Practical Tips

Mediation of Catastrophic and Complex Claims

By John C. Trimble

The most successful parties understand that they must prepare themselves, a mediator, and even the other parties to make a settlement happen.

Mediation of civil claims has been a part of the legal landscape in America for several decades. It caught hold as a routine procedure in a majority of jurisdictions in the late 1980s and early 1990s, and in many states, it is rare today that any case will go to trial without having been submitted to mediation. Despite the prevalence of mediation, many lawyers and their clients approach mediation without the level of forethought and preparation necessary for the most successful outcome. There is no greater need for preparation and forethought than in the mediation of catastrophic and complex cases.

For purposes of this article, "catastrophic" cases will refer to those cases involving a very substantial bodily injury, wrongful death, or property damage claim with or without disputed liability and with one or two defendants with reasonably harmonious views of liability and damages. A "complex" case will describe cases that involve a large exposure, multiple defendants, cross-claims, and third-party complaints for indemnity, coverage issues, and other obstacles to settlement.

Practice Tips Common to Both Catastrophic and Complex Cases

The following is a list of practice pointers that seem obvious, but are frequently overlooked by busy attorneys and their clients. This list's foundation is the "Five P's," which you will want to remember at all times: *prepare* yourself; *prepare* your opponent; *prepare* the mediator; be *patient*; and avoid *pessimism*. All lawyers seem to remember that they need to prepare themselves and their clients for mediation. However, they do not always understand that successful mediation of catastrophic and complex cases requires communication, and that communication should assist your opponent and the mediator in getting ready for mediation. Pessimism is a common aspect of every difficult case, but experienced counsel and mediators need to remember that most cases settle in mediation. Therefore, with adequate patience with the mediator and your opponent, even challenging cases can settle in mediation despite pessimism. Don't allow impatience or pessimism to keep you from trying!

- **Choose the mediator carefully.** Not all mediators are equally equipped to successfully mediate catastrophic and com-

■ John C. Trimble is managing partner of the Indianapolis firm of Lewis Wagner, LLP. He defends catastrophic and complex claims of all kinds. Since 1989, Mr. Trimble has devoted a part of his practice to mediation and is frequently hired to mediate complex and catastrophic claims. He is a past member of the DRI Board of Directors.

plex cases. Mediators for particularly challenging cases need exceptional communication skills, a reputation for patience, a reputation for persistence, the ability to dissect the framework of the case, understanding of human and business dynamics, and, in some cases, substantive knowledge of the case subject matter.

No catastrophic or complex case mediation can be successful if the ultimate decision makers are not directly involved.

- **Allow enough time.** There are *two* aspects of time that must be considered in mediating catastrophic and complex cases. First, mediation requires enough time within the trial deadlines and case setting so that the parties are not distracted by having to force mediation into a schedule of depositions, briefing, and trial preparation. Specifically, the parties need to allow enough time for multiple sessions, side negotiations, meeting with the mediator, reassessment of reserves, and negotiation of terms. Second, busy decision makers must allow enough time in their schedule so that flights, meetings, and other commitments do not detract from their ability to attend and be engaged.
- **Involve and commit the ultimate decision makers for each party.** No catastrophic or complex case mediation can be successful if the ultimate decision makers are not directly involved. While it is sometimes difficult to engage high level executives and board members in hands-on mediation, it is almost always worth the effort.
- **Assess the "hidden agendas" of your client and all other parties.** To craft a strategy that will obtain the best outcome for your client, you and your client need to explore the hidden agendas of all the negotiating parties. This type of analysis will enable you to craft a strategic negotiation plan to drive the negotiation to success.
- **Involve experts and consultants pre-mediation.** You will best equip yourself to explain your negotiating position and constructively dismantle your opponent's negotiating position if you have experts readied and in place before mediation begins.
- **Be strategic.** As simple as it sounds, defense counsel and a client must have an end game in mind *before* mediation begins. Too often, a client will approach mediation with a settlement range in mind but will not share it with defense counsel. In catastrophic and complex cases, defense counsel can be of little assistance to the client if defense counsel is unaware of a client's end game.
- **Understand that creativity is needed.** Many parties rely solely on the mediator for creative thinking. Furthermore, they expect negotiations to proceed in the usual back and forth method with a demand, an offer, a counter-demand, a counter-offer and so on. However, more challenging cases may dictate that parties resolve a case in a more creative fashion. Counsel should not rely solely on a mediator for creativity. Good mediators like to mediate with parties who make suggestions about how to address issues and how to proceed with negotiations.
- **Deal constructively with pessimism.** Pessimism in any case derives from a disagreement or misunderstanding among the parties over facts, law, value, or a combination of these factors. It may also derive from insufficient understanding of the biases or prejudices for or against a party that a jury may bring to a courtroom. The parties to catastrophic and complex cases need to understand that pessimism is part of the process, and they need to analyze their pessimism so that they can assist a mediator in identifying and solving issues that may cause pessimism to impede the negotiation.

Mediation Tips: Catastrophic Cases

- **Prepare well in advance.** Too many parties take for granted that the other party will be prepared in advance or that the mediator will take the steps necessary to get the parties ready. However, the best lawyers understand that the preparation process requires counsel to be concerned about the preparation of *every* participant in the mediation process. The following are some ideas for essential preparation in catastrophic cases.
- ***Make sure that all interested parties will attend mediation sessions.*** The "interested" party who most often does not attend a mediation in a catastrophic case is the lien holder. However, if an injured plaintiff has received workers' compensation from or had medical bills paid by group or individual insurance, a lienholder will be very interested in the outcome. A gravely injured plaintiff or survivor of someone who suffered a wrongful death may also have a number of other creditors that a settlement will impact. If liability is disputed, or a defendant has inadequate insurance coverage or assets to pay a settlement, then compromise of the liens will be imperative. Lien holders and creditors will more fully understand their risks of a bad trial outcome for a plaintiff if they attend a mediation, and mediating will be *far* more successful.
- ***Understand the consequences to the plaintiff of a settlement.*** Quite frequently when a plaintiff receives a substantial settlement, previously received benefits, such as workers compensation, social security, Medicare payments, will end. The settlement money will need managing. The plaintiff might require a guardianship or special needs trust. Developing a defense mediation strategy necessitates consideration of these factors and potential solutions partly to motivate a plaintiff to settle. Thus, a defendant must plan and communicate with the plaintiff on these issues in advance.
- ***Employ your own life-care planner or vocational rehabilitation expert to allow you to craft a strategy.*** Most defendants can expect that a competent plaintiff's lawyer in a catastrophic case will present life-care plans and vocational rehabilitation and economist projections to support a demand in a catastrophic case. While

defense counsel can always simply attack the underlying assumptions of these experts, having experts for the defense address the plaintiff's experts at mediation can help to answer some of the following questions:

—What is the most realistic future for the plaintiff?

—What will happen to the plaintiff *in reality* if he or she gets no money or less money at trial?

—Will the plaintiff's family *really* employ 24/7 home health-care workers or will they *really* send the plaintiff to a group home or an in-patient facility?

—Will the plaintiff *really* need the medical care, the rehabilitation, or the assistance that the plaintiff's experts projected?

—Are the projected future costs reasonable and accurate?

- ***Work closely in advance with a structured settlement consultant.*** Too many parties arrive at a mediation without having spoken with a structured settlement consultant in advance. However, in a catastrophic case, it is imperative that defense counsel retain and provide all medical information about a plaintiff to this consultant so that the consultant can obtain a "rated age" quote for annuities. Many times, life insurance company actuaries will review medical records and will price annuities based on the statistical assumption that a plaintiff will have a shortened life expectancy as a result of his or her medical conditions. This can result in a lower annuity cost and a greater benefits offer to a plaintiff. More importantly, in advance of mediation, defense counsel should have the consultant price monthly payments and lump-sum payments in a variety of forms, amounts, and durations. That way, the consultant and defense counsel can bring to mediation a stack of alternative annuity proposals to piece together a package that meets a plaintiff's needs and that he or she finds attractive. Lastly, the consultant should shop the monthly payment proposals and lump-sum proposals with various carriers. One life insurer may have the best pricing for monthly payments while another insurer might have the best pricing for lump sums.

Negotiation Techniques: Catastrophic Cases

- **Project yourself and your client as "problem solvers."** If you project yourself and your client in the opening mediation session as committed to problem solving, you will immediately increase the level of optimism that a plaintiff will have in the process.
- **In disputed liability cases, avoid expressing liability in terms of who will win or who will lose.** If you characterize the liability picture in terms of who will win or lose, you risk personalizing the case and causing a plaintiff to focus his or her anger or frustration on you and your client. Discuss liability in terms of the risk that *both* parties have in front of a jury. A plaintiff needs to understand that a jury will hear facts and law that they will synthesize with jury members' biases and prejudices, and both parties have tangible and intangible risks that can lead a jury to award less money to a plaintiff than available from a settlement, or no money at all, or greater money against a defendant than a settlement would cost. Objectively discussing the trial risk factors in mediation, coupled with adopting a problem-solving attitude, will condition a plaintiff to understand the negotiating position of a defendant as you make offers.
- **Negotiate based on meeting a plaintiff's needs and not based on jury value.** *This is the number one approach to settling a catastrophic case.* Plaintiffs' lawyers like to talk solely about verdict value. You must begin by addressing a plaintiff's needs through a combination of cash and annuities and stick to it!
- **Explain, explain, explain.** Making dollar offers without explanation will not narrow the gap. You need to choose numbers strategically, explain the basis for your number, and explain the reasons why you believe that a plaintiff's number is unsustainable.
- **Be practical.** Remember that your offer of cash and annuities must have enough cash up front for attorney fees, expenses, liens, the immediate needs of a plaintiff, and a cash "nest egg" for the plaintiff.
- **Nothing will happen until you put the plaintiff at risk.** Remember, you will not give the negotiation the possibility of success until there is enough money on the table to appeal to a plaintiff's expectations and potentially entice him or her and that plaintiff's attorney if motivated by greed. The sooner that you put enough money on the table for a plaintiff to calculate his or her net take-home amount, the sooner the plaintiff will become realistic. Therefore, there is usually little point in "tit for tat" negotiation. The best negotiators will start at a reasonable starting point. If a plaintiff's request remains too high, defense counsel should ask the mediator to tell the plaintiff that the defense will ignore the plaintiff's high demands and will simply march forward to an end point and quit mediating. The mediator should remind the plaintiff that if his or her demand remains too high, he or she will lose the opportunity to "tease" more money from the defense.

Too many parties arrive at a mediation without having spoken with a structured settlement consultant in advance.

- **Consider "brackets" or "conditional" offers to narrow the gap.** If negotiating through demands and offers does not eventually narrow the gap between the parties, then one party or the other will need to suggest a conditional offer where one party will agree to a certain number if the other party will likewise agree to a certain number. This technique usually reduces the negotiating gap.
- **Be cognizant of "hidden agendas" and "secret expectations."** All plaintiffs bring some expectation to mediation of how they will spend the money that they expect to receive after attorneys' fees

and expenses. It is not unusual for a plaintiff to have fallback expectations in case their projected net recovery appears to be lower than their highest expectation. Be patient, avoid pessimism, and remember that expectations die slowly. It can be time-consuming to help plaintiffs realize that they are not going to receive the kind of money that they expected.

It can be time-consuming to help plaintiffs realize that they are not going to receive the kind of money that they expected.

- **Be patient.** Sometimes defendants can lose perspective when large numbers are at stake. In a multimillion dollar case, a savings of $25,000 or $50,000 may not seem like much, but in reality, it is *a lot* of money. If you and your client can save money by proceeding slowly, the savings will add up over time.

Mediation Tips: Complex Cases

- **Prepare in advance.** Preparing in advance for settlement of a complex case is an absolute necessity. You and your client have so many levels of complexity to consider that a complex case cannot possibly settle if the parties and the mediator have not taken great pains to analyze and understand the dynamics of the case well in advance of the first mediation session.
  - ***Create a "framework" or "game board" of the case.*** Too often, the attorneys in a complex case get bogged down in its complexity. You can significantly facilitate preparing a complex case for mediation by diagramming the framework of the case and placing imaginary "buckets" under each party. As preparation for mediation proceeds, you can confer with the mediator and suggest how the "buckets" will be filled to piece together a settlement with the plaintiff. This method allows you to simplify a complicated undertaking.
  - ***Share the defense dynamics with the plaintiff.*** Too often, plaintiffs and their counsel do not fully understand the complexity of the dynamics among the defendants that create obstacles to settlement. A plaintiff who does not understand the dynamics can inadvertently make demands or set conditions that exacerbate the obstacles among the defendants. Thus, to the extent that a plaintiff can be a part of the solution rather than part of the problem, it is helpful for the plaintiff to have as much information about the defense dynamics as possible without giving away defense tactics or secrets.
  - ***Encourage and assist the mediator with pre-mediation strategy.*** The best mediators in complex cases will not only receive pre-mediation confidential submissions, but they will also have pre-mediation planning meetings with the parties. The parties need to understand that mediation is, by its very nature, an *ex parte* procedure and that one-to-one meetings with the mediator are to be encouraged and not feared.
  - ***Provide objective mediation submissions.*** Frequently, mediation submissions are viewed as an opportunity by counsel for strident advocacy. Instead, a mediation submission should offer an objective and thorough description of the facts and law. More importantly, in a complex case the submission should offer a mediator insight into the psychology, dynamics, obstacles, and possible solutions in the case. A party self-positioned as a problem solver in a mediation submission will have great credibility with a mediator and may succeed in gaining the mediator's subconscious sympathy from the outset.
  - ***Communicate about obstacles.*** In mediating a complex case, parties should prepare to share information about obstacles to settlement with a plaintiff and with other defendants. If financial, coverage, precedential, or human obstacles hinder settlement, then counsel needs to be prepared to provide objective and credible proof of the obstacle so that the other parties will believe that the obstacles exist and exercise due diligence to ascertain their legitimacy. For example, a corporate entity that has insufficient insurance coverage and insufficient financial means to voluntarily pay a settlement may need to provide reliable financial documentation to satisfy skeptical parties.
  - ***Hold multiple sessions.*** Many parties involved in a complex case are strapped for time because of the demands of depositions, briefing, and trial preparation. However, you and your client need have an open-mind about having sessions with just one defendant, its insurers, and the mediator; a meeting among defendants only; meeting on multiple consecutive days; and meeting on multiple non-consecutive days. A complex case will rarely settle after simply one session.

Negotiation Tips: Complex Cases

- **Find consensus among multiple defendants.** One very common and effective technique for finding consensus among a group of defendants involves a four-step process as follows:
  - ***Step One:*** The mediator asks the parties, for his or her use, to separately, anonymously, and confidentially:
    - —Provide a range of value of a jury verdict for the plaintiff's claim.
    - —Provide a range of value for settlement of the plaintiff's claim.
    - —Rank the defendants in order of their exposure.
    - —Rank the percentage or dollar amount of exposure of each defendant.
    - —List the parties likely to be involved in the case if it goes to a jury.
  - ***Step Two:*** With the parties' permission, the mediator will begin to show the parties the separate ranges of value of the jury verdict and of settlement that each party projected, *without* revealing who projected which amount. Hopefully, this process will then allow the defendants to collectively engage in dialogue and to obtain consensus on the range of

value of the jury verdict and the range of value of a settlement.

- ***Step Three:*** The mediator may want to ask the parties for permission to reveal how the parties ranked the exposure and the percentage of exposure of each defendant. Usually, this process will reveal that the majority of defendants are on the same page and that one defendant stands alone. This provides an opportunity to the mediator to approach that one defendant and to find out why and address the reasons why that defendant views the case differently than the others.
- ***Step Four:*** If the first three steps have provided the desired outcomes, the mediator may have brought the parties close to putting together a group offer. A mediator can pull together the group offer in multiple ways, trying one or more of the following formulas:
  - —All defendants will contribute equally to a certain dollar level.
  - —All the parties will contribute based on an agreed percentage for each Defendant, up to a certain dollar level.
  - —The mediator can simply obtain blind contribution from each party anonymously and negotiate with the plaintiff without revealing to the defendants collectively the total amount they have offered or anyone else's individual amounts.
- **Buy now—divide later:** There are times when defendants simply cannot or will not agree to a framework for a collective offer as a whole. If they cannot or will not, in the right case, it may be in the interest of all parties to collectively settle the case with the plaintiff and then establish a methodology through arbitration, summary judgment, bench trial, or jury trial to divide the payment among the defendants.
- **Settle in pieces:** Many complex cases are simply too complex for all the defendants to unite initially to make an offer to a plaintiff. When that happens, it may be necessary for a mediator to mediate the case in pieces and to arrange settlement with some defendants but without others. Alternatively, if a particular defendant has coverage or indemnity issues or involves third-party defendants, it may be necessary first to settle the side issues so that your client can approach the table with the other defendants to address settlement with a plaintiff.
- **Negotiate with the plaintiff alone:** In rare cases, with a motivated plaintiff, it may be possible for a mediator to work solely with the plaintiff to assist the plaintiff in understanding the obstacles and dynamics that are preventing the defendants collectively from making an offer. The mediator may be able to bring the plaintiff to a number or a range that represents something close to the plaintiff's bottom line. The mediator may then enable the defendants collectively to cobble together enough money to settle with the plaintiff. However, this strategy only works when a mediator is respected and trusted by all the parties and the plaintiff is trusting enough to reveal a bottom line to the mediator without the concern that they are "bidding against" him or herself.
- **Be prepared to "reshuffle" the deck:** There are many times in complex cases when mediation moves forward along traditional lines and then hits a dead end. It may be necessary at that point to start over by breaking the negotiation into pieces. Be patient and open-minded. Step back from the fray and "visualize" a different approach.

In Conclusion

It bears repeating that successfully mediating catastrophic and complex cases requires preparation, patience, and avoiding pessimism. The most successful parties will understand that they must prepare themselves, a mediator, and even the other parties to make settlement happen. If each party approaches mediation as a problem solver rather than as an obstacle maker, even the most catastrophic or complex case can be settled.