediation they have the opportunity to 1) say what they want said directly to the opposing party; 2) hear the other side’s point of view directly from the horse’s mouth; 3) experience a small amount of the pressures that they would face at a trial; and 4) hear other persons’ opinion of their cases and the value thereof. Though a mediated settlement conference hardly simulates the courtroom experience for lawyers, clients do get a fair introduction of what is to come. Many do not like the taste and consequently settle much earlier.

Mediation empowers litigants to take charge of what happens in their cases. The parties can choose their own destiny at a mediated settlement conference instead of letting twelve strangers decide their fate. Even if a settlement is not reached at the mediated

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<sup>1</sup>N.C.G.S. § 7A-38.1.

settlement conference, the negotiation process is started and the mediation experience usually nudges the parties closer to a pretrial settlement. Or, at least, the parties know that they gave settlement a proper chance.

By most accounts, mediation has been widely successful in North Carolina. Not only do most eligible cases settle at a mediated settlement conference months before trial, but many of the ones that do not settle at mediation settle shortly thereafter. Numbers taken from the North Carolina Administrative Office of the Courts show that, in the 21<sup>st</sup> Century, almost seventy-five percent (75%) of mediation eligible North Carolina cases are settled by the end of the mediated settlement conference. I have heard a number of old timers complain that they "do not get to try many cases anymore." I admit that there may be some bravado influencing these comments (implying that the "younger lawyers don't try any cases," that they really want to spend more of their time in trial, and/or that things were better in "the good ole' days"), but they certainly are based in fact.

If a case does settle at a mediated settlement conference, then the parties can avoid the significant monetary and emotional costs of preparing for trial. They can have certainty sooner and can avoid future disruptions to their personal and professional lives.

### 3. Better Trials

Of course, there are a few cases that will always need to be tried (especially if certain insurance carriers are involved), but better to weed the settled cases out earlier so as to have more time to work on the cases actually going to trial. Mediation forces attorneys and clients to look critically at their cases sooner. Consequently, an attorney

can settle the “bad” cases earlier in the process so that he or she may focus on the cases that actually will be tried.

Collectively, if mediated settlement conferences increase the number of settlements earlier in the litigation process, then it is easier for the court system to set meaningful trial dates. Early in my practice, I had a wrongful death case that was about seventy (70) or eighty (80) on the trial calendar in a county near Charlotte. I thought that there was no way that my case would be called to trial. After Monday's calendar call, my case was fifth and I was told by the Judge to be ready. Though we could have tried the case, I am not sure we could have tried it well as I was not mentally prepared to try the case. By Tuesday we were second on the calendar. I lost a lot of sleep that week, but luckily we never got called into court to try the case. Though court calendars still break down, trial dates are a lot firmer now that we are in the mediation era. From a non-statistical look at the age of cases on trial court calendars, it appears that the time from filing a lawsuit to trial has dramatically decreased since the mediated settlement conference legislation passed in North Carolina.

### **C. Pre-Suit Mediation**

There are a number of situations when a pre-lawsuit mediation is appropriate. In rare instances, a client does not believe in suing. I once represented a minister whose father was killed in a car wreck. Due to religious reasons, the minister said that he would not file a lawsuit. We asked the insurance carrier to do a pre-lawsuit mediation and the company agreed. Through the mediation, we were able to present our case and show the

insurance adjuster that my client was a sympathetic witness. Though the case did not fetch top dollar, it did settle in a reasonable range (and at a number that I do not believe would have been possible in traditional pre-lawsuit negotiations).

Before filing a lawsuit, neither side can really know that their opponent has really disclosed all discoverable evidence (not all documents have been produced, the experts have not been deposed, etc.). As such, I do not believe that one with a strong case will maximize their recovery in a pre-lawsuit mediation. The contrary also is true: if you mediate and settle before filing a lawsuit, maybe you can resolve the case before a “smoking gun” argument is learned by the other side.

Many times a bird in the hand really is worth two in the bush. Plaintiffs may need the settlement money immediately. Defendants may need resolution of a case before they can move on to other things. Maybe there are issues not related to money that can be addressed at an early mediated settlement conference.

Sometimes there is enough trust and respect by both sides that a pre-lawsuit mediation can actually resolve a case for an amount similar to a later post-lawsuit mediation or to a jury verdict. Both sides can save considerable litigation costs if they can settle at mediation before filing a lawsuit. There certainly are times when an early mediation can be a win/win situation.

## **II. “The Rules”**

### **A. Court Ordered Mediated Settlement Conferences**

Under the authority and requirement of North Carolina General Statutes § 7A-

38.1, the North Carolina Supreme Court has promulgated rules of North Carolina's official mediation program.<sup>2</sup> Before any attorney begins the mediation process, he or she should read § 7A-38.1 as well as the Rules promulgated by the North Carolina Supreme Court. Many areas also have local rules which may affect the rights and responsibilities of litigants in mediated settlement conferences, so a review of the applicable local rules is encouraged before filing a lawsuit (as is always advisable).

1. Generally

Whether by local rule or following the procedure set in North Carolina's Rules, the Senior Resident Superior Court Judge is required to issue an order shortly after the answer is due. "The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court."<sup>3</sup> It is a good idea, as always is the case, to read the Court's Order carefully to make sure that you understand it

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<sup>2</sup>See Rules 1-16 of North Carolina's *Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*.

<sup>3</sup>Rule (1)(C)(4) of North Carolina's *Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*.

and that nothing has changed since the last order you received. You may have read three hundred virtually identical scheduling orders, but they do change from time to time, so make sure you are ready when a new statewide or local rule is reflected in an order.

2. The Mediator is the Boss

The mediator has the power to control the procedure of the mediated settlement conference (who does what next), interpret the Rules, and force you to stay until he or she declares an impasse. The mediator can not force the parties to settle, but he or she can delay lunch until the case settles.

3. Deadlines

If a deadline must be missed, BE SURE TO GET AN EXTENSION OF TIME from the court. Extensions are usually easy to get as long as you do not delay the trial date. In Mecklenburg County, a number of parties AND THEIR LAWYERS (individually) recently have been sanctioned by a judge appointed by the Resident Senior Superior Court Judge for failing to mediate within the time limitations. These fines included, I am told, cases that had been settled and/or mediated after the mediation deadline but before the date of the hearing on sanctions. Our clients and we lawyers sometimes have difficult schedules, but nowadays a lawyer who does not take mediation deadlines seriously may have a lighter wallet by the time the case is concluded.

4. Who Pays?

We now know who pays if the parties fail to have a timely mediated settlement conference (the lawyers). Who pays for the mediation when it is timely? Unless the



parties agree otherwise, the parties must pay the mediator's fees in "equal shares" due at the conclusion of the mediated settlement conference.<sup>4</sup> "For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally."<sup>5</sup> As an example: if a husband and wife (represented by lawyer 1) in a lawsuit against the driver of a truck (represented by lawyer 2), the owner of the truck (represented by lawyer 2) and the company for whom the truck driver was working (represented by lawyer 3), then husband pays 1/6 (1/2 of 1/3), wife pays 1/6 (1/2 of 1/3), driver pays 1/6 (1/2 of 1/3), owner pays 1/6 (1/2 of 1/3), and the company pays 1/3.

#### 5. "Confidentiality"

It is important that what is said in Mediation stays at the Mediation. For the most part, that is what North Carolina's laws have to say about Court Ordered Mediated Settlement Conferences. Like Las Vegas, however, what is said in a mediated settlement conference is not always confidential. N.C.G.S. § 7A-38.1(l) provides that negotiations in a mediated settlement conference are NOT subject to discovery and are inadmissible as evidence with limited exceptions.<sup>6</sup> It is important to know that the inadmissibility

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<sup>4</sup>Rule 7(F) of North Carolina's *Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*

<sup>5</sup>*Id.*

<sup>6</sup>"Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil

provision does not prohibit discovery or admissibility in other civil actions that are NOT the same claim. Spoilation of evidence, fraud and/or unfair and deceptive trade practices claims come immediately to mind. So destroying evidence, lying, and cheating at a mediated settlement conference are probably bad ideas. It is also important to note that “[n]o evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.”<sup>7</sup> So you cannot hide bad evidence by showing it at a mediation.

Another confidentiality related issue in Mediated Settlement Conferences is the extent a mediator may let each party know what the other parties have said in private to the mediator. A mediator is required to disclose how he or she will treat statements made in private sessions.<sup>8</sup> Usually, a mediator will request that prior to the end of each private session, a party tell the mediator what can or cannot be disclosed to the opposing parties. I make it a practice to tell the mediator that everything said in private session is confidential unless we tell the mediator otherwise. If the mediator then has questions

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actions on the same claim, except: (1) In proceedings for sanctions under this section; (2) In proceedings to enforce or rescind a settlement of the action; (3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or (4) In proceedings to enforce laws concerning juvenile or elder abuse.”  
N.C.G.S. § 7A-38.1(1)

<sup>7</sup>N.C.G.S. § 7A-38.1(1).

<sup>8</sup>Rule 6(B)(1) of North Carolina’s *Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions* mandates that the mediator must disclose the “circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person; and Whether and under what conditions communications with the mediator will be held in confidence during the conference.”

about what he or she may reveal, the mediator will ask us prior to revealing anything we did not specifically authorize.

#### **B. Voluntary Mediated Settlement Conferences - You Decide**

If the mediation is not Court Ordered, then it does not have the same statutory protection as the Court Ordered variety. I strongly suggest that all parties and participants sign a statement that the parties voluntarily subject themselves to the statutes and rules enacted by the State of North Carolina governing mediated settlement conferences in Superior Court Actions. The extent that these statements are enforceable is unknown, but I certainly feel much more comfortable having everyone agree to North Carolina's statutes and rules governing mediated settlement conferences.

Another option is to modify North Carolina's rules regarding mediated settlement conferences in Superior Court Actions or to replace them all together. In any event, it is very important that all parties, participants and mediators who participate in a mediated settlement conference know the rules and have them in writing.

### **III. Pre-Mediation Considerations**

#### **A. Choosing a mediator**

In almost every case, it is a mistake to allow the court to appoint your mediator. Similarly, do not just accept whomever the other side chooses. I have made both mistakes in the past, either thinking "there is no way this case will settle, so why not get the lower court appointed rate" or "I have control of my client, so why not choose a mediator that the opposing side will listen to." Sometimes you will luck out and get a

good mediator appointed at a discount price. Most of the time you will get a mediator that is inappropriate for your type of case or your client. You usually get what you pay for.

There is no way to know why the opposing party suggests a particular mediator. It may be that they are good and appropriate for your case. It may also be because the mediator is friends with someone, or the mediator has an agenda, or the mediator will browbeat one side or the other, or the mediator will disclose to the other side confidential information. Most of us have attended a mediated settlement conference where a mediator appeared one sided, trust broke down very quickly on one side or the other, and negotiations went nowhere.

It is important to select a truly neutral mediator who handles cases professionally and ethically (it is just as damaging to try and get a mediator that is too much “on your side” as trust and respect of a mediator are needed by all parties for an effective mediation). Do your homework and choose a mediator that gives the process the best chance to be successful. Some mediators will more openly share their opinions than others and/or assist in evaluating the merits of the case. If you do not know a mediator, check around with other members of the Bar the same way as you would when facing an unknown judge. Only suggest fair and qualified mediators.

**B. When to schedule the Mediation?**

This is a very hard question. We have already discussed when pre-lawsuit mediated settlement conferences are appropriate and most of that analysis also fits in

choosing an early court ordered mediated settlement conference. How early or late to schedule a mediated settlement conference depends on the circumstances of the case. Many mediators and lawyers have active trial schedules. There are clients from all sides that are tough to schedule. If you have one or more participants that you know will be a problem, then set up the mediation early.

An early mediated settlement conference also is a good idea when you anticipate multiple conferences in the same case. Large and/or complex cases may need multiple conferences just to define the issues. If you are dealing with a procrastinator or someone who you feel has not given the case the proper weight and you may want to force your opponent (lawyer or client) to work on the case, then schedule it early. Put the case on their radar and make them reevaluate the case early so that subsequent negotiations will be fruitful.

Do not anticipate settlement, however, if the mediated settlement conference is too early. Your opponents rarely settle based on what you say. You can only get good settlements when your opponent sees that you can prove what you say. In most cases, make sure that each side has had the time to do some meaningful discovery.

If someone postpones a conference, verify in writing who postponed it and why in case you have to explain to a judge why the parties failed to mediate in a timely manner or if you need to make a motion for sanctions for one of the party's failure to attend.

**C. How long will it last?**

Most mediated settlement conferences last between four and eight hours. The

longest single conference that I attended started around 9:30 am and ended sometime after 2:30 am the next day (about 17 hours later). The case was a will contest and we all knew it would be difficult mediation (it was like a nasty divorce case, except it involved three siblings, their mother the first wife, and a wife from a second marriage). The case did not settle at the marathon conference, nor at a subsequent conference. It did settle prior to trial and I am convinced that the case would not have settled without the mediated settlement conferences.

The tendencies of the attorneys and mediator should be taken into account. Some attorneys and/or mediators are known for dragging these things longer than others. Other mediators schedule two mediated settlement conferences (or even three) per day. There are certain insurance companies and corporate defendants that have a reputation for not budging - ever, so do not count on staying for long with them.

Be careful scheduling afternoon appointments if you have a morning conference, as you and your client are subject to sanctions if you leave before a mediator gives permission to do so.

**D. Where to hold the Mediation?**

Some attorneys think tactically about where to hold the mediated settlement conference. They want to hold it at their office so that their clients (or themselves) are more comfortable than their opponents. I suggest that this kind of thinking is counterproductive. If the facilities are appropriate and reasonably close, then have the mediation at the appropriate facilities without considering if it is your office or not. I can

think of one exception: make sure to have the conference at your office if there are things there necessary to your presentation (technological, location of evidence, size or number of conference rooms, etc.). Do not schedule a conference somewhere that does not meet your technological needs, nor should you schedule a conference somewhere that you have not had sufficient time to test the facilities (i.e. do a dry run of your presentation). Do NOT take the word of anyone that their facilities “can handle it.” They may think it can, but they may not really know what you need. I have heard lawyers complain that their very expensive video presentations were “sabotaged” by not checking out the promised capabilities of a conference location.

If none of the attorney’s offices is sufficient, there are other places to mediate. Most mediators like to hold conferences at their offices. There are available facilities at many of the courthouses, especially in larger districts.

There are times you may want to schedule a mediation at a particular location because the actual site has meaning. I had a case where my client alleged that a blasting company caused his home to start to crumble. We sued five or six defendants, who all said the blasting did not occur, and if it did, it did not cause any damage. My client was a very nice old widower who lived in a neighborhood of elderly people. We had the mediation at his house. During my presentation, I took all of the lawyers and their clients around the outside of the house to show them the actual cracks. I also offered to bring the neighbors (sweet little old ladies) over to tell how their china fell from the cabinets the day of the (according to the blasting company) non-existent blasting. The corporate

defendants and their lawyers decided from my client's living room to offer us a substantial settlement while my client and I sat drinking lemonade in his carport.

We almost had a mediation at another client's house, because that client was unable to leave his bed without an ambulance and paramedics. I imagined in my head how the defendants who caused his condition would downplay his demands while hearing his ventilator whooshing in the background (there was nowhere in the house where you could not hear the ventilator). In the end, we could not fit everyone at the house, but we did make the client available via a two way internet camera and microphone (really not as expensive as you might think). Let's just say that having our client visually and auditorily available was key to obtaining a nice settlement.

**E. How many Mediated Settlement Conferences to have for one case**

If a case is substantial or complex, you should count on multiple conferences. As discussed above, you should be ready for multiple conferences should you decide to schedule an early (premature) conference.<sup>9</sup> If a case cannot support it economically, then do not consider more than one conference unless you have a very good reason otherwise.

**F. Attendance**

“The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference

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<sup>9</sup> See Section III(B) above.



unless excused...”<sup>10</sup>

1. Excusing Parties from Attendance

What do you do when counsel for one of the opposing attorneys calls you and asks you to excuse a defendant from attending the mediated settlement conference? The quick response is probably to say “ask the mediator, only he can excuse a party.” This answer works for about one hour until the mediator and the opposing attorney are on a conference call asking you again if it is OK for the defendant to miss the conference. During the years of my practice I have answered absolutely both ways. At first, I always agreed to excuse parties, but then after a few years, I always refused. Now, I generally refuse, but I will listen to a good excuse and a good reason why the failure to attend will not adversely affect the possibility of settlement.

I do allow, and even request sometimes, that parties be excused from attendance when they have no authority to settle, but may upset my client or the process. Individual defendants in personal injury cases with adequate insurance coverage immediately comes to mind. I cannot for the life of me understand, but there are times that individual defendants rudely demand that their insurance company not settle or otherwise insult my client. I once requested of a seventeen year old boy who molested my four year old client at a daycare center not appear at mediation. The attorney for the insurance company insisted that he had a right to be there. The mediator did not excuse the defendant or my

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<sup>10</sup>N.C.G.S. § 7A-38.1(f).

client from coming to the conference. As it turns out, I asked the mediator to keep my client and her family in a separate room while we had the group session. Sadly, the tactic worked to a degree as my client's family was so troubled at being so close to the defendant that they agreed to a settlement which I believed was unfair.

## 2. Phone Attendance v. Available by Phone

As mediators and courts have become more strict in enforcement of sanctions against parties who fail to attend conferences, attorneys have begun to request that their clients (usually the insurance adjusters or risk managers) "attend by phone." Most of the time, you will later find out that they mean they will be available by phone if someone wants to call them. It is amazing how many times the mediator and/or the other attorney gets sent to voicemail when they call. Unless you are ready to excuse someone from attendance outright, DO NOT allow a party to be "available by phone."

Attendance by phone (the party is on the speaker phone the entire mediated settlement conference) can work in some cases. It comes down to balancing how important a party's personal attendance verses how important it is do get the mediation done (or what you can bargain against personal attendance). In any event, even attendance by phone is far from ideal and should be avoided, if at all possible.

## 3. Attendance of Non-Parties

Make sure that all of the people who are necessary for the case to actually settle attend the mediated settlement conference. If a husband cannot or will not make a decision without running it by his wife, then, in most cases, you should make sure the

wife attends the mediation. The same reasoning applies to parents, children, business partners, life partners, best friends, experts, consultants, structured settlement agents, lawyers (do not send an associate that your client does not know or trust) or anybody else that may make (or help make) decisions for your client. The opposing parties and mediator should not learn of the possible attendance of non-parties at the start of the mediated settlement conference. As a matter of professional courtesy, ask the opposing parties and the mediator for consent for the attendance of non-parties. Conversely, you should almost always allow the requests of opponents for the attendance of persons who might assist them in making decisions at the conference.

There are times where non-parties can create a problem. For instance, if your client does not want their spouse to attend due to personality or anger issues, then you should listen to your client. A person can be close to your client, but not helpful in focusing on the issues at hand. If these persons are necessary to your client's decision making, try and elicit their opinions before the mediation. Spend all day the week before the conference to get them to assist your client in finding his or her "bottom line" (or "top line" as it may be). Anyone who will disrupt the mediated settlement conference is best left at home.

#### **G. Knowing the Rules**

Other than knowing the statutory, regulatory and local rules governing your mediated settlement conference, it is important to know the ground rules for each individual mediation. Usually there will be some type of conversation between the

attorneys and the mediator prior to the settlement conference. If you want to have special procedures for a settlement conference, discuss them with the attorneys and the mediator prior to the mediated settlement conference. For instance, I have had a case where the only sure fire way to have the case not settle was to put the parties in the same room together. I requested that the parties stay isolated. It turned out that opposing counsel agreed and the case settled at the conference. I have heard of other cases where attorneys requested the settlement conference be held at the courthouse so that one of the parties would have to go through a weapon screening devise.

#### **H. Pre-Mediation Statement**

*Ex parte* communications with the mediator are permitted. The mediator is not a judge nor a jury. No decisions regarding the outcome of the case are decided by the mediator. As such, as long as these communications are disclosed, there are no rules against private communications with a mediator. I strongly suggest that all *ex parte* communications be balanced. In other words, when the mediator tells the parties that he or she spoke with one side, he also will be able to say that he discussed the matter with the other side as well.

To some extent, pre-conference communications are necessary. The mediator must have a general knowledge of the parties (for conflicts checks), facts and issues of the case. In simple cases, a mediator can learn almost all he or she needs during the initial presentations at the mediation. In more complex cases, however, it is a good idea for each party to provide a short memorandum of their view of the facts and issues in dispute

(or more importantly those facts and issues that are not in dispute). At a minimum in complex or unusual cases, a mediator should have the pleadings to review prior to the mediation.

#### **IV. Preparing for Mediation**

Preparing for a mediated settlement conference is hard work. Considering most cases settle by the mediated settlement conference, this phase of litigation may be more important than the trial. Complete your case analysis before the mediated settlement conference so you can properly evaluate and present the case at the conference. If, after reading this section, you think you need to be ready for trial by the time you mediate the case, then you are right. No attorney can know how to evaluate and present his case at a mediated settlement conference if he has not thought about how the case might be tried.

##### **A. Prepare Yourself**

###### **1. Facts**

Know your facts backwards and forwards. There is really no excuse for an attorney not being well versed in all material facts of a case by the time of the mediated settlement conference. You do not need to present each fact, but keep those facts ready to use in the negotiations.

###### **2. Legal Issues**

Ideally, most of the major legal issues crystalize before you file a lawsuit. Make sure that you have thought about the claims and defenses of your opponent AND have all pertinent legal research completed well before the mediated settlement conference. Be

ready to produce key statutes and case law at the settlement conference, if not beforehand.

### 3. Evidence

Try to review and organize all of the relevant evidence early in the case. Prior to the mediated settlement conference, hone in on just a few pieces of evidence that will help prove your version of the facts and will help win the legal issues for your side.

### 4. Witnesses

Know who your best witness are and be prepared to reveal what they have to say and how they will present themselves. In the best world, you will have interviewed your witnesses (and possibly even videotaped the interview). I have never tried this myself, but some attorneys will bring key lay or expert witnesses to the mediation settlement conference. At the very least, be prepared to summarize what key witnesses would testify to at trial.

### 5. Case Value

Properly evaluating your case is imperative to fruitful negotiations. You should first identify each element of damages and give values for each element, and then add the total amount together. Next, try to make an educated guess as to a realistic range of probable jury awards. Compare your numbers with other jury verdicts and settlements in similar cases in your jurisdiction. Evaluate the worst case and best case scenarios at trial regarding damage awards. Use this analysis to come up with a reasonable range of probable jury verdicts if the plaintiff wins on liability. Do not forget to have your analysis include aggravating factors which will motivate a jury to “punish” the defendant

(for driving drunk, punching the foreman as defendant walked off the job, etc.).

After estimating your damages' range, try and identify what weaknesses exist in the plaintiff's case. Try and establish a probability of success for the plaintiff on liability. Discount your damages' range by the likelihood that the plaintiff may lose liability so that you can come up with your suggested reasonable settlement range.

6. Establish Your Recommended Bargaining Strategy

If you ask one thousand lawyers how they bargain, you will probably get one thousand different answers. I usually try to come up with the highest (or lowest if I represent the defendant) number that I can say with a straight face to a jury. This is usually the number I suggest my client offer first at the mediated settlement conference. Ultimately, I know that my client will pressure me to increase (or decrease if I represent the defendant) that first offer. Regardless of what the number is, you should have some rational reason for how you came up with the number no matter what the client says. You should also have in mind what your client's "walk away number" should be as well as a strategy for working from your initial offer toward your final number. No matter how you choose to bargain, make sure you have a plan.

**B. Prepare your client**

Tell your client what to expect at the mediated settlement conference. Let your client know the personalities of the individuals involved (to the extent that you know), where the mediated settlement conference will take place, what a mediated settlement conference is for, what the mediator's role is, the procedure and order of presentation,

what the mediator will tell them in the opening statement, what will happen after the group meeting, and everything else you anticipate may happen at the mediation.

Enlighten your client as to what the opposing side's arguments will be. Play devil's advocate so that your client can understand what the other side may think about the case. I find it useful to cross examine my client so they will not be surprised at what their opponent may say. They will never agree with their opponent, but they may understand how their opponent (wrongly, of course) came up with divergent positions. Do everything you can to help your client resist letting anger take over their reasoning ability at the mediated settlement conference.

Prepare your client for when and how often they will be required to speak, especially in the opening session. If you are going to let your client give a statement, refine their comments and rehearse them over and over. Explain to them to always maintain their cool (avoid anger and bad body language) and to always think about what they are saying (especially during mediation small talk). Let them know that loose lips sink ships and good settlements.

A person who is able to clearly recognize what he or she wants and needs will do better in negotiation than a person who does not know what he or she wants. I like to play a game with my clients to ascertain their gut reactions to settlement amounts. I tell the client that I will tell them settlement offers and ask them to quickly say whether they will accept the number. I start real high and real low until I have reached the amounts that are hard for the client. Then I have an idea where their true initial expectations are.



In my experience, clients are reluctant to tell you their true expectations as to the amount of money they think should settle the case. The clients want to wait for you to tell them. This does not mean that they will like what you have to say. Once they hear you start with numbers that do not match theirs, they will tune out everything you say regarding how you arrived at your numbers.

For instance, with a defendant in a \$50,000.00 +/- case, you may ask how they would feel about paying \$1,000,000.00 to settle the claim. They will be offended and say some cuss word and “no.” Then you say, “how about settling for \$1.00?” They jump out of their seat to say “yes.” You continue until you put out a number like \$30,000.00. The defendant will say “well... I might be able to pay that much.” When you get to the “I don’t know numbers” (like \$35,000.00 in our example), you will know you have hit your clients gut range. This number is not usually a realistic number. It just shows you how much work you have to do to help your client arrive at a more realistic number.

Manage your clients expectations. Use the client’s gut settlement amount and work backwards from their number, using the case value analysis in IV(A)(5) above in reverse. With plaintiffs, there is usually money left over after you have subtracted all other damage element values. With defendants the number ends up negative. Both plaintiffs and defendants tend to view the case values unrealistically. It is your job to work with them to have them come up with a reasonable settlement range.

After your “cross examination” of the client to bring them to the real world, educate them about how you analyzed their case’s worth as well as your proposed

negotiating strategy. Make sure that your client is on board with your negotiating strategy before the day of the mediated settlement conference. Do not wait until the mediation to let “the process” decide where your client wants to go in negotiations and how long it will take to get there.

**C. Prepare your opponents**

As with your client, managing your opponents expectations is key. If a plaintiff walks into a mediated settlement conference and demands two times a reasonable amount and ten times what the defendant expected, then the defendant may shut down, ruining any chances for meaningful negotiations. Prior to the mediated settlement conference, try to give opposing counsel a clue as to which settlement universe you will be located.

After the gasps and righteous indignation, rationally explain your positions on the issues, give your adversaries what they need to properly evaluate the case, and, if possible, give your first offer before the day of the mediated settlement conference. It is especially important to let insurance or corporate opponents have the time (and ammunition) to set their reserves and to obtain the proper authority to resolve the case somewhere in your settlement universe.

**D. Prepare for your Presentation**

Make sure that you match your presentation to the size and complexity of the case. In small cases, we usually put together a small notebook of key evidence, exhibits and charts with a table of contents with tabs for quick access to each exhibit. This helps the attorney stay organized and focused on a short but efficient presentation of the case. A

well prepared client may wish to make a short statement as well.

In larger cases, we sift through every possible way of presenting our clients cases, using anything that will make our positions real to our adversaries. In wrongful death cases, it is essential to watch all of the home movies for clips which will illustrate the plaintiff's relationships with his or her family. Even more powerful can be an audiotape of the voice of someone who has died. In one wrongful death mediation, I dumped on the conference table the contents of a "Santa Bag," which had been stuffed with hundreds of condolence letters and cards. After we settled, the insurance adjuster told us that she read the cards during the down time of the conference (sometimes it make sense to leave your exhibits in your opponents' conference room during closed sessions).

"Day in the life videos" which show how a plaintiff's life has been complicated by their injuries are also effective if well thought out and not too long. Blow-up copies of key documents or pictures work well as long as there are not too many of them. Some attorneys make very good Powerpoint presentations and project everything from their computer onto a large screen. I have made extensive use of videos which integrate (hopefully into a story) pictures, videos of the parties, video clips of witness statements, deposition segments (video and/or transcripts), television or radio coverage, 911 tapes, and anything else which helps communicate our case. One of our clients was unable to play the saxophone due to injuries from a chair collapsing at a restaurant. We used clips from when he performed, including a take from The Tonight Show with Johnny Carson. A few minutes of his performances on videotape meant much more than a few hours of us

telling the defendants how good a musician he was. In another case, we took the audio from a minister's sermon which ended with him singing with the choir and played it while footage from the wreck showed on the screen (music can work if there is a reason for playing it– I am not a big fan of having music there just for music's sake).

An effective presentation takes planning, preparation and hard work. One that is thrown together and not thought out is worse than no presentation at all. Take the time to ensure that nothing is included in your presentation that is not necessary. Treat it like you are supposed to pack for vacation: Start with everything you might want to include, cut it in half, then cut it in half again. Keep it interesting and short. Once you have lost your audience, you are harming, not helping your chances of settling. It does not need to be slick; in fact, avoid slick like the plague.

## **V. The Mediated Settlement Conference**

### **A. General**

#### 1. Tailor

Always tailor what you do at a mediated settlement conference with what you do best. Are you a big picture thinker or better with facts and figures? Do you logically go from one idea to the next without overlap or are you better at integrating multiple ideas into one discussion? Tailor your mediation plans with your strengths in mind. As always in the practice of law: be who you are and do not try to be someone you are not.

#### 2. Adversarial Attacks?

Try to stay away from personal attacks. It is inevitable that when discussions veer

toward attacking the individual rather than the problem, the plaintiff's demands go up and the defendant's offers go down. It is hard enough to get the parties to see the other side. It becomes impossible when an opponent has become even more defensive after being the recipient of a unfair blast. Be easy on the person and hard on the issues. Always treat every participant with respect and courtesy. Stay away from threats and ultimatums unless you are absolutely ready to follow through. Never say you are going to walk away from negotiations unless you are really walking away. Either you will get your way as you walk or you may lose all chance of a possible settlement you can live with.

3. Letting your client speak (or Not)

If your client makes a good impression, let him talk if he wants to say something. If the client makes a great impression, make him talk. If your client is particularly nervous, long winded, angry, or really does not have much productive to say, then do not let him say a word past hello. In any event, be sure to spend the time preparing your client for whatever they do or do not say.

4. While the Other Parties Speak

There is nothing more embarrassing and destructive to a mediation than a client who cannot control themselves at a mediated settlement conference. Clients (and attorneys) who roll their eyes, sigh loudly, interrupt, continuously rub their injured body parts, or otherwise act rudely are like scraping a nail across a chalkboard. This is especially true if they are rude while others are speaking. Some clients feel like people will think the client agrees with a speaker if the client does not show his or her

disapproval somehow. Usually it has the opposite affect at a mediated settlement conference: the speaker usually gets upset and does not want to deal with the rude client. It sets the wrong tone from the very start of the conference and can torpedo the process before it has begun.

**B. Presentation by Plaintiff**

1. Dog and Pony Show?

To go all out or not? A lot of the decision depends on the complexity and size of the case. Every medical malpractice case should be large and complex enough to put on a reasonably timed production. A \$10,000 claim on a promissory note probably does not merit much sizzle. I do think that a plaintiff needs to take this opportunity to show that his or her counsel is capable of presenting the case in a way that jurors understand and will respond to. Similarly, this may be the only time the decision makers for the defendant will see plaintiff's points without the shield of defense counsel. As we were walking out of a mediated settlement conference, an insurance adjuster stopped us at the elevator. He said that he wanted to accept our last offer. The defense attorney was behind the adjuster saying "this is against my advise." We settled because the adjuster saw something in our case that the defense attorney could not see. This really is a true story and I can think of none better to illustrate the point that a mediated settlement conference may be your only shot at directly convincing the person with the pocketbook to pay a reasonable settlement. Do not trust that the defense attorney (or plaintiff's attorney for that matter) is willing or able to communicate your client's position as well

as you.

2. Keep in mind:

Do not ambush defense counsel with a three hour presentation with all the bells and whistles when he has prepared for a two minute speech. Let the attorney know ahead of time (to some degree) what you plan on doing. The defense attorney can be an ally in pulling a reluctant defendant toward a reasonable settlement. An embarrassed attorney may end up trying to discredit what you have done in order to save face with his or her client. Similarly, limit your presentation to (as much as possible) a nonpersonal, respectful, and professional explanation of your version of the issues involved. You want to move your opponents toward your world view, not move them away in disgust.

**C. Presentation by Defendant**

1. Dog and Pony Show?

In my opinion, a defendant (especially in personal injury cases) should have their attorney pull out all of the stops in three limited scenarios: First, in those cases that are so complex that a detailed presentation is necessary to understand the factual and legal issues; second, if the defense has a difficult to understand affirmative defense or claim; and third, if the defendant has no real intention of making much of an offer of settlement.

In my opinion, the best defense attorneys will usually tell the plaintiff some version of this presentation: “You seem like a very nice person. We are sorry that you have been harmed. The legal system only compensates plaintiffs under certain circumstances. [The Plaintiff]’s case does not fit these circumstances. We know that

there is always a chance a jury may decide otherwise. We genuinely want to settle the case today, so we are here today to offer real money.” Generally speaking, the shorter and more sincere the defense opening presentation, the better. More pointed attacks can be presented by the mediator in closed sessions.

2. Keep in mind:

Defense attorneys should never personally attack the plaintiff at a mediated settlement conference. An attorney will never convince a plaintiff that the plaintiff has done something wrong. It just does not happen. Personal attacks just anger and tighten-up plaintiffs, lessening the chances of a settlement.

**D. Rebuttal**

Each side has a chance to respond to their opponent’s presentations. I usually refrain from another presentation on how the other side is wrong. I usually use the mediator to respond to my opponent’s presentation. Wait until a private session and tell the mediator your responses and let the mediator decide what to do with them.

**E. Discussion**

If I can refrain from “cross examination” mode, I may ask a few questions about what the opposing party’s counsel has said. These questions should only be used to find out answers, not to prove a point. If all lawyers decided to interrogate each other at mediation, no mediated settlement conference would ever end.

**F. Responding to Mediator’s Questions**

If I have confidence in my client’s ability to respond in a positive, respectful and



brief manner, I allow him or her to answer the mediator's (or even the opposing party's) questions. This can be a good time to show how well your client will be perceived by the jury at trial. Or it can show what a jerk your client can be. If I am at all concerned with what will happen, I will quickly tell the mediator that we will respond to his or her questions in the private session.

**G. During the “Break Out”**

After the group session, a mediator will probably separate the participants into separate rooms. The mediator will then bounce back and forth from room to room. Usually this involves each side giving their whole (down and dirty) version of the parties and the case. After working through preliminary issues and questions each side may have, the mediator at some point starts to take numbers back and forth (in 99% of mediated settlement conferences). This is when you implement the negotiation strategy you prepared before the mediation.

You should hold some points or evidence back to drip out when the opposing party has declared they have gone as far as they can go. Give them a reason to change their mind without looking like they are going back on what they said. It is not usually a good idea to hold back major evidence. Don't drop large bombs at mediation unless you are planning for multiple conferences.

**H. Get That Agreement in Writing**

You have spent hours negotiating and now you think you have settled. Don't believe it until everybody has signed the paperwork. Get as detailed as you possibly can

in your written settlement agreement and have it signed by as many people as possible. Many times you will find out that the terms of the written agreement open up a whole new mediation. Take the time to get the agreement in writing before you leave or you may have wasted your time.