Summer 2006

THE Verdict

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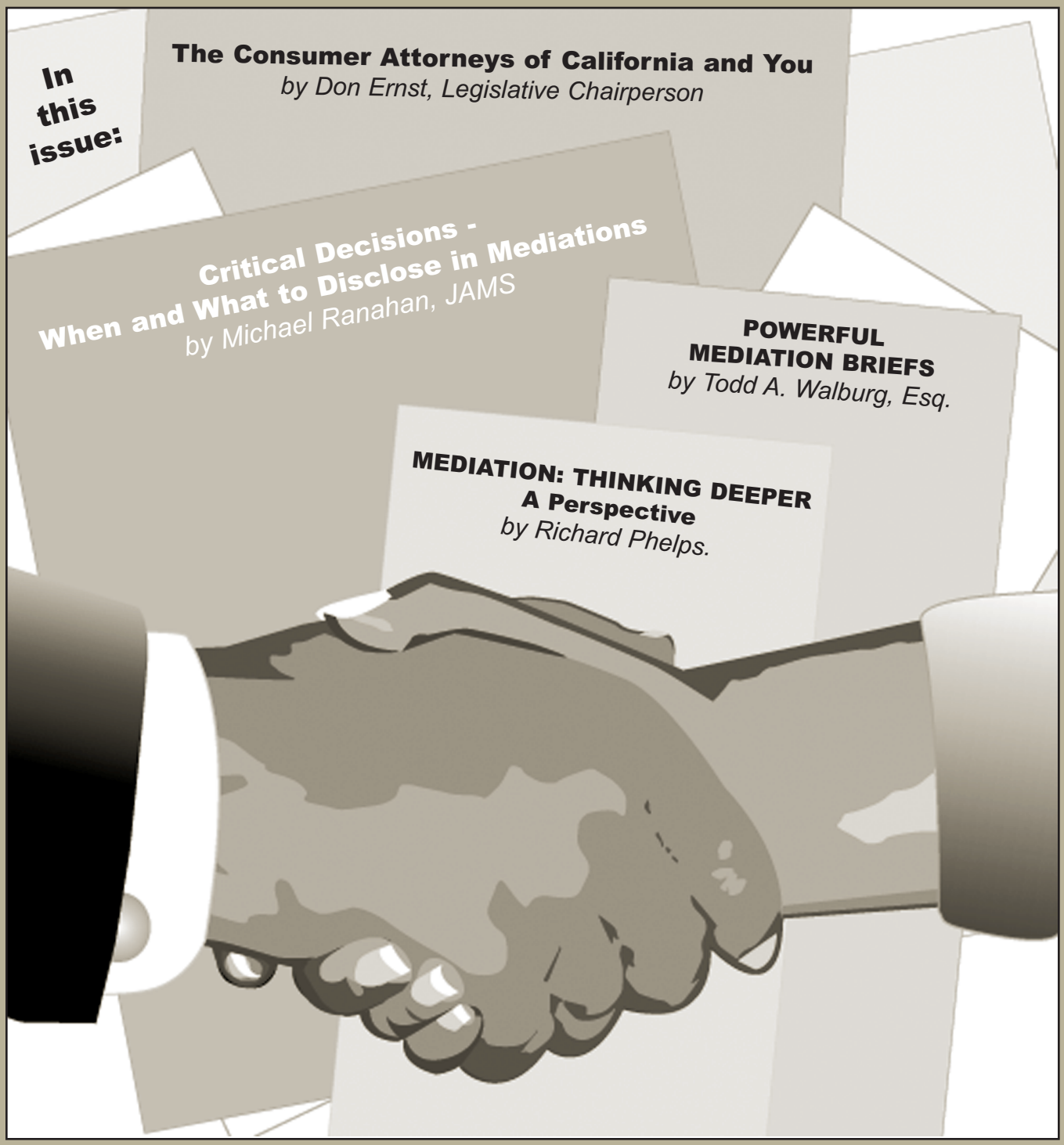

ACCTLA **ALAMEDA-CONTRA COSTA TRIAL LAWYERS' ASSOCIATION**

BENEFITS OF MEMBERSHIP & UPCOMING EVENTS

• **Mark Your Calendars:** ACCTLA's **Annual Judges' Night** will be held on Thursday, January 11, 2007, at the Oakland Marriott Hotel. Invitations and details will follow.

• Become a sustaining member and reap the benefits! They include free admission to Judges' Night and the *What's New in Tort & Trial* seminar. See page 23 for the tear-out Year 2006 Dues Notice.

• Become a mentor or use ACCTLA's mentoring program. Both will help you become a better lawyer. Contact ACCTLA Executive Director Pat Parson at (510) 538-8286 or see page 7 for more details.

• Publish your firm's recent news or successes in *The Verdict*. Contact Pat Parson at (510) 538-8286.

• Membership also entitles you to a listing in, and receipt of, ACCTLA's Membership Directory, a complete list of all members of our organization.

• Benefit from the experience and advice of other members by participating in the LISTSERV!

THE Verdict
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Kathleen Balamuth
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The Consumer Attorneys of California and You

By Don Ernst, Legislative Chairperson

The CAOC leadership team is making it our mission to strengthen the ties between CAOC and local TLA organizations. CAOC benefits individual practitioners through statewide education seminars, a strong lobby team in Sacramento protecting your rights and the rights of your clients, leadership in defending against tort reform initiatives that affect your practice, a political action base to elect legislative candidates that support a fair justice system and the right to a jury trial, and the refreshing camaraderie of spending time with others who share your views of the justice system and understand the pressures and stresses of your day to day life. Additionally, CAOC membership benefits include access to the California College of Trial Arts, 11 statewide list serves, and the Civil Justice Research & Education Project. You can learn about these and other CAOC projects and benefits at the CAOC Web site: www.caoc.com or www.protectciviljustice.org.

I firmly believe that we can all benefit by strengthening the connections and communication between local TLA's and CAOC. Every single TLA member who is not a member of CAOC should join today, and every CAOC member should join and participate in his or her local TLA. CAOC is seeking input and additional communication from members or their respective TLA's on all issues, including those areas that individual members would like to see addressed in the legislature.

While I would love to explain in detail each of the above-mentioned benefits, I think in this guest column, I will share with you how the CAOC legislative team protects you. During the current legislative session 3,526 bills were introduced and our team in Sacramento reviewed each one to assess its possible impact on your clients or your legal practice. They monitored 941 of those bills and actively worked on 192. The simple math equates to nearly one-quarter of the pieces of legislation could have effected your business. Legislation like:

- SB 312 (Ackerman) would have made an exception to the requirement that notice of a summary judgment motion will be served on all parties at least 75 days before the time appointed for hearing. *(Defeated)*
- AB 355 (Tran) would have effectively eliminated joint and several liability in actions against public entities. *(Defeated)*
- AB 526 (Harman) would have allowed insurers to further restrict uninsured motorist coverage in auto cases. *(Defeated)*
- AB 192 (Tran) would have limited the liability of public entities in actions for injury to $250,000 per individual or $500,000 per occurrence under the Governmental Tort Claims Act. *(Defeated)*

These are just a few examples of the types of tort reform bills introduced this session that our legislative team defeated to protect you and your clients. Scores of tort reform bills are introduced every year, and we can expect the attacks on our system of justice to continue. Our past successes with proactive legislation include the two-year statute of limitations and the 75-day time requirement for summary judgment motions.

The key to success or failure of our legislative presence in Sacramento depends on having 41 votes in the Assembly and 21 votes in the Senate. If we do not have those votes, we can expect tort reform. Term limits *have* complicated this process with a steady stream of new legislators every 2 years. Often, the only experience the new legislators have is from their work on city councils or county boards where they were faced with lawsuits against the public entities. Some have skewed views of the tort system. It is a constant education process, and our legislative team spends a great deal of time in this effort.

The future of the legislature is so important that all our lobbyists, as well as leadership, meet with potential political candidates to explain what CAOC does to protect the civil justice system and the consumers of California. Eventually, CAOC backs those candidates who support a fair justice system and the right to a jury trial. CAOC endorses and financially supports those candidates in races where our time, effort and money hopefully can make a difference. In the June 2006 primary election, there were 36 open seats with nearly 100 candidates running for those seats. The stakes were enormous. Indeed, the ability of the everyday citizen to obtain justice from the tort system is at risk every election cycle, affecting all Californians and the lawyers who represent them, including you.

The results of the recent primary elections were important. The decisions about what races and candidates to support were often difficult as friends ran against friends. The organization limited its participation to those races where a clear choice existed between candidates who share CAOC's values and those who do not. CAOC showed five wins in the Assembly races where we worked to impact the outcome. In many districts, candidates with favorable views of the tort system faced an enormous onslaught of corporate spending against them through independent expenditures, for which there are no spending limits. In spite of that, CAOC is pleased to report the Assembly will be significantly more consumer/civil justice friendly.

Nine members of the business caucus were termed out of office and/or vacated their seats. In at least three, and possibly five, of those seats more progressive, consumer friendly candidates were elected to serve. We are pleased to announce four of the five Assembly candidates CAOC viewed as posing some risk to the tort system were defeated and will not be entering into the Assembly in 2007. Additionally, six knowledgeable lawyers were added to the ranks in the Assembly bringing the total number of lawyers in the lower house to 16.

CAOC had three significant wins in the State Senate races. In the 28th District, Assembly Member Jenny Oropeza defeated former Assembly Member George Nakano, a former member of the business caucus. In the most closely watched primary in the state, former Assembly Member Ellen Corbett defeated former Assembly Member and Business Caucus leader, John Dutra in the 10th District. In the 8th District, Assembly Member Leland Yee won a three-way contest over former business caucus member Lou Papan. Even so, the senate will be a somewhat more conservative body, as three additional business-friendly candidates were also elected. Senate Judiciary Chair Joe Dunn is also termed out.

All these variables reinforce how our lobby team in Sacramento adapts to a constantly changing political landscape by developing and fostering ongoing relationships with like-minded groups, such as the California Nurses Association, the Sierra Club and labor groups. Our lobbyists are also adept at creating other beneficial alliances with groups that normally would not work with us. Last year CAOC co-sponsored a hospital lien bill (SB 399-Escutia) with the California Medical Association. Although this particular bill was vetoed by the Governor, the ability to form both types of alliances is further example of our legislative team's effectiveness in Sacramento. ▶

Alameda-Contra Costa Trial Lawyers' Association
1884 Knox Street • Castro Valley, CA 94546
510.538-8286

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Verdict Committee
Micha Star Liberty, *Editor*
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ACCTLA Mentoring Program

Take advantage of ACCTLA's Mentoring Program to improve the quality of litigation in our courts. Attorneys who call will be referred to a mentor attorney for free consultation. The mentor will not prepare your case but will assist you in your approach to the case. This program is not just for newer attorneys, but also is available for seasoned practitioners who run into problems or simply want to bounce ideas off another seasoned practitioner. The mentors are all ACCTLA members, with varied degrees of experience in varied areas of the law. Whether your concerns are Motions in Limine, jury selection, problems that arise during trial or issues relating to proposed instructions, or questions involving any of the earlier stages of litigation.

Please call ACCTLA Executive Director Patricia A. Parson at (510) 538-8286.

CAOC also serves as the point organization for defending against all tort reform ballot initiatives. Currently in 2006, the efforts of our lobby team, leadership and political advisors eliminated two statewide initiatives filed against consumer attorneys and the clients they represent (punitive damages and construction defects). Our lobbyists and staff are now preparing for the general election as well as monitoring all bills currently working through the legislature. The professional lobby team is one of the best values you as a practitioner have. This team protects you, your clients and the citizens of this State. Its value cannot be overestimated.

As trial lawyers, we fight the good fight every day on behalf of our clients. Similarly, CAOC fights the good fight for us in the Capitol every day by preserving a level playing field for the fair administration of justice. This fight is our fight, and I invite you to become a member of CAOC today and be part of this important effort. Come meet our staff at our annual convention to be held at the La Costa Resort and Spa November 16 – 19, 2006. I also want to personally put in a plug for our Hawaii Seminar at the Kea Lani on Maui, scheduled for November 15 – December 2, 2006. It is my personal favorite. It is an excellent travel value, with five-star hotel accommodations, a great negotiated rate, and wonderful seminars. Lastly, let us know your thoughts. If you have any legislative suggestions or just want to communicate, drop a line to our executive director Mike Reyna at Mreyna@caoc.org or to me at dernst@caoc.org. We need and want your help. ◆

— Don Ernst, a partner in Ernst & Mattison since 1980, has tried over 100 cases to verdict. He was awarded the CCTLA Trial Lawyer of the Year in 1998 and 2002.

Alameda-Contra Costa Trial Lawyers' Association

ACCTLA
Annual Cocktail Party

All ACCTLA members, Superior Court Judges and
Commissioners from Alameda County and Contra Costa County,
Appellate Justices, Northern District Federal Judges Magistrate Judges
and their guests are invited to attend

Friday, September 15, 2006

5:00 – 7:00 p.m.

Oakland Marriott

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Please join us for wine, beer, soft drinks
hors d'oeuvres and a live jazz ensemble

Please RSVP by September 12 to:
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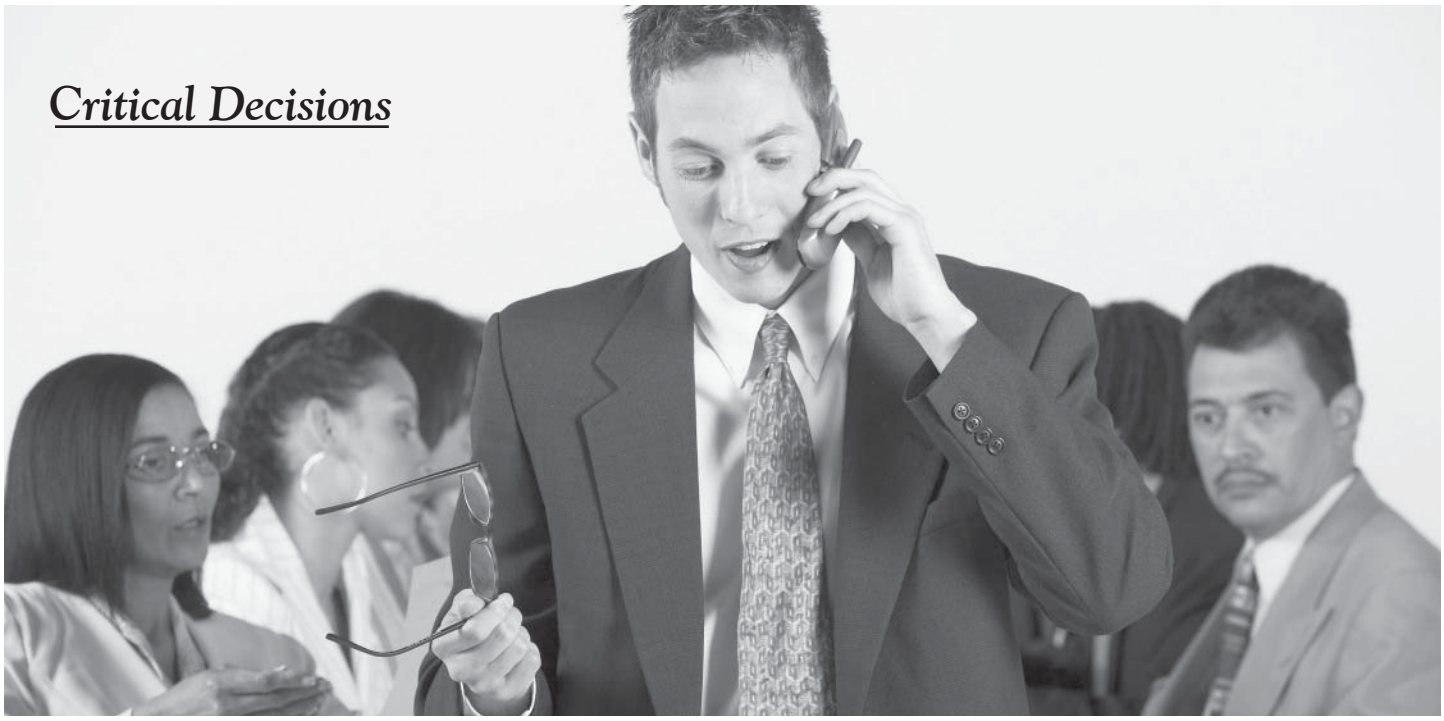
If you are not a member of ACCTLA, contact Pat Parson for an application, or pay dues at the door.



When and What to Disclose in Mediations

By Michael Ranahan

Virtually every case that goes to trial first goes through a mediation, or two, or three. During nearly every one of those mediations, one side or the other debates itself over how much information to disclose and how far to go in revealing their trial strategy. Mediations can present a quandary for trial attorneys who want to reveal enough information about their case to give ample opportunity to settle, yet not hand over all their information and strategy, such that if the case does not settle, they have not prejudiced their ability to effectively try the case.

One common mantra among mediators is: "If nothing else, do no harm," meaning that if you do not settle the case, make sure that no party is prejudiced by going through the mediation process. The same should be true of trial attorneys. If you cannot settle the case, do nothing to adversely impact your trial tactics.

This article will explore utilizing using the mediation process to your best advantage while preserving your trial tactics and strategy. The discussion will focus on the wisdom of disclosing (or not disclosing) information which may tip your hand as to your overall trial strategy or provide your opponent insight regarding the evidence you may present at trial. This article does not address, however, the issue of whether or not, or when, to disclose "smoking gun" evidence, which warrants a separate discussion entirely.

THE TENSION

The conflict between mediation strategy and trial strategy, while fairly obvious, will nevertheless be discussed for the purpose of clarity. The majority of mediations take place early in the discovery phase, before expert depositions have been taken and reports exchanged, and often before some of the key witnesses have been deposed. The parties may have interviewed witnesses, retained experts, and gained insights to their expected testimony, but by the time the mediation occurs, their testimony and opinions have yet to be disclosed or memorialized, much less exchanged. Yet this information may be critical to your analysis and settlement evaluation, and is probably information you will want to utilize to either work up your opponent's offers, or draw down demands, depending on which side of the case you are on.

Your best chance of settling the case in a timely and economical manner may

be at mediation and may depend on your disclosure of certain information. Yet disclosure of this information at a mediation may provide your opponent with not previously disclosed information, and more importantly, may allow them to counter, negate, or minimize the evidence's effectiveness at trial. So, how far do you go in allowing your opponent a "peek" into your trial approach, strategy and/or witness testimony?

THE SOLUTION(S)

First it must be noted, while it is easy to identify the tension which exists between the mediation and preserving trial tactics, it is a far more difficult chore to determine how to best address the tension. There is no "one size fits all" solution to the problem, and each case must be evaluated individually. There are, however, several key variables which can assist you in deciding what, when and how to disclose strategic information.

Evaluate Your Opponent. As is the case with most tactical decisions made during the course of any given case, your opponent's acumen is an important factor in deciding what to reveal. Not all adversaries are created equal, so if your opponent is an extremely thorough and well-prepared type, it may be wise to err on the side of disclosure. A diligent opponent will either already be aware of most of the information you have or, will likely obtain it through discovery or investigation if the mediation does not result in a settlement. Since you are less likely to surprise a diligent opponent at trial, it may be unwise to hold back important information during mediation in the hope of catching them off-guard by subsequent disclosure. Stated another way, if it is extremely likely your opponent is going to obtain the "held-back" informa- ▶

tion, doesn't it make better sense to disclose it and use it in a favorable manner, potentially leading to settlement?

Conversely, if your opponent is less methodical, that is they react rather than act, it may be tactically prudent to hold back information, as your opponent may never ascertain it or discover it timely enough to make it useful. You must assess during the course of the mediation, the prospects of settlement if you reveal the information your opponent does not yet possess. You also need to weigh that assessment against the value of shielding the information from your opponent until a very late stage in the proceedings. Unlike the case with the diligent opponent, you may want to err on the side of non-disclosure in the mediation with the sedentary adversary.

Consider Your Settlement Desire? Face it, at some mediations you are really not terribly anxious to settle a case (for any number of reasons), and some cases you are dying to settle. Most cases, of course, fall somewhere in between; if the other side makes your client a good *enough* settlement proposal, you will recommend it be accepted. It is pretty obvious if your interest in settlement is only lukewarm, i.e., your client is not interested in compromising very much, your inclination to disclose information will be minimal. Likewise, if, for whatever reason, it is imperative you settle the case, why would you hold back information that could help you get there? You must gauge how important settlement is to your client, which in turn will dictate how much information flows from your room to your opponent's.

Will Disclosure Help? The single most important factor to weigh in deciding what information to disclose at a mediation is whether or not the case has a realistic chance of settling. It can be enormously difficult to predict whether your opponent wants to or is in fact ready to settle. Many attorneys have experienced failures to settle in a mediation on cases that they were absolutely convinced would settle and vice versa. And many mediators have stopped trying to make early predictions on whether a given case *will* settle because in most cases, you simply do not know until you get deep enough into the negotiation process.

With these qualifiers, it is nevertheless important to get a sense as to whether your opponent is ready, willing, and able to settle before deciding what information to disclose. The "able" part is a function of whether the right people, the "decision-makers," are either at the mediation or minimally available by telephone. This determination is relatively easy to make. If the opposing individual you need to impress is present at the mediation, educating them by disclosing certain information may be the right call. If you do not sense the true decision maker is present at the mediation or readily available, any information you disclose will be heard by individuals who may not control the decision-making process, and you should therefore be much less inclined to reveal it.

The significantly more difficult inquiry is determining if your opponent, given certain information, has the ability to digest it quickly and responsibly, and utilize the information to impact their evaluation of the case. In simpler terms, you need to decide whether there is a realistic chance your opponent will be favorably influenced by your disclosure of information such that it could result in a settlement, or whether the information will have little or no real impact on your negotiations.

Admittedly, the task outlined above is a difficult one, as attorneys rarely admit to their opponent that they would be significantly influenced by one piece of information or another. This is where you use the services of your mediator. If you are inclined to consider disclosing private information or your trial strategy, send the mediator on a fact-finding mission

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Micha Star Liberty, micha@libertylawoffice.com.

and allow the mediator to gently probe into whether the other side might be influenced up or down if certain information came to light. Without revealing confidences, the mediator may be able to get a sense as to how your opponent may react to new information. The mediator should be able to give you a green light or red light as to whether it would be advisable and effective to disclose information you might otherwise withhold. It may be that the mediator learns that it would do you no good to reveal certain information, or the message might be just the opposite. If the mediator has gained your trust, trust her or him to advise you in this delicate area.

Oakland plaintiffs' attorney John Winer, Senior Partner of Winer, McKenna & Davis, LLP, collaborates with the mediator in making disclosure decisions. During a recent discussion, he noted: "The issue for me in most mediations is not whether or not to disclose a key piece of evidence to the mediator. I always reveal positive evidence to the mediator either in a confidential brief, a confidential portion of the brief, a phone call or I bring it to the mediation. Then, I let the mediation begin to play out and determine for myself, with the help of the mediator whether or not it will be worth it to disclose the information to the other side."

Winer's approach is to err on the side of disclosure when it is unclear whether the information will influence settlement discussions. "I almost always end up revealing key evidence to the other side even if it appears uncertain that the case will settle at the mediation. My experience is that given sufficient information, even skeptical defense counsel will come to their senses and offer appropriate value in most cases. By not giving the defense access to the information you are denying them the opportunity to see the case your way."

TIMING IS EVERYTHING

To the extent you consider disclosing information unknown to your opponent, the timing of the disclosure is critical. The beauty of the mediation process is that you control the flow of information. You control not only what you disclose, but when during the mediation you disclose it.

With this in mind, you should take a wait and see approach in determining when to disclose certain information. If negotiations are going well, there really is no need to lay some of your cards on the table, as the cards you have played may be good enough to get the deal you are seeking. If the negotiations stall, you then may reconsider your decision. The disclosure of information may serve as a catalyst to restart stalled negotiations, or may motivate your opponent to move to a place he/she did not intend to get to.

Even though the primary focus of this article is the disclosure of information during the mediation, a brief discussion addressing disclosure of information prior to the mediation is warranted. In exploring the issue of disclosure of critical information at the mediation with William Mulvihill, Managing Partner at the Oakland firm of Boornazian, Jensen & Garthe, he noted that "From the defense standpoint, we always hope that we have been thorough and creative in discovering the liability and damages claims of plaintiffs. However, if there are elements of liability or damages that have not been disclosed for whatever reason, and which could have a dramatic effect on the settlement evaluation of a defendant, it is of little benefit for settlement purposes to conceal those facts until the mediation has commenced. The defendant's attorney and risk manager need to consider the impact of that potentially significant information and to evaluate the new facts with the powers that be in order to obtain appropriate settlement authority. To only reveal important and previously unknown information (newly discovered liability witnesses or documents, a significant change in the plaintiff's medical or employment condition, etc.) at the mediation does not allow proper evaluation of that information and will only lead to an adjournment so that the information can be properly considered." Defense counsel may also want to consider getting significant information to plaintiff's counsel prior to the mediation since it will assist plaintiff's counsel in evaluating the case and in managing his/her client's expectations.

To recap, every mediation, as is the case with every negotiation, is unique and fluid. Just as there are decisions to be made as to what to demand and what to offer, there are also decisions to be made regarding what to reveal to your opponent and when to reveal it. There exists a delicate balance between disclosure of information and preservation of your trial strategy. Various factors, outlined herein, will dictate how this balance plays out. An experienced mediator can assist you in making decisions regarding what, how and when to disclose information during the mediation. ◆

—Michael D. Ranahan, Esq., a Mediator and Arbitrator with JAMS - The Resolution Experts, has nineteen years of personal injury experience. He has handled over a thousand personal injury cases to conclusion.

POWERFUL
Mediation Briefs

by Todd A. Walburg

Mediation provides a plaintiff's attorney with the opportunity to sell his or her client's case to the involved parties and the mediator without being restricted by the rules of evidence and other limitations. This may be the last chance to close the sale before trial, and therefore it makes sense to thoroughly prepare for your sales presentation and to put forth your finest promotional materials. The methods of closing the sale are almost limitless in this age of technology and creativity. A plaintiff's attorney should take advantage of this opportunity to truly advocate for his or her client by presenting an organized and impressive mediation brief that addresses every possible issue. In order to ensure that you cover all appropriate issues, it is helpful to follow an organized structure that includes the headings discussed herein. Each heading should include subheadings as needed, and the text must be synchronized to refer to the exhibits that can be easily located via a table of contents. A discussion of each section and tips for creating a powerful mediation brief and exhibits follows.

THE INTRODUCTION

Make a good first impression by opening your brief with a compelling and vibrant summary of the strong points of your case and a favorable comment about your client. Thereafter, introduce all of the parties and identify the attorneys that represent each party. Conclude your introduction with a statement about the value and seriousness of your case, but hedge that statement with an indication that you intend to negotiate in good faith and hope that defense counsel will do the same. Other than the introduction of the parties and attorneys, each sentence of the introduction should be used to grab the reader's attention to encourage a careful review of your brief from start to finish.

THE STATEMENT OF FACTS

The factual summary will likely be the longest section of your brief and must focus on the facts that are helpful to your position, but also deal with facts that are damaging to your case. If you fail to discuss facts that the defendants will raise, you have given your opponent an advantage and you may come across as someone who is not able to anticipate defense positions and arguments. As such, it is important to have a response or counter-fact for every bad fact to be raised by the defendants.

Use this section to provide a detailed account of the incident and be sure to utilize and refer to the police report or other pertinent reports. Include a discussion of the events leading up to the incident so as to provide a complete picture of that particular day and to diffuse any defense arguments that your client was doing something improper. In some situations, it is helpful to precede your discussion of the incident with a commentary about your client's life before the incident. Give a synopsis of the medical treatment and injuries endured by your client. Describe all residual injuries and problems that remain. Personalize your client; explain how the incident has changed your client's life.

THE LIABILITY DISCUSSION

The length of this section will vary greatly depending on the case. If it is a case of clear liability, confidently state that, and include a few short citations to law, facts, or evidence. If liability is disputed, it is important to provide a thorough analysis that includes case quotes and statutory language to prove up your case. If there is a particularly relevant case or statute, feel free to attach a copy as an exhibit. In addition to law, it is important to refer to facts and evidence. It is helpful to include excerpts of deposition testimony, which can be done easily by cutting and pasting from the ASCII diskette or CD that you ordered with the deposition transcript. If there has been earlier briefing of legal issues on demurrers or motions for summary judgment, the plaintiff's attorney can use that briefing as a starting point to further refine the legal arguments to be used in the mediation brief.

In cases involving multiple parties, separate out each defendant and provide a detailed explanation as to the liability of that defendant. It is not necessary to apportion fault here, as it is usually preferable to have the defendants argue amongst themselves and come up with their own individual settlement offers.

DESCRIPTION OF INJURIES AND MEDICAL TREATMENT

Provide a comprehensive list of every injury that your client has suffered. This list can be taken from previous discovery responses and modified into a format appropriate for your brief. Medical treatment endured by your client should be described in graphic terms to overcome the desensitization commonly found in attorneys and insurance adjusters. If you have had the medical records summarized by a nurse, it is helpful to cut and paste excerpts of the medical record summary into your mediation brief, being careful to remove any work product or notes not intended for defense counsel.

THE DAMAGES DISCUSSION

In many cases, this may be the most important section of the mediation brief. The discussion should be broken down into subsections that list special damages (past and future medical expenses, past and future loss of income, property damage, miscellaneous damages), general damages, and liens, actual charges, and collateral source issues. Be sure to include every possible element of special damages and do not be embarrassed to include smaller items. Your client may not consider the smaller items to be petty, and by building up the total special damages you are potentially increasing the overall settlement value and adding in some room to withdraw claimed damages should the need arise. List every medical provider and the full amount of the charges for that provider. Include a reference to the exhibit that contains the billing statement. Endeavor to include the most up-to-date bills, however if charges are missing, go through the medical records and document all treatment dates and type of treatment that was not included. Note this information on your list of medical expenses and provide an estimate of the omitted charges which you can obtain from a "biller", an administrator, a physician, or a nurse. ▶

Following discussion of medical expenses, provide an analysis of lost income. It is important to provide sufficient factual basis so that the income loss does not appear to be speculative. The figures should be drawn from the exhibits attached to your brief, which may consist of a declaration or letter from the plaintiff's employer, a wage loss verification form signed by the employer, or income tax records that support the specific loss of income claimed. If you cannot presently provide documentation of lost income, you may state that plaintiff is not claiming loss of income for purposes of this mediation, but such information will be provided at time of trial. If there is no real income loss, it is better not to mention it so that you do not appear to be overreaching.

Future medical expenses and future loss of income must be supported by reports and documentation. If you feel comfortable showing your cards, include expert reports from a life care planner, an economist, and health care providers. The general damages discussion should summarize the most significant injuries, medical treatment, and pain and suffering, and provide a basis for the claimed general damages.

A discussion of liens, actual charges, and collateral source should be included in anticipation of defendants' practice of slicing the amounts of claimed medical expenses. It can be helpful to provide a legal discussion of the current status of the law, and if not favorable, point out the fact that the law is constantly changing in this area and will likely be changed in your favor by the time of trial.

THE CONCLUSION AND DEMAND

Conclude by summarizing the total amounts of special damages and general damages and make a statement about the likely range of jury verdicts. Do a jury verdict search, and if helpful, provide jury verdict information as exhibits. Make reference to the venue where the case will be tried and explain why a jury in said venue will be sympathetic to your client. Following analysis of jury verdict potential, make a demand for purposes of mediation. You can indicate that the demand will be withdrawn and increased if the case is not resolved at mediation. Be careful and strategic when deciding on the amount of your demand, as that amount will set the range or "zone of bargaining". Your opening demand should generally be high but it must also be credible.

THE EXHIBITS

Exhibits are extremely important and provide an opportunity for the plaintiff's attorney to be creative. Color photographs of the plaintiff and his or her family taken before the incident should come first in your binder of exhibits. Thereafter, exhibits should include reports, maps, diagrams, charts, and photographs of the scene. Medical records, reports, and photographs of the plaintiff following the incident should come next. Medical bills, loss of income documentation, and expert reports should conclude the exhibits. By following this order of exhibits, they will match up to the discussion contained in your brief.

THE EXTRA AMMUNITION

Extra ammunition can come in many forms but the most effective ammunition is a legal settlement video. These videos can be produced on DVD and the disc can then be included in your mediation binder. There are several types of settlement videos, including the following: Wrongful Death Settlement Brochures; Day-In-The-Life Documentaries; Deposition Documentaries; Legal Settlement Documentaries; and Hybrid Settlement Documentaries. While many of these videos cost at least $5,000 to produce professionally, it is important to remember that the costs of production are usually a cost of suit, and that these videos can increase settlement value exponentially. An excellent analysis of the various types of settlement videos can be found in an article entitled "Legal Settlement Videos – The Leverage to a Successful Mediation" by Charlie Chapin, in the November 2005 issue of CAOC's Forum magazine, searchable at www.caoc.com.

TIPS FOR ORGANIZATION AND EASE OF USE

You should always use binders, exhibit dividers, and a table of contents. The cost is minimal and the self-contained package of organized materials shows that you are prepared and it allows easy reference to exhibits as issues arise during mediation. DVD's should be placed in CD envelopes and inserted into the binder or its front pocket. You should send out your mediation brief as early as possible to allow time for evaluation, and extra copies should be provided for easy distribution to counsel, claims representatives, and clients.

In conclusion, the mediation brief is an important package of sales presentation materials that should be carefully developed and organized by a savvy plaintiff's attorney seeking to close the sale. Extra work on the front end in timely preparing the mediation brief will also make the mediation session a more productive and enjoyable experience for you and your client. ◆

— Todd A. Walburg, Esq., of Lieff, Cabraser, Heimann & Bernstein, LLP, specializes in litigating personal injury and product liability cases. He can be reached at twalburg@lchb.com.

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MEDIATION

THINKING DEEPER

A perspective by Richard Phelps

For about ten years, mediation has been a regular part of the litigation landscape. I have seen some general improvement in plaintiffs' participation. I would say it is about the same for defendants' participation. Since this article is for plaintiffs, I will focus my comments for that side of the table. I still see mistakes being made that could and should be avoided without much additional work or cost.

There are several causes of failed mediations. Sometimes, the defendant has no intention of settling at a fair value. When you sense this situation, try to get some money on the table before the mediation. If the opening offer is low and the defendant has a reputation for not budging after its initial offer, try to get a commitment that it will approach the negotiation with an open mind and realistic additional authority. If not, mediation at that time will not be worth the your time, your money, or the danger of demoralizing your client. Only by taking the case to trial (or at least close to it) will you achieve a reasonable result. Those situations are the ones I hate most as a mediator. Nobody goes home happy, the case isn't settled and there is an association of me with a sour outcome that I had no control over.

It is important to remember that mediation cannot result in the maximum recovery for the plaintiff; by definition, it is a compromise. Even the most liberal defendant expects plaintiff's counsel to compromise in exchange for a final resolution. Ideally for the plaintiff, the settlement value at mediation can approximate a good jury verdict minus the costs of getting that verdict. However, realistically, the settlement value also includes a discount for the risk of a flat-out loss. On the other hand, catastrophic injury cases or cases with punitive damage potential have an unknown upside. This article is aimed at the vast majority of PI and other cases. You will have to get top value from a friendly jury and risk getting less than you could get from mediation by getting an unfriendly jury and/or a defense oriented judge.

The following hypothetical, a fictionalized amalgam of various mediations I have conducted, demonstrates the interconnected chess moves that build on each other to achieve the best outcome possible for your client. Just as one must think several steps ahead to build a strategy and position the case optimally at trial, so too must one plan proactively in negotiating a settlement.

This was a toxic tort case. The parents and their son were exposed. The child was hospitalized, and after some follow-up treatment, recovered well. The parents sought no medical treatment but complained of stomach problems and headaches for two weeks. The defendants stipulated to liability. The defense attorney was a senior partner, a likeable, honest guy, and able to influence the adjuster. He stated to plaintiffs' counsel that he was sitting in for the assigned attorney and would gladly work the case through as long as there was some progress. Let's say the child's case was worth $75K to $100K. The opening demand was $45K for each parent plus $400K for the child.

The plaintiffs' attorney began on the wrong foot and then compounded his error by failing to notice how he was alienating defense counsel and missing my efforts to guide the discussion back on track. His first mistake was to start off the mediation with a diatribe about the defendant's outrageous conduct, despite the stipulated liability. This approach not only wasted time but also angered the defense attorney and the senior claims rep. It was clear from the defense attorney's body language that he was on the verge of leaving. The plaintiffs' attorney's second mistake was to ignore my attempt to save him from himself. I tried to intercede to get him to drop the issue,

but the plaintiffs' attorney continued. It is important to watch the mediator — and even opposing counsel — for signals about what might produce results in the mediation, and heed those signals.

Remember the human element of lawyering — you rarely get maximum value from an opponent you have insulted or pissed off. Certainly some companies' offers feel insultingly low, but letting your professional outrage boil into emotional anger can be very unproductive. Work out those feelings with your colleagues or in therapy. Getting angry with the messenger will not get you more money, and will likely cost you.

Your primary goal is to gauge their top authority and decide whether to take it. If you end the mediation before you get that information, you have failed. Their offers along the way may be in reaction to your demands. If you are too high, they will be very low. No one wants to give up their negotiating room. If you are far away from the real value, you have NO leverage. They can and will ignore whatever you say and your credibility will take a hit.

In this hypothetical, the plaintiff's attorney tried to justify the liability harangue by stating that he was considering amending to add a request for punitive damages. This move was patently weak — if the punitives case was so strong, why didn't he allege them from the start? Threats almost always undermine your credibility and calcify opposing counsel's position. Any claim worth relying on in mediation is worth including in the complaint, by amendment if necessary. Claims adjusters are, in essence, from Missouri — the "Show Me" state. This is in part because they are skeptical by nature and in part because they need to show their supervisors something to justify giving you more money. For these reasons, give them everything you can with plenty of time to evaluate before the mediation. Prime the pump!

When we caucused, the defendants couldn't believe the demands. Though they assured me that they had come to settle, they were adamant that they weren't going to waste time if the plaintiffs weren't realistic. The plaintiffs wouldn't make realistic offers for the parents, shaving down from $45K to $30K and then to the teens, but this was still too high. The mediation ended early without much discussion of the child's valuable claim. The defendants left saying they were going to trial. What did the plaintiffs not think about? They could have settled the parents' cases by making a reasonable demand. This would have given them credibility in negotiating the son's claim, and, if they had had to try it, credibility with the jury as well — the parents would have been able to testify about what their son went through without holding one hand out to the jury on their own very weak claims with no medical treatment.

Most folks don't make all these mistakes. This was an example to demonstrate that how you deal with one aspect affects the rest of the mediation and your chances to get your case settled. ◆

— Richard Phelps has been mediating since 1995. He has mediated 1200 cases with approximately 90% resolution. He is on the Alameda and Contra Costa Superior Court mediator lists. He was Co-Chair of the Alameda County Bar Association ADR Section for six years. He is a member of the Mediation Society and a Diplomat Member of the California Academy of Distinguished Neutrals. He has mediated cases in all Bay Area counties, Sacramento, Stockton and Modesto.

MEMBER *news*

Caldwell v. USAA

UIM Arbitration award of $355,110.97 by Hon. Michael Ballachey (Ret.). Claimant is a 52-year-old woman who was a curator at the Oakland Museum and was broad-sided by an SUV when she was 11 weeks post-surgery for a hip revision. Initial X-rays were negative, but claimant was eventually diagnosed with a fractured femur, which had to be surgically repaired, and a displacement of her hip prosthesis. The adverse driver had a $100,000 policy with USAA, and the third party case was settled for the policy limits.

USAA then fought the UIM claim for two years, and eventually offered only $50,000 new money before arbitration. Judge Ballachey issued an award for $355,110.97, and USAA paid $249,775.00 new money ($200,000 UIM and $49,775 Med Pay) to satisfy the award. The arb award exceeded claimant's CCP 998 Offer to Compromise, and USAA initially agreed to pay $17,516.59 in litigation costs and $57,596.08 in statutory interest. USAA then changed their mind and filed a motion to tax costs, which was denied, but they intend to appeal that decision.

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~ More details to come ~

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