

## **Mediation Musings: Give Them What They Need Early and Often.**

**By Bradley Bostick**

Well before the mediation date, find out what the defendant needs to evaluate the case. Your motto should be: we're here to help!

What you don't want to happen is to show up at the mediation and find out there is information they still need. That guarantees another round of mediation.

Begin by asking defense counsel if he/she has everything they need. If liability is an issue, they may need an accident reconstruction report. They may need some animation of the accident site and what if scenarios (even if they don't ask for them, if it helps your case give it to them)

If causation is an issue, they may need a report from the treater or a hired expert. They may need a doctor to opine on the cost and necessity of future treatment. A simple narrative report from a credible doctor, stating for instance, that in 5-10 years your client will likely need a future knee replacement can dramatically effect the value of the case. Give them the report early and follow up to make sure it addresses all of their issues.

Go one step further and give them information they haven't asked for like updated medical records and billing. When new information comes in, give it to them immediately. This generates goodwill. Sandbagging is not a good strategy.

Remember that sometimes the defense counsel can be a hidden ally. They are going to be writing a report to the carrier with advice on settlement value. Then they are going to try to get enough money from the carrier to settle. You can make their job easier by providing them with persuasive arguments.

An email setting emphasizing key points can be helpful. Hopefully, it will influence what goes into the defense attorney's premediation report in the section called "case strengths and weaknesses" An example from a recent case was an email sent to defense counsel before the case roundtable. The roundtable is where the die is often cast on settlement authority. Below is an example of getting your talking points into their discussion. The case was an elderly pedestrian killed in a crosswalk by a truck.

Bob: Here are some points to emphasize when you roundtable the case

1. The driver was highly trained, familiar with the crosswalk, the presence of seniors in the area.
2. His perception/reaction time should have been much better than the standard 1.5 seconds.
3. He had plenty of time to stop or slow enough for Ms. Wu to get across if he had been more observant.
4. He failed to alert Ms. Wu to danger by using his horn.
5. The crosswalk was well marked.
6. The Drive Cam video does not have the quality to show what the human eye would have been able to see. His ability to perceive would have been much better.
7. Ms. Wu was wearing light clothing pulling a very visible cart and would have been easy to see.
8. Ms. Wu had a reasonable expectation that she would be seen and the driver would stop for her.
9. It was reasonable for her to assume that she would be seen, that when seen the driver would react and when he reacted, he would have stopped in a timely manner.
10. The jury verdicts I sent you are a little misleading. It looks like 2 of the cases settled for policy limits so arguably they would have settled for more otherwise.
11. In one of the lower settlements, the plaintiff was walking against a red light and a public entity still paid \$900,000.
12. A jury will identify very strongly with Ms. Wu and her family.

Make sure they have all the paid medical bills. If your client has ongoing complaints and they have not done a defense medical examination, invite them to do one *or get a commitment that they can evaluate the case without one*. If the medical records have not been subpoenaed recently, make sure to obtain and send them the more recent medical records.