MEDIATION OF A CAR WRECK

by Sam Graham

This paper addresses mediation generally and car wreck case mediation specifically from a mediator's perspective. It seeks to identify issues which I think should be addressed before, during, and after a mediation. As the goal of this paper is entirely practical, there will be no discussion of the ADR statute (Tex. Civ. Prac. & Rem. Code §§ 154.0001), or any reported cases concerning it. Throughout, the mediation model under discussion (referred to as the "Dallas model") utilizes a joint opening session and a series of private caucuses with each party.

THE DECISION TO MEDIATE

If you represent a person, whether driver or passenger, who has been injured in a car wreck, the initial decision to be made is whether or not to allow the claim to be mediated. Increasingly, insurance adjusters are suggesting mediation of unsettled claims prior to lawsuits being filed. This suggestion seems especially prevalent in soft tissue injury claims. A primary concern confronting an injured party's attorney is whether or not to undergo the expense of mediation and the investment of time in a venture that might not end successfully.

There are four types of cases in which mediation might prove very helpful to you as a plaintiff's attorney:

1. You have a good relationship with the adjuster, and if the claim goes to litigation, a different "litigation" (i.e., tough) adjuster will take over the claim. If you suspect that the present adjuster has not really considered your claim, studied the file, or understood the persuasive nature of your client, you may wish to go to mediation.

2. You have a very compelling, persuasive client and the sooner the adjuster meets her, the sooner the case will be settled. A variation on this theme occurs when you know that the defendant, who is himself highly persuasive, really wants the matter resolved, and you think he will push the adjuster toward settlement if given the opportunity a mediation provides.

3. You have an extremely difficult client who has totally unreasonable expectations and the sooner he has to confront reality through contact with either an adjuster or a mediator

who will ask him the right questions, the sooner the chance for settlement. A twist on this theme is the client who no longer has complete confidence in you because you have told him the negative aspects of his case. A mediation might allow either the transference of some of that distrust to the other side or an acceptance of your opinion because of the mediator's probing and because of the defense's case analysis.

4. You have a chiropractic care case or one in which the medical cost is high because of an unusual reason, such as the purchase of special treatment equipment. While every lawyer, whether representing plaintiffs or defendants, knows that insurance companies try to discount chiropractic care, most clients do not have any inkling of that industry custom. It is usually highly beneficial for such a client to hear the insurance lawyer explain how he will demonstrate excessive charges. On the other hand, you may learn during a mediation why the adjuster is resisting paying for a type of treatment or a piece of equipment that was purchased by your client upon the prescription of a medical doctor or physical therapist, and you may be able to give the adjuster literature about the equipment or supply her with information from the treating physician that clears up this matter.

CHOOSING THE MEDIATOR

Assuming the court has not designated the mediator, the custom for choosing a mediator varies from area to area but it generally involves each party nominating one or more candidates and agreeing on the least objectionable name. If your usual nominees are not available, how do you go about either finding persons to name or checking out a person who has been advanced by another party? The first step is to call the proposed mediator and ask her about herself. This is a common occurrence in our business. We all have resumes and answers to most questions ready. You should always ask how much the charge will be, what legal and mediation experience the mediator has, and which lawyers you can call for references. I do not think that a mediator needs to have mediated cases similar to yours to be successful. I am against specialization for mediators. If your case goes to trial, will it be tried in front of the "car wreck judge" or a "car wreck" jury? Of course not, and by the same token, an experienced mediator who has completed

a forty-hour training course in mediation, as required by the ADR statute, should be able to mediate any car wreck case. About two or three years ago, quite a few mediations were done by untrained persons whom the parties thought would be fair. I would suggest that you shy away from this practice today, because there are more than enough qualified mediators around who fit the bill without the need to use an untrained person.

DO YOU REALLY WANT TO SETTLE NOW?

That may seem like a silly question, but you should ask yourself that before every mediation. There are several reasons why parties participate in a mediation, especially in a large case, other than to settle a dispute. Because you have not completed discovery, you may not be able to move much below your offer, but you want to learn about the opposition's theories. Or, you decide that the only way to educate the insurance company's insured about his personal exposure is to get him to a mediation where you can either communicate to him directly or through the mediator. Occasionally, attorneys use mediation as a means of educating the opposing lawyer. If you come to a mediation with a primary purpose other than settlement, you should make sure to tell that to your client ahead of time.

PREPARING FOR THE MEDIATION

In almost all car wreck cases that I mediate the parties really do want to settle that day. To facilitate the process, these actions should be taken ahead of time by the claimant's attorney:

1. If there is a subrogation claim, contact that company and start negotiations. If possible, have the subrogation worked out before you get there. I never understand why attorneys choose to let "sleeping dogs lie" before a mediation. The insured's carrier will not settle without a release of the subrogation claim and nothing stops negotiation faster than a large unresolved subrogation amount. If the subrogation carrier has intervened, make sure that its adjuster or attorney comes to the mediation. If suit has not been filed yet, try to work out a formula agreement before hand so that you know how much your client will get if you settle for $5,000, $10,000, $20,000 or $50,000.

2. In a multi-party case, decide before you get to the mediation if you can enter into a settlement with some, but not all, of the defendants. The Texas Supreme Court has made partial settlement increasingly difficult, so do your research before hand and know what you can and cannot do.

3. Court costs are no longer automatically paid by the carrier. Each attorney should know the taxable court costs and have them in a form that can be exchanged during the mediation. Each offer or counter-offer should specify whether or not it includes court costs.

4. Check to see if all medical bills have been exchanged and if they have not, bring them to the mediation in a form that is easily readable. Delete or be prepared to advise opposing counsel of any treatment contained in the bills that does not relate to the accident. It saves time and builds your credibility with the adjuster, the person who writes the checks.

5. Learn from your client what her expectations are. Find out if she has any special needs of which you were not aware or financial pressures that have come about since you last visited with her. I have seen an injured party accept much less than what her attorney thought the case was worth because she needed the money for unpaid school tuition.

6. Most importantly, counsel your client in the art of patience. A mediation is a drawn out process designed to drain away negative passions and channel positive ones toward resolution. Time is required. Make sure that your client understands that there may be three, four, five or even six rounds of offer/counter-offer before the case is settled.

PARTICIPATING IN THE MEDIATION

Joint Session

If you represent the injured party, you will be asked to speak first in all mediations that follow the Dallas model. Your opening presentation should be very strong. Let everyone know that no matter what problems there are in the case, you are proud of it and have no hesitancy to file suit and take it to trial if necessary. If liability is an issue, be sure to go through your liability theory. If the adjuster thinks there has been excessive treatment, explain why there is not one extra dollar in the medical bills. There are two reasons that I advise a serious, well considered

opening presentation. First, the adjuster is watching you closely to see if you really believe in this claim or instead are using mediation to convince your client that his case is not that good. Second, your client's confidence will be tremendously bolstered if he thinks that you won the first round. Even though mediations are not supposed to be confrontations, clients do not always understand that at the beginning and many are still thinking in terms of "my lawyer can beat up your lawyer." A forceful opening statement will both increase your client's security level and allow you to make concessions later from a perceived position of strength.

I also think that the injured party should always speak during the opening session when everyone is together unless he simply cannot. While this practice should be followed even if your client has been deposed, it becomes absolutely essential if the plaintiff's deposition has not been taken or if it is a pre-suit mediation. The adjuster and the adjuster's attorney need to have the opportunity to gauge the plaintiff, and the plaintiff needs to have the opportunity to have his say unencumbered by the artificial (to him) rules of giving deposition testimony.

FIRST CAUCUS

In a textbook mediation, the plaintiff has made a demand well before the mediation, the adjuster has responded, the parties have confirmed these in the opening session, and, at the conclusion of the first caucus, the plaintiff has made a new offer so well reasoned it sends a clear message that settlement is just around the corner. Unfortunately, textbooks rarely replicate reality. In real life, often neither party remembers the exact amount of the last demand or response. Another regrettably common occurrence is the plaintiff's attorney refusing to move after the first caucus because he does not "want to bid against himself." I feel that lowering your pre-mediation demand of $1,000,000 in a soft tissue case with medical bills of $2500 before a formal response has been received is not bidding against yourself. If you have received no response to your pre-mediation demand, instruct the mediator to tell the other party(ies) how unhappy that has made you , but make a token concession which sends a clear message that you have come to mediate in good faith. I have carried offers to my first private caucuses with defendants that were only a few dollars less than the pre-mediation demands of the plaintiffs.

Such an offer does not make anyone happy, but it demonstrates that the plaintiff will move once the defendant starts. I do not think anything is accomplished by sending the mediator into his first private caucus with opposing parties carrying the same offer that was out there before the mediation. The risk (opposing parties doing the same thing, thus creating a deadlock) far outweighs the gain; you show that you are a tough negotiator.

The purpose of the first caucus is to establish rapport between the mediator and the injured party, to allow the plaintiff to "vent" the emotions that may impede his reasoning, and to focus the plaintiff and his attorney on the risks inherent in any litigation generically and in your case specifically. This will not happen if the lawyer or the mediator do all the talking. A mediator needs the attorney's help in drawing out the client and making sure that he is following what is going on. Do not back away from the mediator's questions about your case. If there is a contributory negligence problem, your client needs to hear what that is and understand how it affects his chances of recovery. By the same token, he needs to know how much of each settlement offer is going to him and how much is going to his lawyer. In the first caucus, most clients are not comfortable with having a mediator present, so do not hesitate to ask the mediator to step outside while you go over your offer with your client. DO NOT TELL THE MEDIATOR YOUR BOTTOM LINE. First, he might give it away through his body language. Second, your opinion might change, and it is much harder to be flexible if you have stated in front of your client the lowest conceivable amount that you could recommend for settlement. Bottom lines do not accomplish anything in the early stages of a mediation. They may, however, be appropriate near the end of a mediation.

AFTER THE FIRST CAUCUS

For the rest of the mediation, most attorneys are dependent on the mediator to communicate with the other side for them. You do not have to be. At any time, if you think it might be helpful, tell the mediator that you want to speak directly to the attorney or the adjuster. That can save a lot of time and energy. Do not be hesitant to ask the mediator questions. Although I will not tell you what someone said to me, I see nothing wrong in relaying to you that

an adjuster has started packing his briefcase or is changing his flight home to an earlier time. I think most mediators will tell you their impressions about what is going on as long as you understand it is an impression, not a statement or a fact.

PRINCIPLED NEGOTIATING

To bargain in a principled manner is to state a reason for your monetary demands, to state a reason other than "too low" or "not enough" for refusing an offer, and to provide a rationale for the amount you seek for items like pain and suffering. Telling the mediator that the offer is "only one and a half times your clients specials" does not give a mediator any ammunition to use in getting your client more money; nor does negative bargaining, the prime example of which is to go backwards in money or add conditions to your offer after it has been accepted. Women, more than men, seem to stick to reasons in a mediation. Men get right to the money, whereas women will often ask me to explain specifically how the number was derived and want to hear the reasons why an offer has not been accepted. Women more often than men continue to exchange information and ideas as the mediation moves closer toward settlement. I am not implying that women are more principled, but it is easier to continue to move when all sides continue to exchange opinions about the case rather than just dollar amounts.

Not every soft tissue injury resulting from a car wreck is a bad faith insurance claim and yet I hear it mentioned in at least half the car wreck cases I mediate. Similarly, I do not think it especially effective in a car wreck case to tell the insured, if he is present, his exposure should the jury award more than policy limits. Insureds simply do not trust opposing counsel, and often won't even ask their insurance provided attorney to explain what your statement meant.

ASSISTING THE MEDIATOR

When I mediate I trade in risk. The currency of my craft is the examination of all possibilities--good and bad. I cannot practice my craft if you tell me, without thinking, that your case has no weaknesses or that you have a 99% chance of winning on both liability and damage issues. If that were really true, you would not be in a mediation. The case would have already been settled. A lawyer must rigorously examine his case, when asked to do so by the mediator,

for the process to work. When the mediator tells you what the other side thinks are the problems in your case (assuming of course that the mediator has been authorized to share them) it does not help the mediator one iota for you to respond with a jury argument.

WRITTEN AGREEMENT

Even in a simple, two-party collision case with an attorney on the other side that you have known and trusted since childhood, do not leave the mediation without a written agreement, signed by the parties and the parties' representatives. Remember, the mediator cannot be forced to testify as to what went on during a mediation. The only thing you will have to support your version is the written agreement, signed at the time of the agreement. I provide the parties a blank form, but because of a peculiar clause in my liability policy, I do not fill in any of the blanks nor write on the form myself. It does not take long, even if you have to handwrite the agreement, to prepare a written statement that Defendant insurance carrier agrees to pay Bill Smith $1,000,000 and to have that document signed. Always do so before leaving the mediation.

Thank you for inviting me to speak today.