Mediating a Trucking Case

Empathy, Aggression and Getting the Job Done

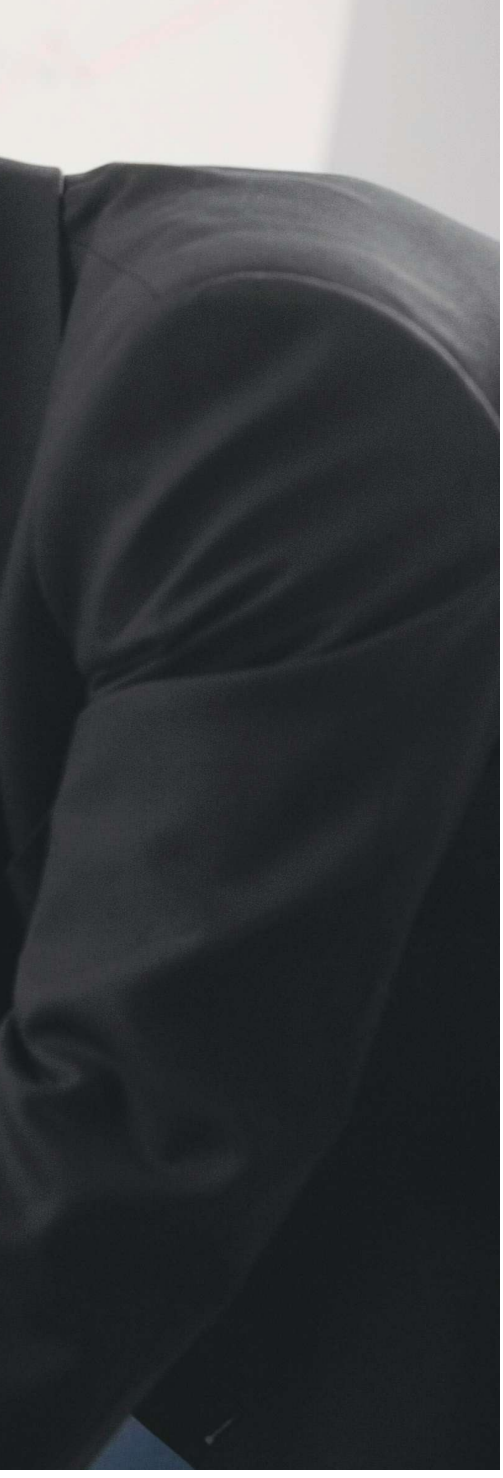
By Ryan McGee and Brian J. Hunt

For larger trucking cases — for which the details will receive more attention and the stakes are higher — mediation is often the best route to resolution. The principal benefit of resolution through mediation is the elimination of the uncertainty, including additional attorney time, expense, distraction from business affairs, judicial rulings, witness performance, and, of course, a jury verdict. All of these uncertainties disappear upon reaching a mediated resolution.

Mediator Selection

The most important decision to be made — once the parties have agreed that a case is ripe for mediation — is the selection of the mediator. The presiding judge may be a suboptimal choice depending upon his or her skill in that area and the potential to prejudice future rulings. Similarly, a retired judge, who must have been decisive and willing to tell the attorneys what must be done may also be a suboptimal choice. The best mediators are often former plaintiff or defense practitioners who have gained the trust of both sides of the bar and have substantial ingenuity and patience. The best mediators will avoid any conduct or comments that embarrass any party or their counsel.

Furthermore, it is wise to remember that the defense side may well be inclined to see mediation as a simple business solution. However, for



the injured plaintiff or their family member, this mediation likely will be their only time through the process. Accordingly, a mediator who can talk the plaintiff through the process and, perhaps, be willing to explain the weaknesses, as well as the strengths, of their case which plaintiff's counsel may be disinclined to do is a good choice.

Timing of Mediation

In conjunction with mediator selection, the timing of mediation — in terms of the likelihood of success — is critically important. The process of information gathering, and the time and expense required to obtain additional information, play a huge role in the success of the mediation. Knowledge of the occurrence facts as well the claimed injury will likely grow with time and either the informal exchange of information or through typical discovery channels.

Perhaps the single largest exception, on the damages front, is a death case where the decedent's age, earnings, decedents, and survivors can often be readily ascertained. A death case for which liability is either clear or can be readily assessed, may be an excellent case for mediation even before suit if filed. However, in the more typical case, meaningful information will be gained by both parties as discovery progresses. Both the plaintiff and the defendant will know when they have collected sufficient information to proceed with the mediation.

The initial starting point for the investigation and analysis will be the police report, any photos and witness statements. The disposition of any traffic citations, including whether the recipient pleaded guilty or stipulated to the facts, will also loom large in the liability analysis. Given modern technology, the presence or absence of cell phone data or other first-party or third-party recordings of the event or the surrounding time interval will be important, such as "black box" data, in-truck or third-party surveillance footage and any satellite (or similar) trucking data. The results of any driver drug test need to be known, and the plaintiff will want a disclosure of any applicable insurance.

The defendant, and very often the plaintiff too, will want a complete set of the plaintiff's pre-occurrence and post-occurrence medical and employment records. The medical records are crucial to assessing the existence of any pre-existing condition, causation, whether the plaintiff has reached maximum medical improvement, the extent of any residual injury and any recommendation for future surgery (and particularly the costs associated therewith). In that regard, the defense counsel will also likely want a complete set of the medical bills, as well as sufficient information to ascertain how much of those bills have been paid, and by whom. Parties must have as much of this information as possible to proceed with the mediation.

Two other topics that should be considered before deciding when to proceed with the mediation are — the opinions of any liability or medical experts and the version of the occurrence and general appearance of the parties. Both of these factors must be balanced against the likelihood of any early resolution. Careful consideration must be given by the defense to the retention of liability and medical experts. Defendants must consider the necessity of physician depositions in advance of mediation. Whether the defense will decide to reveal the identity or opinions of the experts, a review of the medical records by a competent and reliable defense medical expert can be valuable in the early stages and may obviate the need for treating physician depositions or sharpen the questioning during any necessary treating physician depositions.

Similarly, juries often decide cases based on which party they most like and believe. Accordingly, counsel will want the opposing party depositions before any mediation. Whether additional discovery is warranted will depend on the facts and circumstances of each case, including the economics and the perceived likely return on additional discovery. The crucial factor is whether *both* parties are in a position to meaningfully negotiate the case.

Mediation Preparation

The two largest components of

mediation preparation from the defense perspective are:

- A reasonably complete evaluation of liability, verdict potential and settlement value that accounts for the identified uncertainties and leads to a conclusion of the maximum amount to be paid to settle the case at that time

- A strategy shared by client and counsel with respect to mediation negotiations. Defense will want to make sure that all significant stakeholders will participate in the mediation. Similar inquires may be made regarding any Medicare involvement.

Mediation Conduct

Whatever the sequence of events, parties should not proceed to mediation until a settlement demand has been received. It is hard to justify the time and expense of mediation if the defense does not know the plaintiff's starting point. Perhaps more importantly, a settlement demand will indicate plaintiff's willingness to conduct meaningful settlement negotiations.

The party representative or insurer representative should attend the mediation. The mediation will likely be the first mediation the plaintiff has attended. The plaintiff likely wants to feel that she has had "her day." If possible, the mediation should be scheduled to begin in the morning to allow for a full day. Allowing time for the process to work greatly increases the likelihood of success. Opening statements at mediation have nearly become extinct. To the extent that mediators allow such statements, they often do so to permit the plaintiff's attorney to appear that he is doing his job. Defense counsel must assiduously avoid in any such statement any incendiary rhetoric. The defense ought not to kill the spirit of cooperation. The best defense opening statement is likely the briefest with reference to the fact that no one intended the harm. The defense must also consider the benefit of an apology, or a sincere expression of sympathy, particularly in the wrongful death context. Of course, settlement discussions are confidential in virtually every jurisdiction so such a statement can be made without fear of future use.

If the defense deems it necessary, perhaps because a topic has been raised by the plaintiff, defense counsel may point to the areas of disagreement and set forth the defense position. However, in no event should the scope of defense counsel's comments exceed the scope of those of plaintiff's counsel, and defense counsel's rhetoric should be decidedly more conciliatory than whatever plaintiff's counsel has said. After all, his client is new to this arena and client and counsel may feel the need for plaintiff's attorney to do a bit of table pounding. In addition, drawing attention to helpful facts can also be communicated later through the mediator. Whatever comments defense counsel does make are best concluded with the sentiment that they are here to negotiate in good faith. Lastly, any important terms, such as a confidentiality proposal, are best raised early.

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During the conduct of the negotiations, the presence of experienced trial counsel and an expressed willingness to try the case are irreplaceable. Whether the defense wants to settle the case or not, the optics matter. The presence of defense counsel ready, willing and able to try the case will lead to the best results. Trial skills and an established track record count. Experienced trial counsel will have the capacity to listen closely to plaintiff's counsel and to the mediator and address whatever arguments or facts they may raise. Along those lines, the ability to discern who is driving the settlement discussions, whether the plaintiff, her attorney, a spouse or another family member, is important to tailoring persuasive defense arguments and negotiation strategy.

At some point in the negotiations, clarity will likely arrive as to whether the case may be settled on that date. In the event that settlement cannot be achieved, the defense will want to decide in advance how much they want to leave on the table before departing. Not infrequently, allowing those dollars to hang before the plaintiff will ultimately lead to a settlement.

Mediation Aftermath

In the event that the mediation has been completely successfully, defense practice after the mediation will focus solely on obtaining documentation of lien resolution, obtaining an executed release and ensuring that the case is dismissed with prejudice. On the other hand, a mediation may well be regarded as successful if it has either set the table for further settlement discussions that will resolve the case or if the defense has put forth an offer at or near the point at which the defense believes the case ought to settle.

Effective mediation requires detailed and thoughtful preparation, as well as an appropriate mixture of empathy and, if necessary, aggression during the course of the mediation. No size will fit all. The best settlement is one where all parties walk away unhappy.

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