



2018 Construction Conference
September 26-28, 2018
Chicago, IL

Making the Most of Mediation – 90+% of ALL Cases Settle!

I. Mediation Brief Dos and Don'ts

Start the panel discussion off by going over Confidential Briefs vs. Nonconfidential Briefs – More intimacy, transparency, trust with the Mediation, and why this will move the ball faster. Disclose the importance of opening demand in the brief. Present examples of an effective mediation brief vs. examples of ineffective mediation brief. Explain to the audience how much of an impact a brief makes on your evaluation of the case. We will also discuss once reading a brief, how much of your mind should be made up regarding the settlement value of the case. We will discuss how often we see a realistic opening demand or order in a brief and go into detail about anchoring. We will determine what is more helpful in anchoring – an inflated demand/offer vs. realistic.

Strategy at Mediation

Discuss our typical routine for our strategy at mediation. This includes thoughts such as which party do you let speak to first and why? Go over the pros and cons of joint sessions. When should you use joint sessions and when you should not. Your strategy should also include what you are looking for from counsel when you decide to hold a joint session. Strategy/themes at mediation – evidence and demonstrative visual. The points that you are going to try to convey in your initial conversation with the mediator should also be included in your strategy. Passion; emotion; belief in case; as well as trial preparedness – exhibits; photos: cross-examination in deposition (Deposition Transcripts in hand). Discuss the arguments we lead our mediations with. We will give tips for the attorneys in the room on how to start a mediation off on the right foot.

Liens

Discuss the issues that are important for you to keep in mind as a plaintiff's attorney when you mediate a case with a lien. Give examples of settled cases where you have a plaintiff making a civil and worker's compensation claim for the same injury. Present the steps you can take to avoid the challenges associated with these types of cases. Discuss what steps you take when preparing to mediate a case with medical liens. As for regular liens on medical billing (i.e. Not through government entity or program. Howell is critical [Court held that Defendant is only obligated to consider the adjusted/paid for amounts, rather than the inflated charges]. As for Medi-Cal/Medicare Lien (i.e. known as statutory liens) – these can be negotiated. Likewise, Defendants counsel need to protect their clients' interests by obtaining the Final Condition Letter; or Conditional Payment Letter from the governmental body – ensuring the specific (and potentially lowered) lien on the medical billing at issue. Discuss why this is so critical, as Insurance Provider (per California and Federal Law) are specifically required to ensure that statutory liens are accounted for at settlement. Explain that this means an issuance of a two-party check; or two (or multiple) checks at settlement – must be considered a mediation and in final settlement agreement. Ask the audience if they have ever tried to negotiate down plaintiff's lien themselves or buy the lien prior to mediation? And if they have ever had to settle cases where plaintiff has a pending civil and a worker's compensation claim for the same injury? The panel will discuss if they have ever encountered an issue like we saw in *McKinnon v. Otis*. This is when the employer sues third-party tortfeasor (Otis) and settles without including employee. The employee later brings his own claim against Otis and Otis gets out on MSJ because of its prior settlement with employer. Court of Appeal reverses. Otis should have been reasonably aware of employee's interest in the settlement and should have given employee notice. Same duty on employer. We will determine how you determine your Howell figure when there are pending medical liens and if you should hire a medical billing expert. If so, we will explain whether or not they should prepare a report for the mediation. We will also discuss how you successfully settle a case with a lien and does on type of lien (Medicare, Kaiser, MedFin) make it more difficult than another when attempting to negotiate a settlement. We will explain how to determine the Howell figure when there are pending liens and give examples of arguments/tools that counsel has presented at mediation that they have found helpful.

II. To bracket or Not to Bracket

Do you like using brackets at your mediation? We don't think it's necessary but can be a "fall back" if unsuccessful in negotiating initial amounts. If yes, can you tell us of an occasion where it worked in your favor? Discuss the tips on how to make brackets work in your favor and if you use brackets during your mediation.

If fees are structured properly and counsel has the potential for making a profit, then there are no financial considerations that prohibit sound representation of the client. Additionally, in the insurance context, quick resolution of a claim is often in the business interests of the client.

III. CCP 998

Discuss the pros and cons of serving a 998 prior to mediation. Make the point that a 998 can force Plaintiff to meet with Client; as well as redistribute control over direction of the case should defense counsel get the feel that Plaintiff is trying to "control" the case.

IV. Mediator Proposals

Discuss why it's important to have a strategy when it comes to mediator proposals and when and why you should use them.

V. Strategy at Mediation

Discuss why maintaining professionalism amongst the attorneys impacts your ability to mediate. Go over pet peeves that attorneys conduct at mediations. Give tips to the attorneys to get the most bang for their buck at mediations. Go over one tip that we would give to a plaintiff's attorney that we believe would make mediations more effective. Go over one tip that we would give to a defense attorney that we believe would make mediations more effective.