PROGRAM MATERIALS
Program #35120
September 11, 2025

Master Trial Series - Session One: Client Relationships – Getting the Client Ready for the Process

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

ON LINE TRIAL PRACTICE COURSE

Teaching trial practice involves four phases: instruction, simulation and supervised participation and finally experience.

Phase One, Instruction involves a series of courses which alert the "student" to the various phases and how to prepare and approach each. The goal is to get the "student" to think about the litigation process and begin to develop a method of handling cases so that instincts are developed and there is an awareness to the challenges that are faced in being a trial lawyer. *This type of course also is for lawyers with some experience in trial work as it allows them to reflect on how they are approaching this process to see if that appraoch needs to be modified*.

Phase two involves exercises that are essentially *Simulations*. These are mock exercises or trials that allow the "student" to experience the phases of trial work under supervision. This process has developed over the years so that now there are courses designed to assist lawyers who are learning to experience the first two phases, instruction and simulation. These exist in both law school and post graduate formats, with the latter being offered by programs which also offer CLE

credits for participation. Various bar and trial lawyer groups offer these programs for lawyers, so there are many choices and variations from which to choose.[1]

I have also written a negotiation book, "Negotiating and Settling Tort Cases: Reaching the Settlement," which is over 1000 pages on negotiation strategy and which I have developed from my many years of negotiating for my clients, plus many published articles on Civil Trial Practice and its various aspects. The experience, teaching and writing has led me to develop this course.

My course – Civil Trial Practice – is designed to give lawyers the chance to reflect on how they should approach trial work. It allows the "student" to reflect on the process and to organize it in a manner that develops or refine an approach after the lawyer has had experience handling civil litigation.

I have been doing this work for over 50 years and have taught in various programs in law schools and for post=graduate programs for admitted lawyers. I have developed law school programs for trial lawyers and participated in those organized by others. I have also prepared course materials and 'case files' for simulations and practice exercises. It also is the result of talking to so many highly

[1] Going to the internet and just looking for "Trial Practice Courses" will lead you to a long list of programs for instruction which use both lecturing and simulations to teach trial practice. The same approach of instruction, simulation, supervised participation and then experience is typical of other professional disciplines, including medicine, dentistry and other healing arts.

trained and experienced lawyers who have participated in programs for training trial lawyers over the years and have also been involved in mentorships in their own practice. All of this has contributed to my knowledge and experience in developing my ten-session course on Civil Trial Practice.

Here are the Couse Topics:

THE BASICS OF CIVIL TRIAL WORK – AND THEN SOME

Mr. Kornblum, a highly experienced trial and litigation lawyer for over 50 years will conduct ten 75 minute Webinars sessions on "Civil Trial Work and Then Some." The course will explore what you need for refining your skills in handling civil cases in their various phases.

Session One: Client Relationships – Getting the Client Ready for the Process.

Session Two: Drafting the Complaint to Tell the Story and Other Case Strategies.

Session Three: Working the Case Up: The Investigation, the Case Management Plan, and Ethical Issues You May Face.

Session Four: Creating a Discovery Plan and Implementing It.

Session Five: Working with Your Client Including Preparing for Deposition

Session Six: Taking Depositions the Right Way.

Session Seven: Cross-Examination Techniques – and More.

Session Eight: Expert Witnesses – Yours and Theirs

Session Nine: How to Achieve a Settlement – Direct Negotiations, Mediation or ?

Session Ten: Trying the Case: Special Considerations.

Accompanying Materials:

MEDIATION ADVOCACY HANDBOOK – over 150 pages on techniques for negotiation and settlement techniques and strategies with an emphasis on Mediation.

CIVIL TRIAL PRACTICE HANDBOOK – also over 150 pages with Chapters on litigation and trial strategy.

TRIAL PRACTICE COURSE

CLIENT RELATIONSHIPS

With
GUY O. KORNBLUM
A PROFESSIONAL LAW CORPORATION

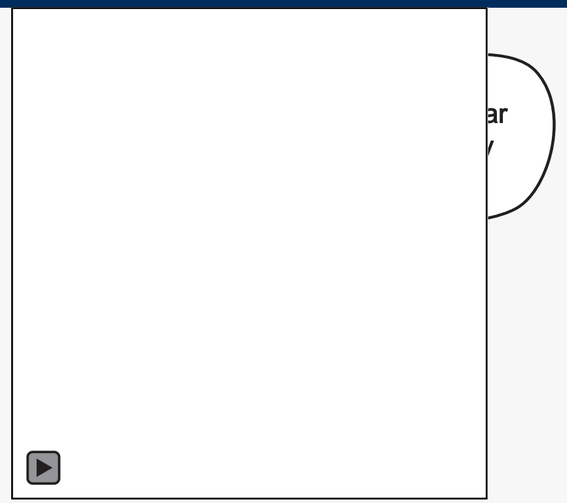
THE COURSE PURPOSE

This course is designed to provide participants with an understanding of my approach to the **civil litigation process** , from the **first contact** with a potential new client (“**PNC**”) through **trial** .

I cannot teach you how to try a case, but I can alert you to the essentials you need to consider in handling civil cases.

We will cover some but not all of the essential legal principles, procedural rules, practices.

What We Can and Cannot Do in This Format – Realistic Learning Expectations



How This Course "Fits"
into the arsenal of learning about Civil Trial Practice

The Four Phases Of “Trial Work”

PHASE 1:
Initial Learning

PHASE 2:
Simulated Experience

PHASE 3:
Serving As “Second” Chair

PHASE 4:
On Your Own

Consider Additional Learning By.....

- WATCHING OTHERS TRY CASES
- ACTING AS SECOND CHAIR
- ASSUMING SOME RESPONSIBILITY FOR CASE WORK
- APPEARING IN COURT AS OFTEN AS POSSIBLE
- SEEKING GUIDANCE WHEN RESPONSIBILITY ASSUMED
- LEARNING FROM YOUR EXPERIENCE. MANY DO NOT!

Course Materials

- **Mediation Advocacy Handbook**
- **Trial Advocacy Handbook**
- **“Ethics and Diplomacy for the Trial Lawyer, etc.”**
- **“Negotiating and Settling Torts Cases: Reaching the Settlement” (available)**

Agenda

Topic 1: Attracting Clients

Topic 2: Selecting the Right Cases

Topic 3: Securing Quality Cases

Topic 4: Managing the Intake Process

Topic 1: Attracting Clients

Your Tasks . . . .

- Assess your skills – your strength as an advocate
- Are you a *finder, binder, minder or grinder*?
- Be realistic about the process

Your Tasks, cont'd. . . . .

- Once a candid assessment, then what?
- Develop a plan for how attract and manage your cases.
- Apply your best skill set.

Queries to Reflect On . . . .

- How do you attract clients?
- Is your approach likely to bring in those that “fit”?
- Do you monitor the process?
- Do you track the source of a client contact?
- Do you re-evaluate its value and what it produces?
- Is it an ongoing process?

Attracting Clients Requires A Confidence And Realistic Strategy

Queries to Reflect On *Again* . . . .

- How do you attract clients?
- Is your approach likely to bring in those that “fit”?
- Do you monitor the process?
- Do you track the source of a client contact?
- Do you re-evaluate its value and what it produces?
- Is it an ongoing process?

Topic 2: Selecting the Right Cases

The Dilemma? Or Is It...

- Attracting clients *vs.* Getting quality (*i.e.*, “deserving”) clients/cases
- Case selection is the best means of avoiding disappointing results.
- Is your intake and evaluation process tidy and well-organized?
- Consider your approach and system of case evaluation.

Marginal Cases: The Urge

Distinguish. . . .

Marginal Cases v. Tough Cases

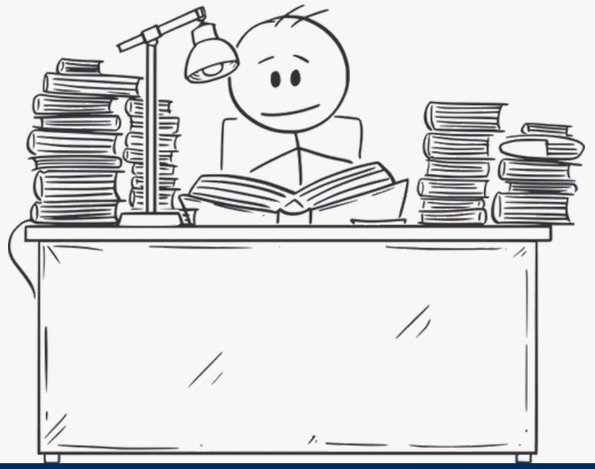
Marginal means less than 50% chance of recovering an adequate/reasonable sum

+

The cost of case workup

The Best Case Is The One I Did Not Take!

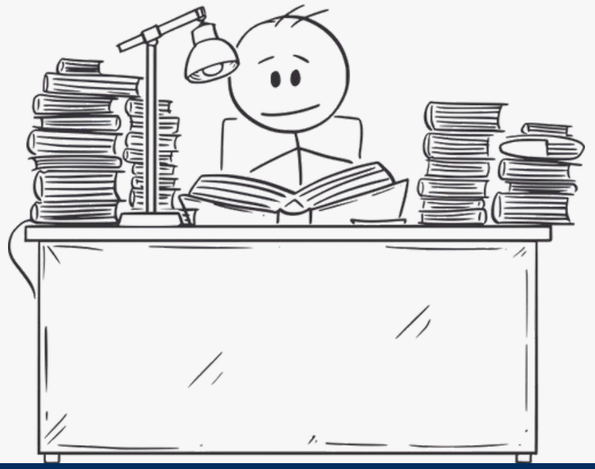
- Upon initial contact, make it clear you are assessing the matter.
- Do it quickly and stay in touch with *PNC* (*Potential New Client*).
- Be honest with yourself on evaluation.
- Resist *marginal* cases.
- Do the math: cost to recovery; net to client and firm.



The Case Workup:
The Key To A Successful Resolution

The Keys Include

1. Make plan clear to the PNC.
2. Make it clear you have NOT accepted the case.
3. Have a realistic approach – discuss with PNC.
4. Be prepared to decline a case that does not have the economic potential or does not ‘fit’ your practice (including a difficult or unrealistic client!)



Again: Be prepared to decline a case that does not have the economic potential or does not ‘fit’ your practice!

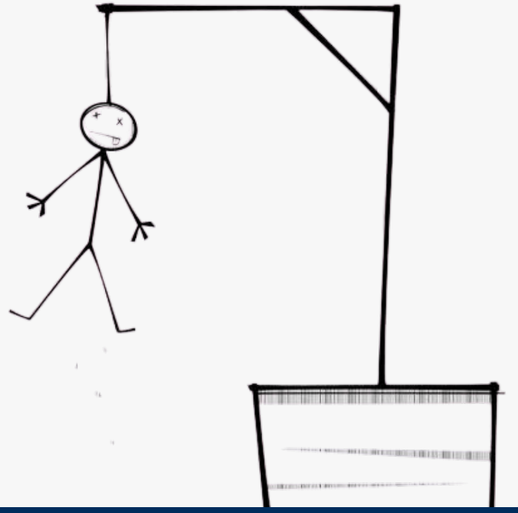
What Will It Take?

Do a case cost projection early **BUT**. . .

- Factor in Hiccups and Cost Increases
- Be realistic
- Consider - What The Defendant May Do!

Topic 3: Securing Quality Cases

Confirming Representation and Getting Started



Take Your Time —
But Don’t Leave Clients Uncertain And Hanging.

Know The Ethical Responsibilities Of Accepting A Case For Investigation Not Representation

Topic 4: Managing the Intake Process

What To Consider?

Client Fit & Case Viability

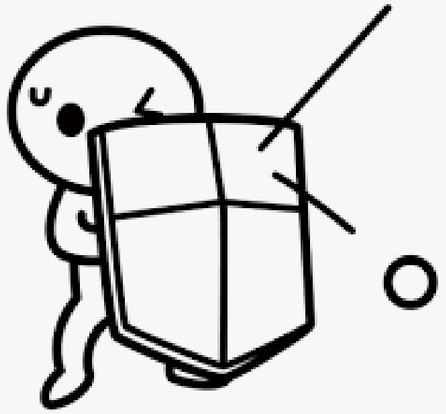
- Who is the client?
- Are they reliable storytellers?
- Can you work with them?
- Are the damages real and provable?
- Do the specials support the general damages claim?
- Do the numbers work: cost, timing, investment?

What To Consider?

Support & Credibility

- What support do you have for them?
- Will friends and family support the claims?
- Who are the witnesses and are they reliable?
- Who are the damages witnesses, and will they cooperate (doctors, etc.)?

How Do You Protect Yourself Before Confirmed Representation?



What To Consider?

Before an attorney-client relationship is formally confirmed, a lawyer owes a **prospective client fundamental ethical duties of confidentiality and conflict of interest avoidance**. The investigation phase is critical because **an informal consultation can trigger these professional obligations**, even if the lawyer does not ultimately take the case.

What To Consider?

Under American Bar Association (ABA) Model Rule 1.18, a lawyer's duties to a prospective client include:

Confidentiality: A lawyer cannot use or reveal information learned during the initial consultation. This duty of confidentiality applies even if no formal attorney-client relationship is ever created.

Conflict of interest avoidance: A lawyer is barred from representing a client with interests "materially adverse" to a prospective client in the same or a substantially related matter if the lawyer received information that could be "significantly harmful" to the prospective client.

Safeguarding property: If a prospective client provides the lawyer with documents or other property, the lawyer must handle that property with the same care as if the person were a confirmed client.

What To Consider?

To manage these ethical duties, lawyers should employ clear communication and robust screening procedures during the initial investigation phase.

Clear communication: Lawyers should clearly inform the prospective client that no attorney-client relationship has been formed and that the consultation is only for the purpose of the lawyer evaluating the case.

Limit information: A lawyer can limit the information they request from a prospective client to only what is necessary to perform a conflict check and assess the case. This helps to avoid acquiring "significantly harmful" information that could later disqualify the lawyer.

Obtain informed consent: Some jurisdictions allow a lawyer to condition the initial consultation on the prospective client's informed consent that no information shared during the meeting will prohibit the lawyer from representing a different client in the matter.

There Is A Reason, So...

Confirm in writing the limitations of your inquiry

Keep PNC informed

Be sure the potential client understands what you are going to do

Calendar follow -up

Resist the temptation on skimpy liability and large damages cases.

Don’t languish

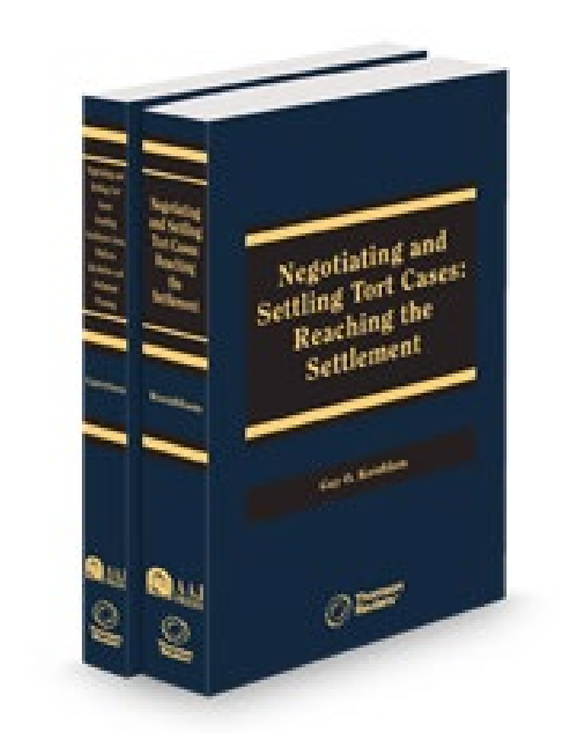
You Are Now Ready To “Commence Firing”

- Send an engagement letter - the nature and scope of representation.
- State what you are doing.
- Prepare a comprehensive case outline.
- All clients sign and date the engagement letter.
- The client relationship already began; it is now formalized in writing.
- Be sure your client and you have a fully signed copy.
- See Sample Representation Letter.

NEXT SESSION:

DRAFTING THE COMPLAINT TO TELL THE STORY AND OTHER CASE STRATEGIES

THANK YOU



Please click here to order the updated version of my book: **Negotiating and Settling Tort Cases, 2025 ed. (AAJ Press)**

https://store.legal.thomsonreuters.com/law-products/Practice-Materials/Negotiating-and-Settling-Tort-Cases-2025-ed-AAJ-Press/p/107127426

Discount Code: **TORT20**

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ATTORNEYS' REPRESENTATION AND FEE AGREEMENT

This Agreement, executed in counterparts with each party receiving a copy of the executed original, is made between [Attorneys] (hereafter "Attorneys") and [Insert] (hereafter "Client"). Unless a different agreement is made in writing, this Agreement alone shall govern Attorneys' and Client's respective rights and responsibilities as to matters to which it pertains.

This Agreement is required by California Business and Professions Code section 6147 and is intended to fulfill the requirements of that section.

1. **Claims Covered by Agreement**: Client retains Attorneys to represent Client in connection with a claim and lawsuit relating to [Insert] and persons and related entities in connection with the personal injury claims for all damages and remedies available and arising therefrom.

2. **Services to Be Performed by Attorneys**: Attorneys agree to perform the following legal services, as necessary, with respect to the claim(s) described above:

— Review and analysis of your files, including the relevant insurance coverage documents;

— Preparation and filing of pleadings;

— Meet the court deadline and meeting requirements (for counsel to confer for the purposes of having initial status conference with the court);

— Prepare an evaluation letter of the merits of the case if requested;

— Prepare any special status reports as necessary;

— Carry out the following activities:

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- Investigation of claim(s);
- Determining responsible parties;
- Preparing and filing a lawsuit;
- Participating in settlement procedures and negotiations;
- Prosecution of claim(s) by arbitration or legal action until settlement, award or judgment is obtained; and

__ If judgment is obtained in Client's favor, opposing an opposing party's motion for new trial (if any).

3. **Participation of Client**: Client agrees to comply with all requests by Attorneys for assistance in securing materials and information relevant to the claim(s) described above. These materials and information include, but are not limited to, personal financial and business records, medical records, psychiatric reports, documents concerning prior litigation involving Client, relevant background information concerning Client, and any other materials or information Attorney(s) deem necessary.

4. **Services Not Covered by This Agreement**: If other legal services are necessary in connection with Client's claim(s), and Client requests Attorneys to perform such services, the parties will review this Agreement with a view toward any modifications that are in good faith required. Such additional services may result from any of the following:

— If the judgment obtained is not in Client's favor, or the amount thereof is unsatisfactory to Client;

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Client Initials

— If the judgment obtained is in Client's favor and an opposing party appeals from the judgment;

— If a retrial is ordered after a motion for new trial or mistrial, or after reversal of the judgment on appeal; or

— In judgment enforcement proceedings.

5. **No Guarantees as to Result**:

CLIENT ACKNOWLEDGES THAT NOTHING IN THIS CONTRACT AND NOTHING IN ATTORNEYS' STATEMENTS TO CLIENT WILL BE CONSTRUED AS A PROMISE OR GUARANTEE ABOUT THE MERITS OF THE CASE, THE POSSIBLE OUTCOME OF THIS LITIGATION, OR THE AMOUNTS RECOVERABLE IN CONNECTION WITH CLIENT'S CLAIM(S). ATTORNEYS MAKE NO SUCH PROMISES OR GUARANTEES. ATTORNEYS' COMMENTS ABOUT THE OUTCOME OF CLIENT'S MATTER ARE EXPRESSIONS OF OPINION ONLY.

6. **Compensation for Attorneys' Services**: Attorneys agree to provide the above listed services in return for compensation to be determined as follows with respect to the recovery of Client:

— **Thirty Three & One-Third Percent (33&1/3%)** of the **"net recovery"** recovered if the matter concludes by settlement before the *first trial date*;

— thereafter Attorneys will be paid **Forty Percent (40%)** of the **"net**

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Client Initials

recovery" recovered; and

__ **Fifty Percent (50%)** of any sums actually recovered as **punitive damages**.

Client acknowledges that they have been advised by Attorneys that, as to matters of this type, any contingency fee is negotiable and is not set by law.

7. Additional Terms Concerning Attorney Compensation: The term **"net recovery"** means the **"gross sum** received as a result of settlement or judgment (including all sums paid for settlement, attorneys' fees, reimbursement of costs or satisfaction of judgment) **minus** all deductions for costs and expenses, pursuant to Paragraph 9. This contingency fee shall apply whether the recovery is by way of settlement, judgment or otherwise. Client acknowledges that Attorneys have made no promises about the total amount of attorneys' fees to be incurred by Client under this Agreement.

Client further consents to any sums paid as a result of a settlement or judgment shall be paid to Attorneys by check or similar instrument payable as follows: ***"Guy O. Kornblum, A Professional Law Corporation in Trust for Client from the [insert[Settlement/Judgment***." Client further consents to Attorneys depositing any such check or similar instrument in an interest-bearing account with interest payable to the California Bar Association to provide legal services for those who are indigent. Notwithstanding this consent, Attorneys agree to process any Client funds as promptly as is reasonable under the circumstances.

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Client Initials

8. **Litigation Costs and Expenses**: Attorneys are authorized to incur reasonable costs and expenses in performing legal services under this Agreement. Client agrees that reasonable costs and expenses may be incurred as follows:

a) **Particular Costs and Expenses**: The costs and expenses necessary in this case may include any or all of the following items. This list is not exclusive; other items may also be necessary:

— Court filing fees;

— Process service/subpoena fees;

— Private investigator fees, if any (and only if said services become necessary in addition to work performed by Attorneys' in-house investigator);

— Court reporter and transcript charges;

— Photographic/graphic artist fees;

— Fees to experts for consultation and/or appearance at deposition or trial;

— Jury fees;

— Mail, messenger and other delivery charges, including express services where necessary;

— Parking and other local travel, at cost;

— The reasonable cost of transportation, meals, lodging and all other costs of necessary out-of-town travel;

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— Long distance and facsimile telephone charges (at 1% of the net recovery);

— Facsimile charges and photocopying, at cost;

— Computerized legal research (at .05% of the net recovery);

— Fees for preparation and production of court exhibits.

b) **Responsibility for Payment of Costs**: Such costs and expenses shall be advanced by Attorneys, who will be reimbursed for such out of the **"gross sum"** received, after which fees shall be computed and paid.

9. **Effect of Discharge by Client or Withdrawal of Attorneys**: Client shall have the right to discharge Attorneys at any time upon written notice to Attorneys. Such discharge shall not affect Client's obligation to reimburse Attorneys for costs incurred prior to such discharge. Attorneys have the right to withdraw as counsel on giving reasonable notice, subject to the Rules of Professional Responsibility of the State Bar of California. Attorneys shall be entitled to the reasonable value of legal services performed prior to such discharge or withdrawal, and to be paid by Client from any subsequent recovery, by settlement, judgment or otherwise, on the claim(s) covered by this Agreement.

10. **Attorneys' Lien**: Client hereby grants Attorneys a lien on all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorneys' services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney

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may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien.

By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

Initial: _____

11. <u>Disclosure re: Errors and Omissions Insurance</u>: Attorneys maintain errors and omissions insurance covering the services to be rendered under this Agreement.

12. <u>Mediation/Arbitration of Disputes</u>: Client and Attorneys agree that any dispute regarding the terms of this Agreement or payments due hereunder shall be submitted to mandatory fee arbitration pursuant to California Business & Prof. Code § 6200, *et seq*., by one arbitrator appointed by the Bar Association of San Francisco. The parties further agree that the party obtaining an arbitration award shall be entitled to an award of post-arbitration attorneys' fees and all expenses incurred in obtaining judicial enforcement of the arbitration award. Client and Attorneys agree that since Attorneys are located in San Francisco, California, their services are to be provided and payments received in San Francisco, California, this contract is deemed to be entered into in San Francisco, California, and Client expressly submits to the jurisdiction of the Bar Association of San Francisco for the above arbitration and to the State and Federal

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Courts located in San Francisco, California, for any dispute concerning this agreement, its terms or performance. **Except as provided in the referenced statutory provisions, the award of the arbitrator shall be final and binding**.

However, prior to any arbitration, any party having a dispute must first give notice of such to any other party against which any claim is made or dispute arises. The parties then have ninety (90) days to mediate the matter, unless otherwise agreed in writing, the completion of which is a condition precedent to demanding arbitration. Any mediation shall be with a mediator chosen from a total of six mediators, three from each side, which shall be submitted (via the parties' respective exchanged lists) within ten (10) days after the date of any notice given by a party that a dispute has arising or claim is being made. If the parties cannot agree on a mediator from the resulting list of six mediators, then from that list of six mediators each party will chose, and provide the names to the other party, of two mediators within three (3) days of receipt of the list three mediators received from the other party. If there is a common name on the list of the four (4) submitted names, then that person will be the mediator; if not, the list of six (6) mediators will be submitted to the Chairperson of the San Francisco Bar Association Committee on Fee Disputes, who will then chose a mediator from such list of six mediators.

Any mediation shall be completed within forty-five (45) days from the date the parties chose or are notified of the name of the mediator. The mediation will take place in San Francisco, California. Evidence Code §§1115 *et seq.* (Chapter 2, Div. 9) shall apply to any mediation proceedings.

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Client specifically acknowledges, that entering into this agreement to arbitrate results in the loss of any right to a jury trial and to any appeal from the findings and award of the arbitrator(s) who hear such disputes.

Initial: _____

13. **Governing Law**: This Agreement shall be construed and enforced pursuant to the laws of the State of California as they exist on the date that this Agreement is considered fully executed. In any action to enforce any of the terms and conditions of this Agreement, the parties agree that the venue for any such action shall be in the County of [Insert].

14. **Notices**: All notices and correspondence from Attorneys to Client shall be sent to the following address and telephone number which is the address and telephone number Client has instructed Attorneys to use to contact client: [Insert]. If Client changes an address or telephone number, Client agrees to notify Attorneys in writing within seven (7) days of such changes of the new address and/or telephone number.

15. **Waiver**: No waiver of any of the provisions of this Agreement shall be effective unless such waiver is in writing and signed by the party or parties to be bound. No notice to or demand on either party shall entitle it to any other or further notice or demand in similar or other circumstances.

16. **Amendments and Integration**: The parties agree that all changes or modifications hereto shall be in writing and signed by the parties. This Agreement constitutes

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Client Initials

the entire agreement between the parties. If, at any time, Client makes requests for services outside the scope of Paragraph 1 above, and in the absence of any other written agreement applying to said additional services, the provisions of this Agreement, as modified from time to time, shall apply thereto.

17. **Effective Date and Term**: This Agreement shall take effect when signed below by Client.

18. **Client's Receipt of Agreement and Acknowledgment of Terms**: Client acknowledges that this Agreement has been read by Client who understands its terms and conditions as of the time of its signing and that a copy of this Agreement has been received.

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Client Initials

19. **Agreement to be Governed by Laws of State of California**: Client and Attorneys agree that this Agreement shall be governed by the laws of the State of California in all respects.

Executed at_____CALIFORNIA, on _____**.**

CLIENT:

_____

[Insert typed name]

AGREED TO:

Attorneys:

_____

_____

Client Initials

CIVIL TRIAL PRACTICE HANDBOOK

By Guy O. Kornblum
Member, California and Indiana Bars

Civil Trial Practice Handbook

Guy O. Kornblum
Member, California and Indiana Bars

Dedication

I am indebted to the judges before whom I have appeared and my colleagues, both co-counsel and adversaries, for the lessons I have learned from them in my practice.

Table of Contents

About the Author

Guy O. Kornblum is the principal in Guy O. Kornblum, A Professional Law Corporation, with offices in San Francisco, where Mr. Kornblum has practiced for over 50 years. He is Certified in Civil Trial Law by the National Board of Trial Advocacy. He has been trying civil cases his entire career and has taught at the thenHastings College of the Law, University of California (now UC Law San Francisco) where he obtained his law degree. Once on the defense side, he has been a plaintiff's lawyer for the past 25 years.

He also is an expert witness in insurance claims and legal malpractice cases.

While an active practitioner, Mr. Kornblum has drawn on his experience as a former full-time law teacher and administrator and continued his interest in continuing legal education. His passion for learning has continued thru giving hundreds of courses to practitioners over the years and writing for numerous legal publications. He is the author of *Negotiating and Settling Tort Cases: Reaching the Settlement* published by the Thomson Reuters Publishing Company with a 2025 edition. This is a book for practitioners on settlement techniques that get results.

His firm handles a wide variety of civil cases which suit them because of the nature of the issue and the requirements of the case. They especially look for challenging personal injury and insurance related cases. *www.kornblumlaw.com/*

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Chapter 1
Trial practice – From Start to Finish

Well, here goes!

This is the first Chapter on Trial Practice.This book arose out of series of columns I have done these past few years for the FORUM, the bimonthly journal of the Consumer Attorneys of California.

. The idea is was write about subjects related to our practice area. Some call it “litigation” while others refer to it as “trial practice” or a phrase I use, “trial work.”

Nonetheless, a lot of what we do is not what takes place during trial. In fact, a lot of what we do during the process of preparing a case or “working it up” is to bring it to a conclusion by settling. One lawyer I know once said, “The best piece of paper in your file is a release!” There is some sense to that comment.

In my experience, most clients wish to resolve their cases by settling instead of enduring the anxiety of trial. And, indeed, most cases settle. Just look around at all the mediation services and mediators offering to help us accomplish just that.

However, some cases will be tried. Look at the calendar in any court, federal or state, and you will see a docket showing trial days actually taking place.

So, while the objective may be to settle a case, and that certainly should be encouraged, the case may not settle. Thus, the

first rule is: **Prepare your client's case for trial.** Fulfilling this objective is likely to lead to a settlement, but if not, you will be ready to put on your client's case.

So, now let's talk about what I hope to accomplish in this column to be included in each issue.

It all started with an article I submitted on direct examination of lay witnesses (your client and your witnesses who tell the story of your client's case). The idea of a regular column was born out of that. After many years in this practice, I have something to say about what we do, and how we do it. These are my ideas. I hope by writing about them, you will consider what I write, and that it will cause you to think more about what we do and how we accomplish our goals of representation of our clients in the trial/litigation process.

I call our practice, "A Grand Game of Mother May I." It is storytelling in the world of the real. You are retelling what happened, but a judge controls what a jury hears. ("Your Honor, may I be heard.") Our job is to present the best and most compelling story on behalf of our client with the permission of the presiding officer.

I hope you will find what I write worth reading and even passing on to your colleagues.

Chapter 2
Thoughts About Direct Examination: Winning Ways to Achieve Successful Proof of Your Client's Case

The key to successful proof is direct examination of the witnesses you present in your client's case. While some might think that cross-examination of an adverse witness is the key to prevailing, in my view that is not where your best chance of proving your client's case lies. That chance lies best in the examination you conduct of the witnesses testifying on your client's behalf. That is, you win cases on direct examination, but you can lose cases on cross (the latter is for a later article).

So how do you prepare and posture yourself for the direct examination of the witnesses you present on your client's behalf? What are the rules – no let's call them "best practices" – for successfully doing so and avoiding objections that may disrupt the flow of that examination. It is more than just asking questions with a "who, what, where, when or why" beginning.[1]

Even the most seasoned and successful practitioner can trip in the process of examining the witnesses who are testifying on a

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1 1 This is a common phrase used by writers (https://comm.gatech.edu/resources/writers/5ws), but it is good principle to follow on direct examination to elicit all information about a client's claim.

client's behalf.

So, here are my thoughts – after several decades engaged in a civil litigation practice – for avoiding pitfalls which prevent you from effectively presenting the case for your client.[2]

AVOID UNNECESSARY INTERRUPTIONS

In my view, a direct examination should be smooth, logical, and easy to follow as it tells the story about your client's case. The examination of the plaintiff is – obviously – critical. It must be clear, persuasive and what I call "inviting" – an invitation to the jury or court to listen to your client's story. Does that sound simple? Yes, it does. Getting the result is not so simple. Do not be deceived into thinking that because you have a "good client" as a witness the fact finder is going to "buy into" that client's story. It is more than that. Credibility, likeability (which is somewhat similar to creditableness) and effectiveness at story telling is so important to an effective direct examination of a client. But it starts with a compelling and credible story.

But that story needs to be told in a clear, interrupted fashion to allow the fact finder – even a trained judge, but particularly a jury – to follow that story and put the pieces together.

2 This is not a new topic for comment. Many have written on it. So, my views may parrot those of others. Still, I have some thoughts that may vary. For other good articles see, e. Wallach and B. McCormack, "Direct and Cross-Examination," California Litigation, Vol. 23, No. 3. 2010; "Ten Tips for Direct Examination and Cross-Examination," https://www.starneslaw.com/wp-content/uploads/2017/10/wwb-rth-wss-ajta-2015.Pdf

FIRST, SOME BASICS

"Direct examination" is the first examination of a witness upon a matter not within the scope of a previous examination of the witness. (Evid. Code, § 760.) Evidence offered on direct must be relevant, authentic, not hearsay, and otherwise admissible. Leading questions are not allowed on direct or redirect examination. (Evid. Code, § 767, subd. (a)(1).) A leading question is one that "suggests to the witness the an swer the examining party desires." (Evid. Code, § 764.)

Leading questions should not be used on direct examination *except as necessary to develop the witness's testimony.* However, we all know they are used frequently and perhaps more permissibly (for lack of objections or court intervention).

So here are the guidelines for direct examination:

- Pose open-ended questions only but with a specific topic in mind. That is, you should not ask simply, "What happened?" but should ask instead, "Tell us what occurred on the evening of [insert]," or "Tell us how the accident happened";
- Cover only one major point at a time;
- A question should be a simple one ending with a question mark.
- The question should ask for an answer that can be stated in a sentence or two so that you can develop the story point by point
- The sequence should be logical and easy to follow.

- Exhibits and testimonial aids (for ex ample, pictures) should be presented in this sequence as they add to the story.
- The beginning and end of the testimony should be "attention grabbing," i.e., an invitation to listen.

The procedure involves posing questions that encourage the witness to narrate the events directly, rather than the counsel providing the account. If you think in these terms, you have achieved the first level of understanding of how to present your client's case. A visual I have in mind – which is commonly referred to – is "slicing salami *thinly*."

The objective of the examination of witnesses (not experts) is to "fill in the blanks" and further develop the story of the tragedy (in a personal injury case for example) of how the circumstances and injury have affected your client's life. What was your client like before? What is your client like now? How has this change impacted your client's life, both past and present?

But be prepared. Direct examination does not end the process. Your client will be subject to a cross-examination which will test the story that your client and supporting witnesses will portray. As each witness will be evaluated by the fact finder, the cross-examination process will test that witness' value in your client's case. The likelihood of being believed on cross examination begins with the belief in the witness on direct exam. Once finished, the fact finder will assess the value of that witness' contribution to the case.

WHAT IS A PROPER QUESTION?

So, given those basics, how do you approach creating a direct examination plan that portrays your client's matter in the best light possible and still anticipates the challenges what will come with the cross examination of your client's witness?

Given the basic rules of direct examination, what types of questions are allowed?

First, the rules do not apply to "experts." Their examination has different rules, including allowing leading questions under court supervision.

But with other witnesses, when is a departure from the true "non-leading" question permitted? Here are some circumstances in which that may occur, such as where a question:

- Deals with simple or uncontested background issues in order to save the court's time;
- Will help to elicit the testimony of a witness who, due to age, incapacity, or limited intelligence, is having difficulty communicating their testimony (minors or handicapped, or infirm in some way that affects ability to testify); or
- Involves an adverse or hostile witness (witnesses are considered adverse or hostile when their interests or sympathies may lead them to resist testifying truthfully and, in most cases, an adverse party or a witness associated with an adverse party is considered hostile). This may occur if a witness you called as "friendly"

(i.e., "your" witness) and turns adverse, which does happen from time to time.

CONSTRUCTING A "FRIENDLY" DIRECT EXAMINATION

I have three basic goals with my client or a favorable witness I am putting on for direct examination (and this one does include experts):

- The witness should understand my objectives in presenting the testimony;
- The witness should have a good idea of the areas I am going to cover;
- The witness should feel comfortable with my goals and areas of inquiry.

This does not require a question-by-question rehearsal, but it does call for a review of the examination and a discussion of the key areas. The most important part of this process is to "listen" to your witness's responses and comments on the questions you pose during your preparation.

The biggest failure I see during direct examination is that counsel conducting it does not listen to the responses to make sure the point of the question has been established. Each question and answer should establish a fact that contributes to the client's case and can be relied on in arguing the case and on appeal if necessary. I often see the question being asked, the answer given, and counsel moves on without assessing whether the "fact" that was to be elicited by the question has actually been established. This happens when counsel is more interested in the question than the answer.

So, listening to the witness's response is critical to a successful direct examination to make sure the fact is in the record.

HANDLING OBJECTIONS

The best approach here is to anticipate objections and try to work them out before your examination begins. I have from time-to-time done a "reverse" motion *in limine*. This is done when I know my opponent is going to raise an objection. If the opponent does not bring a motion *in limine*, then I ponder suggesting to the court that it consider the area of inquiry and rule as to whether I can ask what I want to ask. That way there is no interruption to the examination and no chance for my opponent to object and then get a favor able (i.e., quick) ruling in front of the jury.

The most important aspect of your direct exam is to try to maintain the flow of your examination of your witness so the jury can hear a logical sequence without interruption. Opposing counsel will use objections to disrupt that flow as the examination proceeds.

You also need to anticipate objections that cannot be ironed out beforehand and plan "fall back" questions which can be posed to avoid objection. Of course, the best approach is to consider asking a question in its best form in the first place.

BEST OVERALL APPROACH

My primary suggestion is to not test the process. Learn how to examine your client with proper questions to tell the story. This takes preparation and thought so you have a good outline of a logical sequence which your client and the fact finder can follow.

Do not assume all good cases are tried to aa jury;- some may be tried to the court. The process does not change. A jury of one is susceptible to the same format as a jury of 6, 8 or 12. The same is true in arbitration in which the rules of evidence may be more relaxed (except in very critical areas of the proceedings). So, prepare your case accordingly.

Chapter 3
Direct Negotiations

I may have some helpful news for you—perhaps even a revelation: You may be able to settle your client's case without a mediator—an intermediary. Please understand, I am a big fan of mediation and mediated results. The mediation process is needed, and workswith the right mediator, counsel and attitude of your client. However, there are cases in which you can reach out to opposing counsel and directly resolve a case.

It certainly makes sense to try to directly resolve cases of lower value and avoid incurring the cost of mediation.

Do not misunderstand what I am saying. The mediation process is often needed to resolve a case. But not all cases need the time and expense of this process.

Here are my suggestions if you want to try direct negotiations:

SET THE STAGE

Settlement does not just happen. There has to be a plan from the outset. So, if you believe your client's case is susceptible to direct negotiations, plan out your approach early. One way is to be forthright and ask defense counsel what is needed to evaluate the case for their client, or its insurer, to consider trying to settle it. This works well in cases of clear or likely liability. It can also work if there are issues regarding liability and damages if you are willing to acknowledge those issues. The point is that being candid and

upfront—and realistic—is critical if you are sincere about this effort. Otherwise, do not waste your time and just get on with the discovery process.

USE DIPLOMACY

This strategy does not work unless the negotiation environment is right—that is, there is a good line of communication with opposing counsel. This requires—obviously—a diplomatic approach which is without hostility and even without any adversarial nature to it. So, if you are going to reach out, be prepared to put "your best foot forward" with sincerity![3]

KNOW HOW AND WHEN TO SAY NO!

The direct approach may not work. If so, you do not want to "burn your bridges"[4] so that negotiations break down and a mediation would not be productive. Thus, your negotiation plan must have a stopping point where you say to opposing counsel, "It appears we cannot settle this case directly so let's consider a plan to mediate and get a neutral to help us."

The reasons for this impasse may be many. You should know why this approach did not work so you can plan better and review your strategy for any follow-up discussions or mediation. *Just do*

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3 US: to behave very well in order to gain someone's approval." https://www.merriam-webster.com/dictionary/put%20one%27s%20best%20foot%20forward

4 "[D]o something which makes it impossible to return to an earlier state." https://www.google.com/search?q=burn+your+bridges&oq=burn+your+bridges&aqs=chrome..69i57j0i512j46i512j0i512j0i512.714j0j15&sourceid=chrome&ie=UTF-8

not close the door to settlement! ("Ok, our discussions were not productive, so let's try mediation.")

LOOK FOR THE PLATEAU

In my book on negotiations (see bio), I talk about two concepts in this process. One is the "plateau."[5] This is defined as the point where the evaluation of the case is appropriate and prudent given the issues, cost of going forward, and the likely liability and damages scenario can be assessed. Of course, this varies from case to case. Nonetheless, you need to be alert to when it appears to be prudent to make the approach. In my view offering to negotiate or inviting direct negotiations is not a sign of weakness, but one of strength, and also a recognition of a) the issues and how they might be resolved going forward, and b) the "economics" of the case as to the costs going forward and how that will impact the "bottom line" of a recovery and net to you and your client.

WAIT FOR OPENERS

If your instincts are working, you will know when the opening is there for talking to opposing counsel about settlement. While it is fine to say, "Be patient," that is too easy. Those who have a nose for this profession and our practice will know the right time to approach your opposing counsel about this discussion. All I can say is: "Wait for that time." When it comes, seize it and get the process started.

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5 See § 4:10.

AVOID THE IMPASSE

If you are going to engage in direct negotiations, it is absolutely necessary you understand that you can reach an impasse, but it cannot stymie further reaching out. One way to approach this is to advise opposing counsel ahead of time that you are approaching the subject in the next phase and that it may not result in a settlement. Recognizing that point is important. You do not want to get to a point where you are close to your goal and not have room to work at mediation. Be sensitive to this point!

KEEP THE DOORS OPEN

By all means, direct negotiations should not close the door. That is counterproductive to the process. The whole idea is to get parties to talk productively. So direct communications should result in a dialogue about settlement, not close the process. Keep that in mind at all times.

BE AN HONEST COMMUNICATOR

Nothing is more important in negotiations than candor. You can hold back and not disclose all. That is not the point. But if you represent a fact or position is true, it needs to be true. Misstatements and misrepresentation will come back to bite you and your client in the hind side. Don't do it!

NO HOLDING THE CARDS IF DISCLOSING WILL GET YOU TO A SETTLEMENT

Here is a critical point. You may have held back information

or support for your position. As negotiations progress, you have the decision whether to disclose some of this information—or all of it, if you have the support (i.e. real evidence). If you are close to a deal and need to have something to get it done, you have the choice as to whether to disclose that information. It is a tough call, but a timely disclosure may help you achieve closure. The judgment call in negotiations should be whether you think disclosing will get the deal for your client you would recommend.

Chapter 4
Dealing With Evidentiary Issues At Trial

Let's talk about pretrial and trial evidentiary objections, and how to preserve the record. More important, our topic is how to properly register your objections, obtain a clear ruling, and preserve your objection (if overruled) for appeal. Of course, what you really want to accomplish is a ruling in your favor.

First, you may see (or raise) evidentiary issues in any motions for summary judgment, both in the opposition or in the reply. Code of Civil Procedure Section 437c(b)(5) and (d) provide that objections must be made "at the hearing" or are deemed waived. Rule 3.1352 of the California Rules of Court provides that a party can make evidentiary objections either in writing or at the hearing if a court reporter is present. In *Reid v. Google, Inc.*, the California Supreme Court confirmed that "written evidentiary objections made before the hearing, as well as oral objections made at the hearing are deemed made 'at the hearing'" under Section 437c for purposes of preserving the objection. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532.) "[E]ither method of objection avoids waiver" on appeal. *Ibid.*

For written objections, Rule 3.1354(a) of the California Rules of Court supplies deadlines which require them to be served and filed "at the same time as the objecting party's opposition or reply

papers are served and filed."[6]

At trial, my experience has taught me that your chances for getting that favorable ruling improve if you first anticipate the issue so the court is aware of it before it is formally raised in court, and second, you clearly outline your position on the record.

We cannot always anticipate objections that need to be made. But we can do our best to alert the court to questions and areas of inquiry that are the subject of our objections. Judges appreciate the "heads up" so they can anticipate the issue, perhaps read any important cases, or at least fit any arguments by counsel about this issue in the trial schedule so that the process is not disrupted unnecessarily.

At times I have even asked for an in-chamber hearing with opposing counsel if a certain area of inquiry is going to be pursued so that I can anticipate the objections, alert the court to it, and get a determination of when it would be best to hear my pitch and make a clear record for appeal. The latter is very important as often objections are taken up in "side bar" conferences that are not reported, so the record lacks confirmation of your position.

The best way to assure you make a record of any proceedings on evidentiary issues is to file a *motion in limine*. .[7]

The important point here is that critical evidentiary issues

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6 These points are made in V. Wang, "EvidentlyObjectionable," Los Angeles Lawyer, September 2015, p. 25. The article is an excellent summary of our topic.

7 See, E. Hernandez, Motions in Limine, https://www.plaintiffmagazine.com/recent-issues/item/motions-in-limine

which may affect the outcome of the case should be a formal part of the record. So, a written record is esswntial. Frther written briefs relating to motions *in limine* should be more than a one-page summary of the issue. Include relevant citationsand all your points for argument. I prefer a bullet point style of argument, which gives the court an "easy read" of your position. So long as your arguments are set out, this approach should preserve them for any appeal.

One final point regarding "side bar" conferences. These are seldom, if ever, done in federal court. In state court the practice can vary. Some judges will use them (with the jury presumably out of hearing range). I have never liked them, although I know some judges want to move things along so it is more efficient to have them with the jury still in the courtroom. At other times, the judge has kept the jury in the room, but had a conference with counsel in the hallway behind the courtroom (preferably with the court reporter present).

If the evidentiary issue is more than just one involving overuse of leading questions on direct or not a critical one which could be the subject of an appeal, any side bar is usually not reported. If it is a critical issue, *e.g*., involving the character of your client such as a prior felony conviction, lifestyle issue (divorce, drinking) or an issue about a client's or witness' past that could affect a jury's perception of the client or witness, I urge you to ask to have it reported.

Another way is to ask the court to record a synopsis of the "side bar" conference out of the presence of the jury at a break or before the court adjourns. The point is – again – make that record clearly and succinctly.

I think I have made my point here.

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Chapter 5
Expert Witnesses — Yours and Theirs!

Are there any cases these days in which experts are not needed? It is unlikely. This Chapter will address your experts for *your* client's case. The next Chapter will address the approach to your adversary's experts.

IDENTIFYING THE ISSUES FOR EXPERT TESTIMONY

At the start you need to figure out why you need an expert, and what points are susceptible to opinion testimony. In some cases – particularly personal injury – you may already have your experts who have treated or are treating your client. They are the "non-retained" experts referred to in relevant statutes.

But beware, if you take that expert beyond talking about what happened, you may need to disclose that expert and additional subjects of expert testimony. For example, a treating physician may be needed to discuss future medical care. While that may be within the areas of that expert's area for testimony, I generally – to be cautious – add that expert's additional areas in my disclosure. In federal court I may have that expert do a Rule 26 report on areas of opinions regarding prognosis or future medical care.

FINDING THE RIGHT EXPERT FOR THE JOB

Locating the right expert for the case and topic requires an analysis of the opinions you are seeking so you can identify the area of expertise. This means you have to focus on the precise area of expertise that is involved. Someone who knows about certain

types of insurance claims may only know about those claims and not ones involving different insurance provisions or subjects. Knowledge and experience regarding personal insurance claims likely does not translate into a knowledge and expertise in commercial claims – even though the basic claims principles of "good faith" may apply to both. The customary claims handling principles for investigation and evaluation of the two types of claims may be different.

I try to find an expert who has a deep knowledge and experience base in the subject at hand. Even in those cases where the knowledge base may allow you to qualify the expert, it is better to find the expert who is familiar with the specific principles that apply to the case. An orthopedist who has a more general practice may be qualified, but one who specializes in the specific area of the problem, *e.g.*, shoulders, ankles, etc. – may be preferable.[8] The more specific the experience base for your expert the better in my view.

FOCUSING ON THE ISSUES – WHAT DO YOU WANT TO PROVE?

Before contacting the expertyou are considering, have a good sense of what issues you need to be addressed for your case. Unless you have someonewho is likely to be the "perfect" candidate, it is best to talk and pay for consultations with more than one expert candidate to get a good feel for the topic. Your ideas may not track what an expert will say, so these preliminary conversations may

8 N. Eddy. "Evaluating and Expert's Qualifications: IO Items to Consider." https://www.expertinstitute.com/resources/insights/10- keys-to-evaluating-expert-qualifications/

help you refine your thought process and more precisely focus on the issue that you need addressed for your client's case.

THERE IS NO ALL-PURPOSE EXPERT – YOU MAY NEED MORE THAN ONE

I often see counsel trying to use one expert to address all issues. One expert physician may not qualify on all medical issues. Usually, the treaters will be from different specialty areas, so if you have to add experts, they should be as well. I realize cost may be a factor so you may need to consider how you are going to approach a case from this standpoint at the outset given the costs of proceeding.

PREPARING FOR DIRECT EXAM

My preparation of an expert is extensive. Even those with experience in testifying are subject to my preparation. I may do my examination differently from others, so this kind of preparation allows your expert to understand how you are going to approach the presentation of this important testimony. Here are some areas to review with your expert:

- Review how the expert's testimony fits into the case.
- Review the expert's qualifications to emphasize areas or subsareas that allow the expert to provide the testimony you need to elicit.
- Discuss how you can present the testimony in an orderly and understandable fashion. Bear in mind that the topics to be discussed are new to

the court and jurors as they all need to be educated on the expert's topics.

- Review the exhibits and aids to be used, and how they fit into the expert's testimony. Make sure you understand the value of what the expert will be using.
- Review the overall outline of how you are going to present the expert's testimony so there is an understanding of the "roadmap" for presentation.
- Make sure you ask the expert to express any views about your proposed presentation plan. I want the expert to be comfortable and clear about the process.

DON'T FORGET THE PICTURES!

I am sure we all know the value of "pictures." So, use them. They do what they say; they supplement and help explain the expert's opinions. But make sure you use them so a jury understands what the "pictures" show. For example, medical films often need real explanation of what is pictured. A fact finder's "eyes" are not the same as the expert who sees what others do not. Your expert needs to clearly explain the value of what is being shown and how it helps to explain what the expert is saying.

AND DON'T FORGET TO PREPARE FOR CROSS-EXAMINATION

Make sure you review with your expert the areas where they may be either a difference of opinion or vulnerability. I often just ask: Where are you vulnerable? What questions can the other side

ask? What will be difficult for you to answer? Where can you be challenged? You need to bring this out so you understand what cross-examination your expert may face. Sometimes a dry run by someone else in your office doing a mock cross-examination helps get the expert ready for any challenes.

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Chapter 6
Expert Witnesses — Theirs!

CHALLENGING YOUR OPPONENT'S EXPERT

. Now, let's address how to deal with the opposition's experts

Generally, there are three areas for challenging an opposing party's expert

- The expert's professional qualifications and experience (Cal. Evid. Code § 702);
- The helpfulness or relevance of the testimony being offered to the issues at hand;
- The *reliability* of the expert's conclusions.

FIRST: KNOW THE PROCEDURAL RULES FOR FEDERAL AND STATE COURT

While most states follow the Federal Rules of Civil Procedure, California does not/ Also, in federal court, expert disclosures are often governed by pretrial orders. So make sure you know the rules for disclosure of experts in the relevant jursidition.

In short, reports outlining the expert's opinions and basis therefor are required in federal court (Rule 26(a)(2)(B), Fed. Rules Civ. Proc.), while they are not in California state court. (Cal. Rules Civ. Proc. § 2034.210-2034.310.) Only certain disclosures are required in California. *Id.*

Whatever the jurisdiction, you must be intimately familiar

with the process, as deadlines can be missed which can result in the preclusion of the non-disclosed expert or the subject matter of the testimony.

RESEARCH REGARDING THE EXPERT

I cannot stress enough how important it is to do research regarding any disclosed adverse expert. Do not just rely on questioning at deposition about the expert's background, areas of expertise, relationship with the law firm who is offering the expert's opinions, or history as an expert.

The internet provides resources aside from just a Google search. Look for reports on a expert web-based service where an expert's services are listed in prior cases. You also can find background and work information about the expert you will be facing.

The point here is that you should dig deeply into the available resources to help you build a portfolio about your opposition's proffered expert.

DECIDING WHOSE DEPOSITION AND WHEN

Once a disclosure is made or reports are received under the federal rules, consider what depositions might be taken. In federal court, where the Rule 26 report should lay out the experts' background, opinions and basis therefore, some very experienced lawyers may not opt for a deposition but consider instead to simply wait until trial for cross-examination, or until motion practice to limit the expert's opinions. That is a strategic decision to make and may be prudent in cases in which the expert is "pushing the limits"

of an area of expert testimony or is testifying in peripheral areas which may be challenged in motion at trial.

PREPARING FOR THE DEPOSITION

I cannot emphasize enough how much "digging" should be done into the history of the expert, including the professionally background, testimony (defense vs. plaintiff), expertise, relationship with adverse counsel and firm, and prior history in similar cases. Frankly it is astounding to me how "flexible" some experts are on testifying in their primary work. So, do not leave any "stones unturned" in conducting your research, which the internet certainly facilitates. Also do not forget to talk to *your* expert about questions to ask and points to make in order to challenge the opposition's expert or set up that expert for cross-examination at trial.

THE 10 KEY AREAS FOR QUESTIONING

At deposition (and later at trial), there are 10 essential areas of inquiry you should explore with the opponent's expert. At deposition, the objective is to "set up" the expert for cross-examination by narrowing qualifications, limiting the scope of the opinions and otherwise challenging the expert's ability to speak on the issues.

Key areas are:

1. Bias

Explore areas for bias, such as testifying on a more regular basis for one side or the other, being identified with a particular

view or otherwise having a reason to provide more favorable testimony for one side of the case. Has the expert been asked to serve in a similar case? And if so, what were the opinions expressed in that case and how do they compare with those in the case at hand?

2. Curriculum Vitae

A C.V. is a primary source of information about the expert and should be requested to be produced at deposition, so the background of the expert can be explored. Has that background been overstated? Has the expert really spent time on the subject or, on the other hand, contrary to the views expressed in the case at bar? What experience does the expert offer that adds to the expert's qualifications? Are these genuine reasons to trust the expert's views, or are they borderline support for such?

3. Qualifications

As noted above, the expert's education, training and experience for testifying in this case at hand should be explored. Each of these areas provides a topic for examination of how the expert's background fits into the case and the areas of expertise on which the expert is being proffered.

4. Methodology

Inquire into the process by which the expert assessed the case, by not only exploring the factual basis for the opinions expressed but the reasons for relying on these "facts." If science is involved, then the scientific basis for the conclusions reached and opinions expressed should be established and the reasons for doing so

confirmed.

5. Prior Statements/Cases/Opinions

Also, obtain a list of past cases (or if provided, explore the list) that are similar to the case at hand. Testimony in those cases or reports written should be checked to verify that the opinions expressed are consistent with those expressed in the case at bar or are contrary and thus subject to exploration for the reasons why there is a difference.showing major dissimilarities should be challenged.

6. Opinions

Make sure the experts gives you each of the opinons reached in the case and the bases for each (*i.e.* separately stated). Use a "clean up" question for opinions and the basis for each by asking: "Have you stated all the opinions you intend to offer at trial in this case?" "Have you stated the basis for each opinion you have expressed? Have you testified as to each fact upon which you rely in reaching this opinion?"

Also, it is important to determine when the opinions were reached. Most likely, the expert will push the timeline to a later point. However, you may be able to establish that all the work was focused on establishing an opinion unfavorable to your client at an earlier point in time.

Finally on this point, make sure you ask the expert if all work has been done, and that there is no more work to do so as to close out the expert's views and the bases for them. If the expert has not completed the weork, then reserve the right to take that witness'

deposition when the work is completed or to foreclose the expert's opinions based on any additional work.

7. Fee Questions Including Time Spent

The fee structure, and the time spent should always be explored. Is the time spent fair and reasonable for the subject matter? Has anyone associated with the expert charged for the work in the case? If so, what value did that person bring to the case and was that service essential in forming the opinions expressed?

8. Interaction with Retaining Counsel

An area of inquiry that is essential is about the expert's history of services with opposing counsel *and that firm*. I have found that large firms tend to "pass an expert around" as lawyers in the firm exchange names of experts they have used. So, it is important to find out how much work this expert has done for a firm. This can be the case with smaller firms who have similar cases and tend to use the same experts for each. You never know until you ask, so you should ask!

9. Investigation

Another area of inquiry is what investigation the expert has independently conducted. In cases of technical experts, they likely will conduct their own inquiry into relevant facts. Find out what they did, what they found, how they found such, and what relevance it has to their opinions. You also need to determine if this was an objective investigation, that is one that was incomplete or ignored sources of relevant information that should have been used. An incomplete investigation can result in a challenge the

the basis for the expert's views. 10. Reports

Here, the inquiry is about how any report or outline of the case was prepared. While, in federal court, "drafts" are protected from discovery (Rule 26(b)(4)(B), Fed. Rules Civ. Proc.), they are likely open for inquiry in California. (Cal. Rules Civ. Proc. § 2034.270.) Even in federal court, an inquiry should be made into the process by which any required report was prepared.

OVERALL APPROACH AT TRIAL

The primary focus of your efforts with an adverse expert is to either a) discredit the testimony, or b) limit the opinions so you can argue that they should be disregarded, limited or lack relevancy. In trial, keep your cross-examination focused and controlled. If not controlled by cross-examination, the expert is free to reinforce any opinions and restate them.

Chapter 7
Six Thoughts for a More Effective Mediation!

Let's take a break from talking about trial practice itself and turn to mediations since so many cases are resolved by this process. The topic here is how we can be more effective in mediation so that the chances of settlement and a successful day are high. There are six thoughts that should improve those chances significantly.

NO. 1: IS THE TIMING RIGHT FOR MEDIATION?

Again permit me to note: In my book on negotiations, I stress looking for the *plateau*. It is defined as "resting places at which the parties—independent of one another—must assess how the case is progressing, what needs to be done to ready the case for resolution by negotiation or trial, and what risks and expenses are posed by proceeding further in the litigation process." The point is that timing is critical. In addition, from a plaintiff's perspective, you cannot languish. You have an obligation to your client (and yourself and your firm) to move the case along.

Your litigation plan should consider what you need to evaluate the case and posture it in an effort to resolve it short of trial. This has three phases: a) the selection of key witnesses to establish liability and damages; b) the selection, preparation and evaluation of experts who are engaged to provide their views on any liability or damages issues; and c) the evaluation of the defense's response

to any efforts to resolve. This includes an evaluation of the collection process, *i.e.*, is there insurance to cover the claim against the defendant? If there are insufficient limits, what are the prospects of recovery against the insured? Always keep in mind the three legs of the "litigation stool": liability, damages *and* collection.

NO. 2: IS MY CLIENT PREPARED TO MEDIATE?

A critical factor in this process is assessing your client's attitude towards resolution. What are your client's needs and how can they be best served? How is a settlement going to help the client heal, be more comfortable, or be compensated for any injury and economic loss? These need to be considered in determining how to approach a mediation. Most clients that I have represented want to resolve a case short of trial. And that makes sense for all the reasons that we know: to have funds for the healing process and to provide for additional needs that may not be readily available because of a lack of insurance coverage or other financial resources. So, a client's needs should be assessed in determining whether the client is ready to participate in the mediation process. But, here is a point to consider: in assessing this, it is critical to know IF the client understands this process, and further understands that a successful mediation needs complete closure to the matter with no further prospect of receiving compensation.

Again, my experience tells me that once the process is fully explained to the client, that client will be willing to participate in the process. But again, it must be carefully and fully explained so that you are assured *your client knows how this all works.*

NO. 3: HAVE I PREPARED THE MEDIATOR?

Rule #1 might be: never go to a mediation without a pre-mediation conference with the mediator to review the case. You can use this pre-mediation call to give the mediator insights into your client and the case, and get the mediator's thoughts on how to proceed.

In some cases (and Zoom is a big asset here), I have had the client and those directly involved meet in a brief-introductory session just so the mediator knows who the client is before the mediation. This provides an opportunity for a brief exchange so your client is at ease with mediation as the overall intent. This also allows the mediator to make an assessment of your client, even if a brief one..

I seldom go to mediation without at least engaging in this process. And I also leave it with the mediator to let us know if more is needed, so the mediator is prepared to "dive in" on the day of mediation.

NO. 4: AM I PREPARED TO DISCUSS RESOLUTION?

It is our job to line up the witnesses, evidence, facts and law so that we are prepared to mediate and try to resolve the case. This means providing the mediator and the opposing side, and their representatives, with *evidence* to support your client's case. In a mediation statement, text is not enough. Exhibits, exhibits, exhibits .they are the key to resolution. These exhibits should be in the form of admissible evidence to support your client's case. I even prepare videos of key witness testimony, either from video transcripts of depositions, or specially prepared videos of experts or other

witnesses who will support the client's claims of injury.

Also in the Zoom era, I have asked experts to appear at the mediation via this virtual process and provide their views of the case. If this is an alternative, I first make sure the mediator believes this *will* be helpful and also make sure the witness is positive about this process.

NO. 5: DO I HAVE OTHERS LINED UP TO ASSIST IN THE MEDIATION PROCESS?

This is just another way of discussing what I have said in number 4. Have your experts provided complete reports or testimony? Have you confirmed the liability facts through depositions or other ways to prove that aspect of the case? Have you fully developed — from a practical standpoint — what you need to convince the other side, and the mediator, of the merits of a client's case?

NO. 6: DOES MY CLIENT NEED CLOSURE?

I have touched on this already in discussing the client's needs. Resolution not only means closure, but it can also mean — and often does mean — that the client is relieved and now has the resources to get on with life. This is a a positive emotional impact on clients which can be very motivating as settlement becomes closer to being reached.

In looking at this process, I am reminded of a Biblical quotation from the Letter of Paul to Philemon (New Testament, Philemon 1-21):

> "Or what King, going out to wage a war against another King, will not sit down first and consider whether he is able with ten thousand to oppose the one who comes against him with twenty thousand? If he cannot, then, while the other is still far away, he sends a delegation and asks for the terms of peace."

Chapter 8
Preparation of Your Client for Deposition

From what I have experienced in my many years of taking depositions, not all lawyers do what is necessary for preparing a client for deposition. That deposition is the key to your client telling the story of the case. It may lead to negotiations for resolution. If thorough preparation is not done, the client is essentially left alone to figure out how to approach the process. So, let's go over what needs to be done to fully prepare your client for deposition testimony—to make sure we are doing our job to get our client ready for the process.

From a plaintiff's perspective, your client needs to be prepared to talk about issues relating to liability and damages. Truth is the goal, but sometimes clients do not understand how to talk about the truth. They can get confused, forget the question, and often fail to answer the question asked and thus become non-responsive. Obviously, that does not work.

The goal of client preparation for deposition is not to teach that client what to say, but *how* to respond to the question-and-answer process—which is far from the ordinary conversation process that is the day-to-day experience of anyone.

Most clients are unfamiliar with the deposition process. Even if they have given a deposition before, you cannot trust that experience as being prepared for a deposition regarding the issues

your client is facing now. My recommendation is that you simply start from scratch to be sure your client is fully prepared to tell the story of the case.

So, let's go over the preparation process.

INTRODUCTION TO THE PROCESS

The deposition is not a "water fountain" conversation. Most likely, it is a very unfamiliar one to your client. So, you need to explain how it works. Topics to be discussed should include:

- Describe the process of a question posed with an answer to that question to follow.
- Consider showing your client what a transcript looks like after it is transcribed. This will give your client a visual picture and a better understanding of what a transcript of the testimony looks like.
- Note that your client will have an opportunity to review the transcript after it is transcribed. Be sure that answers are correct.
- Stress that time should be set aside to complete this process, so your client commits to making sure the transcript is accurate.
- Explain how changes are to be made and the consequences of making them—i.e., that opposing counsel may inquire about the changes and the reasons. However, if the transcript is inaccurate, your client should not hesitate in correcting inaccuracies. See also my comment below.

- Explain how the transcript will be received, so it can be reviewed.
- Explain the need to sign the deposition and that this means the transcript is verified as accurate.

PRIOR DEPOSITION TESTIMONY

You should already know what your client's history is with litigation including any testimony at deposition. However, experience does not necessarily mean your client knows how the process works. So, it is important that you cover the basics yourself as I have stressed.

THE DEPOSITION PROCESS: THE GUIDELINES FOR TESTIFYING

The Oath Effect

Even though the deposition is being taken in a relatively informal setting, remind your client the testimony is under oath which requires "truth telling." I also tell my clients that this process is the same as if the testimony was in court. Not all clients understand this, so it is important to explain this.

Audible Answers

Remind your client to answer audibly and only after the examiner has finished speaking, so the court reporter can take down each person's words with only one person speaking at a time.

Don't answer until you hear full question

In a normal conversation setting, my experience is that most participants do not wait for the other person to finish a thought; there are many interruptions and overlapping statements. Nothing frustrates a court reporter more than to have the questioner and witness talking at the same time. Only one person's comments can be recorded at a time, so the court reporter is likely to interrupt. So, explain the importance of waiting for the full question to be stated. Similarly, if the examiner cuts the witness off before a full answer is given, the witness should tell the examining lawyer that an answer was cut off and thus not completed..

Clear Questions

Tell your client to advise the examining attorney if any question is unclear in any way, after which the examining attorney shouldreword the question. Stress the importance of making sure the complete question is before your client and fully understood by your client before an answer is given.

No Guessing

Tell your client not to guess when providing responses but, if appropriate, provide an estimate that is based on recollection.

Use Words, Not Gestures

If a question calls for a yes or no answer, tell the deponent to answer "yes" or "no" rather than with a nod or a shake of the head. But if that answer does not provide complete information about the subject matter, your client should be told to say so and add any

additional information to provide a complete answer to the question.

Right to Break

Advise your client that they are entitled to request a break at any time to confer with counsel, to use the restroom, or for any other reason.

Heads Up On Objections

Explain that you or other attorneys may make objections to questions or move to strike responses to questions – which are objections for the judge to consider later. Advise your client that they are required to answer unless there is an instruction to not answer.

The Objection/Instruction Process

Review this process with your client. I tell my clients that if I (or another attorney present) objects, they are not to answer the question until I give the "OK." I also explain that if I give an instruction not to answer a question, nothing further needs to be said. We move on to the next question.

Recording Rules

Explain that the court reporter is recording all answers, as well as comments, and objections that may provide information to booklet form after the deposition ends, at which point your client will have the opportunity to read the transcript and correct any inaccuracies.

Explain the Post Deposition Review Process

Go over the process of reviewing the transcript during the post-deposition process, and how you chose to complete that process. You should review the rules on changing and finalizing the deposition transcript. (See Cal. Code Civ. Proc. § 2025, 520; Rule 30(e), Fed. Rule Civ. Proc.)

Changing Testimony

Explain that if your client makes changes in their testimony that are inconsistent with the answers given during the deposition, the examining attorney will be entitled to comment on those discrepancies at trial to possibly question the deponent's veracity.

CONCLUSION

Good and thorough preparation means a quality deposition that allows your client to tell what happened and allows you to describe the impact on your client's life.

Chapter 9
"Settlement" Ain't A Bad Word

My experience with clients these days is that they want (and perhaps even expect) their case to settle. They want to avoid the stress and delay of a trial, and they want to avoid the risk of an unacceptable result (to them). So, the first question after "What is my case worth?" is usually: *"Can you settle my case?"*

Educatinga client about the process and prospects of a resolution short of trial should, and usually does, begin at the first client meeting. And this discussion early on is important to successfully settling your clients' case because obviously they hold the authority to settle. So, it is necessary to have a dialogue with clients about the negotiating process. The focus should be on educating clients about how this all works and what their expectations should be for a settlement instead of a trial at an early stage in your representation.

Here are some thoughts on how to educate and prepare clients on this approach:

PREPARE FOR THE PROCESS

You need to prepare clients for the negotiating process by first helping your client develop the right attitude towards settlement. This means explaining the various negotiating and settlrmrny alternatives that are available, and when they might be an advisable part of the effort to settle the case. To help accomplish this, I explain the difference between direct negotiations, a court

supervised settlement conference or mediation, and a mediation through a private dispute resource.

THE TIMING

I also inform the client about the level of preparation needed to posture the case to get the other side interested in negotiating. And I explain that this might be accomplished through a "demand letter" or a simple conversation with opposing counsel at the "right" time. Or it might be addressed at a Case Management Conference. No matter how it happens, the client needs to know that it does not happen overnight, and a good bit of work needs to be done before negotiations can begin.

"SETTLEMENT" AIN'T A BAD WORD

Hence the title of this commentary: Showing interest in settling is not a manifestation that you don't believe in your client's case. Instead, it can show confidence in the facts and the applicable law and illustrate your experience and wisdom in handling the matter. Also, by reaching out to the opposition, you can begin the process of educating the client as you get feedback from opposing counsel which you pass on to your client.

UNDERSTAND CONFIDENTIALITY AND WHAT THAT MEANS

I make sure the client understands that what takes place during negotiations is confidential. I stress that anything said during negotiations, whether direct or through mediation, cannot be brought up in court during trial if settlement efforts are not

successful. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.

GET DOWN TO BUSINESS

Settlement is where clients learn the business side of resolving disputes. It is important to talk about numbers at a stage at which they become important – usually when costs begin to significantly increase and start to reduce the "net" to the client and counsel. So, it is important to recognize when the costs going forward significantly increase and advise clients accordingly.

IT'S THE CLIENT'S DECISION

I stress that it is the client's decision whether to settle, and I make sure the client has all necessary information to make an informed decision about whether or not to settle.

A CHANCE FOR AN OBJECTIVE VIEW OF THE CASE:

I explain that an advantage of mediation is that it provides a chance for an objective view of the case. A mediator will often comment on the issues and give their views on each side's pros and cons in settling versus further litigation. This provides an objective third-party's view of the matterwhich is valuable.

USING THE PROPER WORDS

The proper words should be used in getting the client ready for mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or the use of war and combat slogans have no place in getting a client ready for

negotiations and setting the right tone for the negotiation process. This is not war; this is negotiation and compromise, so words appropriate to that process should be used. I prefer words like, "educating the other side about our case," "working with the mediator [and the other side] to resolve the dispute," "resolution," "settlement," and "compromise." I also stress that we are not giving in, and these words do not mean that. I remind the client that it takes all parties having the same attitude to get a settlement that works for all.

SETTLEMENT IS VOLUNTARY – THERE IS NO DECISION UNLESS ALL AGREE

Some clients think a mediation is an arbitration and the neutral will decide the case. I stress that no one is forcing the parties to settle. A deal will be made only if all agree to the terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort is encouraged to illustrate what a settlement means for the client's case, and how the client can benefit from this process.

DOES THE CLIENT NEED A "NUMBER"?

I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement. There are three ways to approach this:

- Don't give the client a settlement number. Tell the client that a "demand" should be made first (if you are the plaintiff). That initial number

needs to give your client plenty of room to negotiate so it may be well above what you believe is an acceptable number. Be sure you stress that this is a starting point for the "give" and "take" of negotiating. You and the client need to see how the defense responds and what the mediator says before you think about a response and how the process might play out. In short, you are "feeling" your way along.

- Give the client a reasonable but wide range for settlement, suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to a higher number. Your efforts are to get the best number you can in the range that is discussed.
- Normally I do not set a rock-bottom "walk-away" number. You never know what you might learn in negotiations, particularly a more formal mediation, that can change a view of a case's value. However, your initial demand must provide negotiation room with a focus on the likelihood of the back and forth negotiation process.

MANAGING CLIENT EXPECTATIONS

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement inclulding:

- The costs of further proceeding.

- The certainty of a settlement versus the uncertainty of a trial or arbitration;
- The emotional drain on the client and family or business partners;
- Adverse publicity that might result;
- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;
- The present value of money in hand versus the chance of a greater gain at trial [which after affixing value to the two, can vary greatly, and in fact, lower a client's unrealistic expectations];
- The positive impact of having money now for life planning rather than the long wait through trial and appeal.

I also explain the major points in favor of a settlement – that at its core, settlement is a business approach to resolving disputes. Your client should be ready to engage in this process and understand that this can be a productive, positive way for resolution, and that the client has control over the outcome. Obviously, that is not true if the case is left to a jury's discretion.

Chapter 10
Some New Developments in the Insurance Bad Faith World!

Let's take a break from the more discreet topic of trial practice and strategy and talk about some critical developments in the insurance bad faith world.

I have been involved in that world for several decades. I tried the first two insurance first party bad faith cases in California in the early 70's when I was a defense lawyer. I was an insurance defense lawyer then, and changed hats to the plaintiff side twenty years later, which is now a part of my practice.

In these years I have seen a few major changes:

- In 1979, the California Supreme Court decided *Egan v. Mutual of Omaha Insurance Company*, 24 Cal.3d 809, which confirmed that the duty to "thoroughly" investigate a claim was a part of the "good faith" requirements of any insurer.
- In the early 80's California adopted the regulations found in 10 California Administrative Code section 2695.1 et seq. which defined further the wide scope of an insurer's duty to investigate (§ 2695.2(k), and also the nature and extent of that duty (§ 2695.7(d)).
- In 1988, the California Legislature amended Civil Code section 3294 and added section 3295

> to more specifically define "malice, oppression or fraud" as a basis for a punitive claim, and it also added the requirement that a punitive claim had to meet the burden of "clear and convincing" evidence rather that the ordinary burden of proof.

In addition, there have been new developments which alter the bad faith landscape and frankly, made it different for lawyers handling claims of insureds against insurers in third party "failure to settle" cases in which policy limits demands are made *before* a personal injury or wrongful death action is filed.

The enactment of California Code of Civil Procedure Chapter 3.2, Sections 999–999.5, titled "Time-Limited Demands," went into effect January 1, 2023. These sections will apply to demands made after this date if it applies to causes of action and coverages covered under automobile, motor vehicle, homeowner, or commercial premises liability insurance policies for property damage, personal or bodily injury, and wrongful death.

Claimants' time-limited demands seek policy limits and are usually referred to in the industry as "policy limits demands," though theoretically they could be for an amount below limits. The demands must be reasonable, and the rejection must be unreasonable, in order to subsequently impose extracontractual liability on an insurer for bad faith failure to settle. *Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676.

For certain types of claims and policies, Section 999 imposes several new criteria that a *pre-suit* demand must comply with to be considered a reasonable offer to settle within policy limits.

Claimants must carefully draft Section 999 demands to meet the procedural requirements of the new section, or their pre-suit demands will not be a basis to later impose liability in excess of the policy limits on the tortfeasor's insurer. These additional requirements are, theoretically, designed to constrain and limit bad faith claims. However, because Section 999 makes it clear how to make a reasonable demand, where to send it and how much time must be provided, it can also be viewed as a road map. If used correctly, Section 999 demands may be a tool for claimants and policyholders to more easily establish that a reasonable pre-suit offer to settle was made. And because Section 999 also creates new requirements for how insurers must respond, it may also make it easier to prove that the basis for the insurer's rejection of a demand was unreasonable — thus exposing the insurer to liability in excess of the policy limit.

Here is a quick summary of how it now works.

> A time-limited demand that does not substantially comply with the terms of Section 999 shall not be considered to be a reasonable offer to settle the claims against the tortfeasor"

This law requires a time-limited demand to be in writing, to be labeled as a time- limited demand or containing reference to section 999, and to contain material terms, which include the following:

- The time period in which the demand must be accepted shall be not fewer than 30 days from date of transmission of the demand, if transmission is by email, facsimile, or certified

mail; or not fewer than 33 days, if transmission is by mail.

- A clear and unequivocal offer to settle all claims within policy limits, including the satisfaction of all liens.
- An offer for a complete release from the claimant for the liability insurer's insureds from all present and future liability for the occurrence.
- The date and location of the loss.
- The claim number, if known.
- A description of all known injuries sustained by the claimant.
- Reasonable proof, which may include, if applicable, medical records or bills, sufficient to support the claim.

The demand must be sent to:

- The email address, or physical address, designated by the liability insurer for receipt of time-limited demands for purposes of the law if an address has been provided by the liability insurer to the Department of Insurance, and the address publicly available. The Department of Insurance shall post on its website the email address, or physical address, designated by a liability insurer for receipt of time-limited demands for purposes of this chapter.
- The insurance representative assigned to handle the claim, if known.

So once the insurance company receives a time-limited demand, how must the insurer respond?

- The recipients of a time-limited demand may accept the demand by providing written acceptance of the material terms outlined in the law in their entirety.
- The new law also states that an attempt to seek clarification or additional information, or a request for an extension due to the need for further information or investigation made during the time in which to accept a time-limited demand, shall not, in and of itself, be deemed a counteroffer or rejection of the demand.
- Under the law, if, for any reason, an insurer does not accept a time-limited demand, the insurer shall notify the claimant in writing of its decision and the basis for its decision. This notification shall be sent prior to the expiration of the time-limited demand, including any extensions agreed to by the parties, and shall be relevant in damages against the tortfeasor's liability insurer.

The consequences of a failure to follow this procedure is as follows:

> Under the law, in any lawsuit filed by a claimant, or by a claimant as an assignee of the tortfeasor, or by the tortfeasor for the benefit of the claimant, a time-limited demand that does not substantially comply with the terms of Section 999 shall not be considered to be a

> reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits for purposes of any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer. However, this section of the law does not apply to a claimant not represented by counsel.

The new law provides a framework for insurers, insureds, and claimants to issue and respond to time-limited, policy-limit demands, and the requirements to set up insurers for liability beyond the policy limits in pre-suit communications by establishing time periods for the insurer to respond to the demands, and the information that must be included in the demands.

So, beware if you are looking to hook an insured defendant's insurer for their entire judgment in a third-party case that has not yet been filed and you are using a pre-suit status to set up the insuer for a "bad faith" refusal to settle..

Chapter 11
The Elegance of Our Law Practice

I suspect you do not think of a civil litigation practice as being an "elegant endeavor." Perhaps we should consider this term as a fair description of what we are trying to achieve not only in how we practice our profession but how others perceive us as engaging in that endeavor.

The word "elegant" is defined as:

> The quality of being graceful and stylish in appearance or manner; style …
>
> The quality of being pleasingly ingenious and simple; neatness.
>
> "The simplicity and elegance of the solution"9

In my view there is an "elegance" – a style – that goes with our practice that perhaps is being ignored in the more relaxed environment of Zoom and post-pandemic era. That "elegance" is

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9https://www.google.com/search?q=definition+of+elegance&rlz=1C1GCEU_enUS1060US1060&oq=Definition+&gs_lcp=CgcEzJahHwbUQgBgBEUTUCJgCAACo-RRgSMgY1ABRFg5YcCgCEAAyASOMYgAQyDQgDEAAYgwEy5-OMYgiUBw-eEAAyAOgCgCEAAyASOMYgAQyBw-eEAAyAogCgCEAAyASOMYgAQyBw-eEAAyAogCgCEAAyASOMYgAQyBw-eEAAyAogCgCEAAyASOMYgATSAQg2MzU1ajFgNGcLACAA&sourceid=chrome&ie=UTF-8

reflected both in how we present our case and ourselves in the environment in which we work, whether in the conference room, in a "Zoom Room" or in a courtroom.

I recall the book *"Dress for Success,"* originally published in 1975, which was the standard for dressing for the business and corporate world at that time.[10] The new standard, which began some years ago, challenged what was stated in the book. I recently came across this book doing some research and was curious whether it was still "relevant" to our business of being trial lawyers or litigators.

In Mr. Malloy's first book which was for men, there is even a chapter *"For Lawyers: How to Dress Up Your Case and Win Judges and Juries."* He writes: "Good courtroom lawyers are super salesmen and consummate actors, and they well realize that nonverbal forms of communication are frequently just as important (and sometimes more so) as the facts of a case. Clothing and appearance are hardly the only important nonverbal communicants, but they are the only ones within my province."[11]

Is dress still important to our skill set in the courtroom? Is this relaxed dress appropriate for taking a deposition or appearing at a

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10 J. Malloy, "Dress for Success," Warner Books (1975), which was followed in 1977 by "The Women's Dress for Success." The author was a consultant to companies regarding dressing for the business environment, claiming: "Most American men dress for failure." The books were best sellers. Mr. Malloy stated in his first chapter: "The way we dress has a remarkable impact on the people we meet professionally or socially and greatly (sometimes crucially) affects how they treat us."

11 "Dress for Success," Chapter 12, "For Lawyers: How to Dress Up Your Case and Win Judges and Juries," p. 186.

mediation? Does it make a difference if the proceeding is on Zoom?

The move to more casual dress in the business environment started some years ago with "casual Friday" when companies and firms "relaxed" Friday dress to tie-less standards.[12] The process worked its way into the work environment. From what I have experienced in the business environment, there is no expectation that anyone is required to wear what was once "business attire" for any event. Newscasters, politicians and those interviewed on television often exhibit this relaxed dress code. In the legal environment this appears to be true short of court appearance.

The absence of what was once perceived as a professional dress standard of suit and tie has been encouraged by the advent of remote appearances, where a less than formal environment is often the setting for those attending. In my view, at least in the legal environment, these reduced "standards" for appearance send a message that what is taking place is not serious work. This message should not be sent in the legal environment particularly in our business of dispute resolution. It is always serious business and should be treated as such. Does a relaxed dress code contribute to that?

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12 In 1994, 497 of the 1000 most important companies in America observed casual Friday, including General Motors, Ford, and IBM. The trend originated from Hawaii's midcentury custom of Aloha Friday which slowly spread to California, continuing around the globe until the 1990s when it became known as Casual Friday. https://www.google.com/search?q=when+did+casual+dress+start+in+the+business+environment&rlz=1C1GCEU_enUS1060US1060&oq=&gs_lcrp=EgZjaHJvbWUqCQgAECMYJxjqAjIJCAAQIxgnGOoCMgkIARAjGCcY6glyCQgCECMYJxjqAjIJCAMQIxgnGOoCMgkIBBAjGCcY6glyCQgFECMYJxjqAjIJCAYQIxgnGOOCMgkIBxAjGCcY6gLSAQ0yOTUxMjY5NGowajE1qAIISAIB&sourceid=chrome&ie=UTF-8

With the advent of mediations being handled remotely, there is a tendency to treat the process in a more casual fashion. Participants are often tieless and coatless; and appear from a less than formal environment. Often there is a fake background which is available to disguise the true setting. Is that a good standard to adopt in our profession?

Recently I participated in the mediation of a mid-level personal injury case, with good liability and confirmed injuries. The mediator was a retired judge and very experienced. I had participated in a mediation with our mediator before and it was a very positive experience. We had a brief pre-mediation meeting on Zoom which was conducted from what appeared to be his actual office. However, when we appeared on Zoom on mediation day the mediator was tieless, coatless and in his kitchen with his wife (or partner) coming in and out of the viewing area performing chores.

While I appreciate a more relaxed environment, this approach did not sit well with me or my adversary. The case did settle but the environment in which it was conducted just did not convey a professional one as it should. Our success – fortunately – was not directly impacted but I could see a case where it would be affected. Now, I am more cautious about confirming how a mediation is to be conducted.

It is rare today when those appearing wear a coat and tie in these settings which are perceived as less than formal. Zoom and other remote forms allow us to appear from anywhere but disguise the location with a background that keeps the real site a secret.

So, what are the standards that we should adopt. Are the

compromised standards that have crept into our work acceptable?

For me whether we are in a Zoom room or a court room our professional appearance should be the same. Why? Because a high standard for business and professional dress shows respect for the seriousness of the process. It is still a professional business, and it should be treated as such. Mr. Malloy's book may not be as relevant as it once was, but that does not mean we should compromise in a way that lessens the standards for what we do and how we do it.

In his book Mr. Malloy recognizes the differences in culture of the location where a case is being held. Nonetheless, we should be mindful of what we are doing and how we appear. I submit we should exhibit the respect that our professional environment deserves when practicing that profession. Neither Mr. Malloy nor I urge that we wear expensive clothes or fancy dress. What he urged is appropriate dress for presentations in the environment in which that takes place. I concur. That should always be the case.

So "Dress for Success" so that how we appear contributes to our client's case and does not detract from the seriousness of what we are doing.

Chapter 12
The Ethics of Witness Preparation: Does ABA Formal Opinion 508[13] Change the Dynamics and Rules of Witness Preparation

A. AN OVERVIEW[14]

The practice of law is demanding in many ways, one of which is the need to comply with the rules of professional conduct for lawyers.[15] These ethical rules are intended to protect the public and

13 ABA ethics opinions are written by the Standing Committee on Ethics and Professional Responsibility. These opinions are advisory, and not binding on any court. Formal opinions are on matters deemed to be of interest to a large number of attorneys.

14 See generally: https://lawyertrialforms.com/power-litigation-tips-tactics/the-ethics-of-witness-preparation/

15 The ABA Model Rules of Professional Conduct (MRPC) are a set of legal ethics rules that were created by the American Bar Association (ABA) in 1983 and are continually updated over the years. They serve as models for the ethics rules of most jurisdictions. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility. Preceding the Model Code were the 1908 Canons of Professional Ethics (last amended in 1963). Although the MRPC generally is not binding law in and of itself, it is intended to be a model for state regulators of the legal profession (such as bar associations) to adopt, while leaving room for state-specific adaptations. All fifty states and the District of Columbia have adopted legal ethics rules based at least in part on the MRPC.

California has not adopted the MRPC in their entirety. California's rules have a large degree of overlap with the MRPC, but also contain rules unique to the state.

The California Rules of Professional Conduct were drafted by the Board of Trustees and approved by the California Supreme Court pursuant to state statutory mandate to protect the public and confidence in the legal profession. The rules and any related standards

maintain the integrity of the legal profession. Accordingly, you must be familiar with the applicable ethics rules and guide your professional conduct with them in mind.[16]

Before we start, if you want to test your judgment on this topic, see what is, in my opinion, one of the two best lawyer movies, "Anatomy of a Murder"[17] (the other is "To Kill a Mockingbird"), in which James Stewart, as a small-town lawyer is asked to defend Ben Gazara who is charged with killing a man his wife (Lee Remick) claims raped and beat her. She tells Gazara and within an hour, he finds the alleged rapist and shoots him. Gazara is arrested, jailed and charged with murder. He seeks out Stewart, a former DA in the community who failed to be re-elected, to represent him as defense counsel. There is a scene in the movie in which Stewart, as Gazara's defense counsel, discusses how Gazara will respond to the charge. In defending Gazara, Stewart suggests Gazara should assert a potential "insanity" defense. Is it improper coaching, or is he just informing the client of the possible defenses? Watch the movie and answer the question: Did Stewart's inquiry and counsel cross the line of preparation or is it

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adopted by the court are binding on all attorneys licensed by the State Bar. On May 10, 2018, the California Supreme Court issued an order adopting the New Rules of Professional Conduct, effective November 1, 2018, which is the current version governing California lawyers (with subsequent amendments).

16 This column deals with the topic of witness preparation. There are other ethical minefields on witness coaching during a deposition, hearing or trial, attempting to influence testimony during that process, or assisting a client to make a witness unavailable. The issue of improperly influencing or obstructing the attainment of necessary testimony due to the advent of remote or "Zoom" proceedings. This latter topic is discussed briefly at the end of Formal Opinion 508. For me, those are topics for another day or column.

17https://www.kim.com/dl-title/0065261/
https://en.wikipedia.org/wiki/Anatomy_of_a_Murder. See also, T. Bank, Civil Trials: A Fair Illusion, 85 Fordham L. Rev. 1959. See the video at:
https://youtu.be/Tn14Dp8_Yis?si=RDMUC3g&NmQbTJbFb9SX8nk.

ethical?

The American Bar Association Standing Committee on Ethics and Professional Responsibility adopted Formal Opinion 508, dated August 5, 2023, dealing with "The Ethics of Witness Preparation," which includes this statement:

A lawyer's role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct governing the client-lawyer relationship and a lawyer's duties as an advisor, the failure to adequately prepare a witness would, in many situations, be classified as unethical conduct. But, in some witness-steps over the line of what is ethically permissible. Counselling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of determining what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.

What authority does the MRPC have for the California lawyer or any othe state? Like sister state rules and court opinions, it is not binding in California, but it may be persuasive in those instances where there is no controlling rule of professional conduct, statute or court ruling in California. The MRPC, if otherwise applicable, is subject to California's public policy and reasonable inferences which may be drawn from existing California Rules of Professional Conduct, statutes, and court

rulings.[18]

As a general proposition, a lawyer may interview a witness for the purpose of preparing that witness to testify but may not obstruct another party's access to a witness or induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify. Further, a lawyer may not request that a person refrain from voluntarily giving relevant testimony or information to another party, unless the person is the lawyer's client in the matter. Or if the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.[19]

B. OKAY TO TALK TO WITNESS – A LAWYER MAY INTERVIEW A WITNESS FOR THE PURPOSE OF PREPARING THE WITNESS TO TESTIFY

Most lawyers have heard the term "horse-shedding the witness." The term was originated by James Fenimore Cooper in the 1800's, when there were horse sheds near the courthouse where lawyers would talk the case over with their witness. Witness preparation has always been an expected and even essential part of trial preparation. Section 116 of the Restatement of the Law Third, The Law Governing Lawyers expressly permits interviews with a witness for the purpose of preparing testimony, and Comment (b) to Section 116 lists a wide range of permissible witness

18 Formal Opinion No. 1983-71, The State Bar of California, Standing Committee on Professional Responsibility and Conduct.
19 See generally, Restatement of the Law Third, The Law Governing Lawyers, Section 116 and 120; Model Rules of Professional Conduct, Rules 1, 3 and 8.

preparation activities:

- Inviting the witness to provide truthful testimony favorable to the lawyer's client.
- Discussing the role of the witness and effective courtroom demeanor.
- Discussing the witness's recollection and probable testimony.
- Revealing to the witness other testimony or evidence that will be presented, and asking the witness to reconsider the witness's recollection or recounting of events in that light.
- Discussing the applicability of law to the events in issue.
- Reviewing the factual context into which the witness's observations or opinions will fit.
- Reviewing documents or other physical evidence that may be introduced.
- Discussing probable lines of hostile cross-examination that the witness should be prepared to meet.[20]

In addition, witness preparation may include rehearsal of testimony. A lawyer may suggest a choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

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20 See a summary of J. Allen, "The Emerging Issue the Horse Shed, and Still Basing the Smell Test: Ethics of Witness Preparation and Testimony," https://lawyertrialforms.com/power-litigation-tips-tactics/the-ethics-of-witness-preparation/

How you follow each of the above is important.[21]

ABA Formal Opinion 508 relating to a lawyer's ethical obligations for preparing witnesses has elaborated on this subject. How, if at all, does it change the ethical rules regarding witness preparation? And what are the restrictions regarding how we prepare that witness, what we say and tell the witness about the case, and how we approach that preparation without unethically influencing the witness?[22]

In short, this Opinion gives lawyers great leeway in dealing with clients and witnesses in preparing them to testify. As the Opinion notes, "There is a fair amount of literature on the types of lawyer-orchestrated preparatory activities that are recognized as permissible." As in the case of due to the fact this relies heavily on lawyers to stay within the rules and use common sense to govern themselves with a sense of fairness and propriety.

The Opinion lists activities that *are* permitted. They include:

- Reminding the witness of the oath they take.
- Emphasizing the importance of telling the truth.
- Explaining that telling the truth can include a truthful answer of "I do not recall."
- Explaining case strategy and procedure, including the nature of the testimonial process

21 Geders v. U.S., 425 U.S. 80, 90 n. 3 (1976) ("an attorney must respect the traditional ethical distinction between discussing testimony and illicitly encouraging to influence it"); Hall v. Clifton Precision, 150 FRD 525 (USDC E. Pa. 1993); State v. Blakeney, 408 A.2d 636 (Vt. Sup. Ct. 1979).

22 Companion rules that might govern your conduct include Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for the Rights of Third Persons) and Rule 8.4 (Misconduct).

or the purpose of the deposition.

- Suggesting proper attire and appropriate demeanor and decorum.
- Providing a context for the witness's testimony.
- Inquiring into the witness's probable testimony and recollection.
- Identifying other testimony that is expected to be presented to explore the witness's version of events considering that testimony.
- Reviewing documents or physical evidence with the witness including using documents to refresh a witness's recollection of the facts.
- Identifying lines of questioning and potential cross-examination.
- Suggesting a choice of words that might be employed to make the witness's meaning clear.
- Telling the witness not to answer a question until it has been completely asked.
- Emphasizing the importance of remaining calm and not arguing with the questioning lawyer.
- Telling the witness to testify only about what they know and remember and not to guess or speculate.

Familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.It also lists those that are *not ethical*, including:

- Counselling a witness to give false testimony.
- Assisting a witness in offering false testimony.
- Advising a client or witness to disobey a court order regulating discovery or the trial process.
- Offering an unlawful inducement to a witness.

- Procuring a witness's absence from a proceeding.

The ABA Opinion is required reading for all who are involved in litigation or presenting testimony where witness preparation is part of the process. While it gives wide latitude in the witness preparation process, caution is advised as lines between ethical and unethical conduct can be crossed because the witness preparation process is fluid. I suggest you include in your preparation a clear statement to the witness that you are interested only in the truth and are not trying to influence the witness' version of what happened in any way. You are only trying to help the witness understand the process and what will take place so that they are comfortable with the procedure.

In carrying out this function, any lawyer needs to be able to recognize when the line of impropriety and unethical conduct are close to being crossed to assure that it is not. This process relies on the trust, honesty and good judgment of the lawyer involved.

Chapter 13
Case Selection, Evaluation, and Beyond: Should You Take the Case?

The key to a successful plaintiff practice is case selection. This is a decision involving an assessment of the merits of the case coupled with a realistic appraisal of your law practice's ability to properly manage and prosecute it. It is not productive for our clients or ourselves if we take cases we cannot resolve favorably given the case's merits and other factors that go into this process. If we do not achieve this goal, our clients lose and their expectations are demolished. We lose because the investment we have made does not yield a return.

There is an old saying that I have heard for years: "If you are not losing a case from time to time, you are not trying enough of them." I have no idea of its origin, but it is not relevant today with all the alternatives there are to resolution of cases, even if they are tenuous.

That does not mean that the work on a case we pursue may not be what we thought. That happens. However, we all try to minimize the risk of pursuing a case that is not productive for our clients or us.

So, we need to evaluate our strategy from a business standpoint about how we select our cases and clients to represent. Case selection is the key to a successful plaintiff's practice, even if some cases do not "pan out."

A key point here is that before you commit to the case and include it in your inventory, you need to confirm the full and accurate "story" of the case. Consider the admissible evidence and proof that is available to support it. The intake process is the time to make sure you have as much relevant information as you can gather to make the assessment regarding whether it is a good case, and fit, for your practice. The last thing you want is to later learn an important fact that adversely changes the recovery picture significantly that you should have found out earlier.

AN INITIAL COMMENT OF CAUTION

First, we must consider how we manage our practice. Are you prudent about case selection, given your experience and your case inventory, and your ability to manage your case load? Prudence is required here.

Areas of concern include: Do we take a case which a) you do not have the expertise to handle , b) you do not have the staff to process and manage, c) you are so committed to other matters that we do not have the time or resources to handle properly, or d) you simply have bigger cases to handle and would have to push the new matter to the back burner thinking it will settle early.

Be honest with yourself, your partners and your firm members in assessing if you can diligently pursue the case you are considering on behalf of a potential client.

One way of handling this is to have a good relationship with another law firm with which you can reciprocate and cross-refer cases. These are sensitive issues because they involve another firm and perhaps some fee sharing; however, this approach can work

within the rules of professional responsibility.

THE INITIAL CONTACT

New matters come to a law practice from various sources. Sometimes those sources will give you information you need to make an initial assessment of interest. Case referring attorneys are good at getting the information you need to evaluate the referral. That helps. On the other hand, "cold" calls from viewers of websites may need considerable scrutiny.

No matter how the potential client finds you, a prudent assessment of the case must follow the initial contact. The point is to obtain the information needed to evaluate the matter initially and see if a follow-up evaluation process should be pursued.

That follow-up evaluation process should be explained to the potential client and any referring source. Frankly, I ask potential clients to represent that they will not allow another firm to review the case during the time that it is being reviewed by my office. In response, I tell them that we will promptly investigate the matter and decide if my firm is interested in pursuing the case. We normally give the potential client a date on which we will complete our initial investigation and advise whether we are willing to either take the case or consider it seriously with further investigation.

GETTING THE CASE FACTS – THE FULL STORY

So, you need to promptly do whatever investigation you can to assess the three parts of any case: liability, damages, and *collection*. From a business perspective, the latter may be one that is often overlooked since sometimes we lose our way in the

liability and injury parts and forget about whether a defendant is judgment proof. This is part of any assessment of whether a case is worth pursuing from a business perspective.

ASSESSING THE ISSUES AND RECOVERY POTENTIAL

Once you have completed your initial investigation and have as many of the facts at hand as you can gather at that point, then there has to be an assessment of the issues. This assessment not only relates to the liability, damages and collection process but includes questions regarding the client's stability and cooperation, the time best it will take to work up the case, the drain on the firm's resources, and the amount of effort that will be required to make the case work for both the client and you. These factors all must be evaluated and worked into the process of deciding if you can and are willing to assume responsibility for this new matter.

TRUTH TELLING FACTORS

A key part of this process is simply figuring out how to test the story a potential client tells. Most likely only favorable facts will be revealed in your interview. "Cross-examining" a new client at this point is a sensitive matter. You want to preserve the relationship, so you need to be diplomatic in testing your client's story and that client's ability to relate it. This is a time consuming but critical part of the intake and evaluation process. No one can write or tell you how to do this. This process must be done in your own way to verify whether this is a case for you and your firm to undertake.

To accomplish this, I suggest using what I call a "soft cross." Rather than being confrontational, one way is to ask: *"Tell me*

more about ...." Or, *"Can you explain ...?"* Use questions that invite the potential client to comment and expand on what was said. This is the same process that a defense lawyer might use in "unpacking" a plaintiff who has sued that lawyer's client, and who is trying to determine the adverse party's version as well as testing the merits of the case. It is better for you to complete this process before defense counsel has the chance to do so.

THE ROAD TO RESOLUTION

In taking in a case, a focus needs to be on the potential resolution process. A law firm – no matter how big or small – can only try so many cases in a year, particularly if the case is expected to last several weeks.

So, an important part of the intake evaluation is: How is this case likely to resolve and can our inventory provide our working up this case properly? There are many questions to ask here including:

- How busy is the firm?
- What are our commitments to current work?
- What is our calendar in the future?
- Can we fit this case in properly for its workload?
- Can we commit to a discovery plan?
- Can we try/arbitrate the case if necessary?

We all have our firm "tolerance" levels, and we need to be mindful of that level. As much as we might want to take a good value case, we cannot if our current commitments preclude us from doing so. Perhaps a referral should be considered in that situation.

PROJECTING THE CASE WORK UP

You should also assess and project the case "work up." The three components of liability, damages and – again – collection are the keys. They each must work for you before you commit to representing the client.

A "work list" should be prepared on two fronts: a) what you need to do to evaluate if you should take the case, and then b) what work you need to do IF you accept the case and pursue it. Both are critical.

A key point here: Use a good investigator to help you with the first component. Have your investigator obtain public records and do an initial investigation including identifying key witnesses and determining how they are involved in the case. You can use an experienced paralegal to do this but often that is not efficient if your paralegals are committed to work on already accepted cases. A qualified and trustworthy investigator can be cost efficient. I also like the "objectivity" of using someone outside a firm to do this analysis to put the case in perspective.

SETTLEMENT VS. TRIAL: PROSPECTS

A key component to this evaluation process is assuming the case will go to trial. What if it does? Can you be ready? Will you be able to try the case in the manner that best serves your client? Can you staff a trial? Can you be preoccupied with trial preparation and trial in a manner that allows you to continue to serve your other clients? If you have other lawyers in your firm, you may have to ask them to help you with your other cases while you are occupied with a case requiring a considerable bite of your available time. If

you do not have the resources in your firm to get involved with the other cases, you may have to call on another lawyer to do the same thing (for some appropriate compensation or trade off).

This is an assessment you must make so that if the case goes to trial, you can still manage your firm and meet your clients' needs.

NEGOTIATION: DIRECT VS. MEDIATION

I am a big fan of direct negotiation. While I appreciate the role mediations have in our practice – and I applaud this alternative – I still believe cases can be settled directly. How is that possible when so many are used to just "mediating" a case? It takes experience to negotiate directly. If you are not skillful at this, then defer to mediation. But if you enjoy the negotiation process and can participate in a way that benefits your client, then try.

One critical point is that you need to be careful when you pursue direct negotiationsfor if this process is not successful you may need to go to mediation. You do not want to end up at a point in direct negotiation of "no further negotiation" – a point of reaching your "bottom line" and an impasse regarding settlement. So, if direct negotiations are not working, stop well before that point thus leaving you room for further negotiations with a mediator.

OVERALL APPROACH TO THE PRACTICE: A BUSINESS PERSPECTIVE

We cannot forget that our law practice is also a business. That means we must be mindful of our costs of doing business as it

relates to our income source. This is not a new concept. The difference between income and expenses is called gross profit (not necessarily "net" to anyone). From this we can assess our practice's profitability. But to be potentially successful the "bottom line" needs to be positive. If it is not, then there needs to be a reassessment of how a practice is being run and whether the case selection process is working.

From a plaintiff's perspective, that means keeping track of the costs to pursue our cases as they move along. That is cash out the door, and we hope that this expenditure is an "investment" in a case that results in a good recovery for our client and income – and profit – for our practice.

There is, of course, no guarantee that a case will pay your client for the losses suffered and you for the time and effort put into the case. Not every year will be a highly profitable year. If it is not, then the practice needs to be evaluated and a determination needs to be made regarding how cases are being selected, pursued and processed.

A FINAL COMMENT

One lawyer colleague says, "The best case I ever took was the one I did *not* take." Given what is outlined in this article, this makes sense.

A successful plaintiff's practice is focused on good business for both the client and the lawyer. It counters logic and good business to stretch and strain to make a case or overspend. However, sometimes it just does not work out for our client or us. If so, be honest — in a timely manner — and discuss your

assessment of the situation with your client. That is usually a difficult conversation to have, but a realistic and candid evaluation of a case is our professional responsibility to the client that has entrusted the case to us.

Not every case will work out, but a successful plaintiff's lawyer will take every precaution to evaluate the process so that the chances are good for recovery for clients and a business profit for a law practice.

Chapter 14
Arbitration, Court or Jury Trial?

The selection of the means for resolving your client's claim and dispute if it cannot be resolved takes some thought. Not every case needs to be tried to a jury. Sometimes submitting it to voluntary arbitration or waiving a jury and having a court trial may be preferable. In making this decision, and advising a client, there needs to be considerable thought given to this topic. One point is critical: Your client needs to understand the choices and understand your recommendation and advice and why you have posed them.

Some of the factors which may should be considered include the timing for reolution. Most recognize that arbitration can be faster, less expensive and less public for resolving disputes, but it is not subject to the same rules of evidence and discovery as a court case. This can result in concerns regarding fairness and transparency.

DO YOU HAVE A CHOICE AS TO THE FORUM?

First is the question of whether you have a choice of the forum for resolving your client's matter. Contracts may contain mandatory aribitration provisions or require a court trial (with a jury trial waiver). . ,

The first item for review is what forum choices you have for resolution of your client's matter? Even if a jury trial is available, it may not be right for your client's case.

WHAT ARE THE CONSIDERATIONS FOR DECIDING HOW TO PROCEED?

Even if the option is open for a jury trial, that does not mean that it is the best choice for your client. So, what are the considerations for determining if a jury trial is the preferred alternative to resolution?

Here are some factors to consider:

- **Is time important?** That is, will opting for a jury trial result in a delay in obtaining compensation for your client? The delay may be extended given appellate rights that may further extend the opportunity for collection. Arbitration certainly is likely to be quicker with a degree of finality (with limited or no appellate rights).
- **What is your client's jury appeal?** How will your client appear in front of a jury? Will your client make a good impression? Is the client sympathetic? Will the client be viewed in a positive way, or are there aspects that may turn off a jury?
- **How will your client handle a jury trial?** Is your client able to handle the process? Will nerves or testifying cause the client to be unable to emotionally handle the stresses and strains of attending a jury trial and testifying? Arbitration and even a court trial provide a less intimidating and more relaxed process which may make your client and witnesses more comfortable. So, if emotions are a factor, a less public forum may

be preferred.

- **Are the issues in the case so complicated they will be difficult to present to a jury?** Is there a better chance that an arbitrator or judge will better understand the complexities? If so, a court trial or arbitration may be the preferred forum for resolving the dispute.
- **Is it better to chose the neutral?** More to that point, arbitration allows the parties to choose someone who understands the subject matter and who has experience with the issues involved. Emotion is less of a factor so the issues have more prominence with a more sophisticated trier of fact who can focus on them.
- **Is arbitration more efficient?** Arbitration usually results in a more efficient process at a lower cost (even if the arbitrator is paid) with relaxed rules of evidence allowing testimony remotely or by an expedited process, streamlined hearings, flexibility in scheduling, and other efficient and cost saving alternatives which can offset the arbitrator's cost.
- **Are there ongoing relationships to consider?** Finally, if there are relationships to be preserved, arbitration presents a less confrontive and more diplomatic manner of resolving any dispute.

WHY NOT A COURT TRIAL?

Another alternative is to bypass a jury and opt for a court trial. In my view, this is an alternative to arbitration if you are willing to take the chance on the selection of a judge ruling rather than the

opportunity to choose the presiding officer which arbitration presents. In short matters this may be the most efficient and cost-saving approach as arbitration requires planning and the expense of paying a presiding officer.

In business cases or even admitted liability cases with damages only an issue, with perhaps only a few days needed to present your case, a court trial is an option. It can be efficient and less costly as the parties can agree on more streamlined methods of presenting their case. And like an arbitration the "rules" may be relaxed, and the court can hear the "whole story."

One advantage is that all rights of appeal are preserved with a court trial if there are issues that should be subject to further attention. Appellate rights may have been waived if there is a mandatory arbitration provision in an agreement.

Also, a court trial may be a reasonable alternative if costs are a factor which can be substantial if an arbitrator is paid for a case that takes a several days to conclude. .

WILL YOUR ADVERSARY BE A BARRIER TO FORUM SELECTION?

Obviously, your adversary could be an impediment to your selecting a forum other than a court or jury trial if there is no mandatory provision for arbitration. Perhaps a candid approach to the other side will reveal what your alternatives might be and if the parties can agree on a forum for resolution. It is worth a try to have this conversation if circumstances permit.

A Final Thought

To summarize, options may be available for resolution of your client's dispute. Jury trials are not for everyone or every case, so discussing the options for resolution with your client should be on your agenda. This gives your client the opportunity to consider the best process for resolving the dispute.

Chapter 15
Love at First Listen: The Art of Listening

Lawyers presumably know how to talk and effectively present their client's case. But do they know how to listen? That is, can they be effective in representing a client not by talking but by listening?

Listening skills are so important in negotiating with your adversary and during witness testimony, whether at deposition or trial.

I am sorry to say that too often I am in a deposition, hearing or proceeding and my adversary is asking questions. A witness answers, but instead of asking necessary follow up questions, the questioner moves on to the next area of inquiry. Clearly, that questioner did not listen to what the witness had to say. So, follow up questions were called for but not asked.

Similarly, in negotiations it is important for the parties to listen to each otherand the mediator if in a supervised negotiation. Listening is learning so those involved can address the key issues which are important in that process. Deaf ears cannot negotiate or conduct a quality examination of a witness. This also applies across the board, to case intake, client interviews and preparation for testimony, as well as other aspects of fact gathering and fact presentation.

One of my principal tasks as a lawyer for my client is to assess what my opponent is contending, and the basis for those contentions. Seldom can you accomplish that if you are not getting the other side to reveal their position. That does not happen if you, as counsel, are talking.

Listening is important when attending a court hearing as well as working with witnesses or negotiating with your adversary.

So how do we get the other side to tell us about their case? How do we get witnesses to reveal the story and "tell all?" Let's give it a run as to ways in which we can find out about what the other side is thinking and advocating, as well as what witnesses have to say by not talking but by *listening*.

SOME BASICS ABOUT LISTENING

According to the experts, there are 6 active listening skills: paying attention, withholding judgment, reflecting, clarifying, summarizing, and sharing.

Active listening requires you to listen attentively to a speaker, understand what they are saying, respond and reflect on what is being said, and retain the information for later. This keeps both listener and speaker actively engaged in the conversation, and it is an essential building block for understanding the other side.

Active listening and reflecting, responding, and giving feedback are not always easy. Here are some thoughts:

- Pay close attention to a speaker's behavior and body language to gain a better understanding of

the message.

- Signal that you are following along, interested, and listening by providing visual cues like nodding and eye contact.
- Avoid potential visual interruptions, like fidgeting and pacing.
- Do not evaluate the message and offer an opinion, but rather, simply make the speaker feel heard and validated.
- Be an attentive listener and have your toolkit of active listening techniques ready. These are critical parts of the process of developing the story of your case before testimony is taken. Listening (and follow up inquiries) provide the basis for developing the story you will portray and that your client will tell at trial.

LISTENING AT DEPOSITIONS

The listening process continues during depositions when the case starts to develop "on the record." This process focuses on "follow up" questions which allow you to explore a statement by a witness which requires further questioning and exploration to confirm it is potentially admissible testimony at trial, both favorable and unfavorable.

You should not be reluctant to explore – and to test – statements by a witness at deposition that are adverse to your client's case. Testing those statements by questions thatchallenge the basis for a witness' testimony leads you to a determination of whether you believe the statements will be admissible and persuasive.

One admonition: be sure you really listen, which means you allow the witness to complete the answer to a question. It is critical that you not anticipate the answer and, instead, allow the witness to complete the answer to the question so that answer is complete and ready for testing by further examination.

A deposition is the right time to pursue questions of a witness that reveal whether the statement will be admitted. When faced with adverse facts consider:

- What is the source of the statement? That is, is it from personal knowledge, or has the witness learned this from another or secondary source?
- Is the statement based on an assumption from certain facts, and if so (even if admissibility is a question), is this a fair assumption from those facts? There is no reason not to test it.
- Is the witness being objective or neutral, or does the witness have a motive to put an adverse spin on the facts?

These are some of the areas of exploration you should consider in testing a witness's story. The point is: test the story and obtain a clear basis for the testimony so you can challenge its admissibility or limit its impact by cross-examination at trial. This includes asking clarifying questions – with full answers obtained – which allow the witness to fully develop this testimony. This means that you then know all the witness has to say about the topic and know the basis on which the witness is providing this "testimony." Again, this allows you to determine if there is a basis for challenging the admissibility of the testimony or at least limit its impact.

Listening skills are obviously important in preparing for trial and then using what you learn from it to develop your plan for examining witnesses at trial. So, use that skill, so that you develop a positive story for your client when the case is tested in the trial or arbitration forum.

Chapter 16
Presentations Before the Court or Tribunal

The presentation of your client's matter in court proceedings can be mundane and administrative or it can be critical to the survival of your case. No matter the purpose, it is important that you put your "best foot forward" in all proceedings involving the court. Regardless of the type of proceeding, you are representing your client and speaking for them. You are also representing your firm and yourself as a practicing lawyer.

So, how are you viewed when you appear in these proceedings? Is the "picture" one of a lawyer prepared to deal with the matter at hand, or one who has a cavalier approach which, frankly, is less than professional. Is it a picture of a lawyer who shows respect for the forum that lawyer is in – a courtroom where dignity and respect should be shown for all who participate?

Unfortunately, I have seen more than my share of instances in which a counsel's presentation and image were not only not acceptable but were below the respectable and dignified one that should be the case. This resulted in an image of counsel that was less than positive and likely affected the level of respect given by the court for the presentation and the matter at hand. The privilege of representing clients in a respected forum should be evident in your appearance before any tribunal. That is the obligation we accepted when we took the oath of our office as attorneys licensed to represent clients in the jurisdiction in which we appear.

In certain cases, counsel may be familiar with the court and its staff and view the appearance as a mere formality. Even if I am familiar to that level, I still show respect for the forum in which I am appearing. So here are some thoughts.

1. Dress Appropriately: A conservative, well put together counsel results in a professional image. That means suit or proper garment, dress shirt or blouse, matching and conservative additions (tie, jewelry etc.), and well-matched footwear. Opting for more conservative dress means you are the focus of the appearance, not your dress. The trend towards more casual dress has no place in the courtroom or similar forum.

2. The Opening of the Session: Despite the usual "Remain Seated and Come to Order," I'm prepared to stand or am in the process of standing any time an announcement of this type is made by the clerk. It is then appropriate to sit as permitted.

3. When You Are Called: Even if you are in your office, your appearance on the screen should be professional. That means a coat or proper upper garment, and not coatless or casual. Even if the appearance is more administrative than substantive, or is brief, my suit coat is on me, and I am "together" and ready to address the presiding officer.

4. Standing When Addressing the Court: I always stand when I am in any dialogue with the court. This applies to any questions asked after my presentation. When the presiding officer is addressing you, please rise and address the court from a standing position. If it is a remote appearance, I may be seated but my coat is on, my desk or location is clear and not cluttered, and my background is either a professional virtual one or my office.

5. More Extended Hearings or Proceedings: In an arbitration or court trial, where there is likely less formality, I still maintain the professional demeanor which is the area where the proceedings are conducted. My coat is on, I am at my position at the table, and my needed work product is close at hand (which means on the table and out of my briefcase), and my computer or technical equipment is ready to support me.

6. Greeting the Presiding Officer: When it is my turn, the first words out of my mouth are an appropriate professional greeting to the tribunal: "Good morning, Your Honor, I am Guy O. Kornblum, counsel for [party]." This is the proper way to begin your appearance whether it is officially reported or not.

7. Organizing the Presentation: Your appearance should address the issue at hand. Often, I introduce the topic I am addressing and the issue which is the reason we are appearing by stating it. "Your Honor, the issue here is, etc." Simple and straightforward. If there are several issues, outline them first and then address them one by one. But be organized, clearly make your transitions from one topic to the next, and strive for a presentation that is easy to follow.

8. Watch Your Time: Whether administrative, substantive, or in trial, be respectful of the time you take for presenting your side of the matter.

9. Closing Your Presentation: When you wrap up your presentation, give a summary – and I mean brief – of your argument or point, thank the court for the time it is giving to the matter, and be seated. Close properly with a "thank you" or statement of appreciation for the court's and counsel's time

addressing the matter. If the presiding officer appears to understand the issue and is siding with you, do not belabor the point. If you are winning, close properly and move on or wrap it up and be seated.

10. Your Overall Approach: As an officer of the court, show respect for the forum and the process. That oath of office means something. We have the privilege of serving our legal system, and that privilege should be evidenced by how we present our client's matter to any tribunal. What I have suggested is your approach means you understand that privilege and show respect for it.

Once you are finished, listen to what your opposing counsel says and show respect for that presentation. While you make a note or two if responding, you still need to respect what opposing counsel is saying and how the presiding officer is responding.

The point: Show respect for the forum always. Formality contributes to respect for the process. It is our job as those privileged to appear to help maintain respect for that process and the place where justice is obtained..

Chapter 17
Motions *in Limine* – Short or Long?

It is rare for a case to go to trial without motions *in limine* (MIL) being filed,[23] whether the case is in state or federal court. As we know, these are motions filed in advance of the introduction of evidence which will be subject to an objection. A party anticipating the proffer of that evidence will file the MIL in advance of trial (or later before the evidence is offered) so that there is time to argue and assess the question of admissibility, and time to contemplate the impact of the court's ruling on the overall case.

A motion *in limine* generally seeks to preclude disputably inadmissible or highly prejudicial evidence before trial. These motions are brought before that evidence is offered and outside the presence of the jury to avoid needing to "unring the bell" should the jury be exposed to prejudicial evidence. *See People v. Morris* (1991) 53 Cal.3d 175, 188-191; *see also, Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669-670. This approach avoids having to disrupt a trial so that counsel can argue admissibility issues and provides for a more orderly process. It also avoids "curative instructions" to clarify situations in which the jury has heard inadmissible testimony or testimony which has a limited

23 There are several articles on this topic that are available. See, e.g., Horvance, "Motions in Limine," 2004; California Judges Benchguide 204: Motions in Limine, https://www.sdcba.org/; https://www.americanbar.org/; https://www.lacba.org/; https://www.uscourts.gov/.

purpose, thus the use of the term "unringing the bell."

This approach gives the parties advance notice of how a court will rule, so that the ruling can be factored into the assessment and presentation of a client's case.

These motions and their separate time for assessing their merits are not just for jury trials. MILs can be made in court trials to give the court time to reflect on the issues and the parties to make their presentations on the record. They simply help make the trial an orderly and thoughtful process for all concerned. For example, rulings may clarify what areas of inquiry will be permitted in examining witnesses which can make the direct and cross-examination more efficient as disruptions to rule on objections can be avoided by pre-examination rulings by the court.

Motions *in limine* are not noticed motions. California Rules of Court, Rule 3.1112(f) provides that: "A motion in limine filed before or during trial need not be accompanied by a notice of hearing." The deadline for filing motions *in limine* in California depends on local rules for the county in which the case is tried or in accordance with the rules of the jurisdiction or judge in federal court. So, it is critical as you approach trial to make sure you know the requirements for filing motions *in limine* to make sure they are properly and timely filed.[24]

In anticipating these motions, there are points that should be

24 For example, the United States District Court for the Eastern District has local rules for motions in limine in both civil and criminal cases. Similarly, the federal rules of procedure provide specific rules that govern the filing and timing of motions and procedural requirements. In Sacramento County, motions in limine are exchanged with the opposing party 25 days before the trial. Local Rule 2.9.

made in both preparing and presenting your position which are subject to the rules and requirements of the court in which the case is to be tried.

GENERAL GUIDELINES

Court rules provide that motions *in limine* be filed and served before trial. Similarly, an opposition is usually required before trial as well. As noted, court rules will set forth the time and content requirements for the filings. This does not mean that a MIL cannot be made during the trial as well if there are evidentiary issues which come up which require a more extensive review to allow the court to make a considered ruling.

For the filing (i.e., objecting) attorney's papers, the motion should squarely address four topics (these can be used as headings):

- The specific proof that is the subject of the motion;
- The applicable rule and the admissibility issue;
- The applicable authorities; and
- The specific ruling or order that is requested.

The moving papers should directly address the evidence which is the subject of the motion and the logic and authorities that support its inadmissibility.

Also, for the moving party, here is a list of general guidelines to follow which can be a safe start with the required motion added. Each motion should be separately briefed and labeled as indicated. The moving papers should include (under the appropriate heading

suggested above):

- A clear identification of the specific evidence alleged to be inadmissible or unduly prejudicial. This means that the pleading page where proof is found beyond a general label such as "MIL No. 1" and include the subject matter of the motion (e.g., "Exclusion of expert's testing on site").
- A representation to the court that the subject of the motion has been discussed with the opposing counsel, and that opposing counsel has either indicated that they will or will not be contesting the motion.
- A statement of the anticipated prejudicial impact of the jury unless ruled on at the outset, if it is granted, and if the court has determined in previous cases that similar testimony should be excluded.
- A statement of the prejudice that will be suffered if the moving party if the motion is not granted.

The motion for a motion *in limine* must include a proposed order. The proposed order must be worded in such a way that it effectively encompasses and conforms to the requirement of California Rules of Court 3.1116(b).

YOUR BRIEF IN SUPPORT OF OPPOSITION

The moving papers should be succinct, organized and articulated in an "outline" form. The point is to make a written record of your motion and preserve it for appeal. The court will hold a hearing outside of the presence of any jury when your

papers sufficiently lay out the argument of the court. That is, always request that the argument on the admissibility issue be reported so that the judge's opinion in support or opposition of the motion will be a part of the record.

OBTAINING A RULING

Judges will address the precise evidentiary issue raised by the motion and issue a ruling that is directed at that issue. However, counsel making the motion should be sure the ruling is crystalized and succinctly put on record by the court. At that time counsel can address the court for reconsideration or further objections need be made in order to preserve the record for appeal.

ASSESSING YOUR APPROACH GIVEN THE RULING

Once the ruling is made then both counsel can adjust their evidentiary presentation to it. The approach of obtaining this ruling in advance avoids disruption to the presentation of evidence and the assessment of the case once trial is underway. It also allows counsel to focus on the impact of the ruling on the case and witnesses.

RENEWING AN OBJECTION IF DENIED

If denied, it is good practice to renew the motion when the evidence, or even related evidence, is offered at trial. You can also "object" on different grounds, such as relevance through a stipulation with counsel or direct a request to the court, so you preserve the record.

MAKE A RECORD AND PRESERVE FOR APPEAL

It is important that the motion be properly made so that the motion lays out the issue for the court and the record.. The point is to make sure you have made the record to preserve your position outside of the court's ruling for appeal if adverse. *See People v. Morris*, *supra*; see also, *People v. Jennings*, 53 Cal.3d 334, at 363.Your record is important to give the the judge ia full record to consider in making a determination. n. If it is done, the ruling and its basis are preserved. .

Sometimes a court will defer a hearing on an evidentiary moiton to a recess to avoid disrupting the trial day. If so, make sure it is noted that your objection was timely made to preservfe it. The court can then work in a more extensive discussion when it fits into the schedule.

Chapter 18
The Business Side of Plaintiff's Litigation Law Practice

Anyone who has a plaintiff-oriented law practice, and who accepts some or most of their cases on a contingency basis knows how challenging and anxiety producing that practice can be. The business side of the practice is challenging. It needs to be managed in good times when it is flush and not so good times when cash is short. Along this path, xpenses must be met to keep the practice moving, serve our clients properly, and meet our professional obligations.

Those of us who are or have been involved in this type of practice know how important it is to structure it properly and closely monitor the business side. Expenses of the practice and the investment in cases must be monitored to allow the practice to continue. Overspending on staff or cases that do not provide a good return on the investment of capital in them can stress the practice or threaten its survival. This is particularly true in the very competitive environment resulting from extensive marketing of these practices on television, the print media, and other sources of competing for business.

As Walt Disney once said, "The way to get started is to quit

talking and begin doing."[25]

So, here are some suggestions for the business side of this type of practice.[26]

CREATE AN HONEST PROFILE OF YOUR PRACTICE

A critical part of your business is to realistically identify the legal services you can deliver and how to reach those who *need* those services. That is, what is the geographical area you can efficiently and effectively serve given the kinds of legal services you are competent to provide. The primary client bases will be those who contact you because of some marketing activity you have used or referrals from other lawyers, social or business contacts or former clients.

So, how do you either reach these sources or remain in contact?

STAY IN TOUCH WITH FORMER CLIENTS

As I have often said to a client when a matter is concluded, "Once a client, always a client." This, of course, is trying to suggest that I am available for contact when a matter arises that might need my help, either as a lawyer or as one who can help the client find the right lawyer. I do get calls from former clients from time to time and I respond by doing what I have said: Either I help them with the matter or help them with the search for a lawyer who

25 https://www.brainyquote.com/quotes/walt_disney_131640
26 A good read on this topic is W. Koster, "The Business of the Practice of Law: What Every Associate Should Know About Law Firm Life." www.authorhouse.com (2004).

can. I should add that I am reluctant to refer to a particular lawyer or specific firm unless I am very confident in that lawyer's or firm's abilities to handle the matter. Most of the time, I either agree to see if I can help with the matter or assist in defining what type of lawyer is needed. And, if I assist specifically with the matter, I seldom charge if it can be resolved in a short time. If it is more prolonged, then we discuss any fees to be charged, and appropriate documentation of that agreement is prepared and executed.

The point is that it is our job to help former clients who call try to solve their legal problem in the manner that I have described. Having that in mind, I also have to be mindful of the professional rules that apply to any lawyer client relationship, whether it is for a fee or not.

IDENTIFY YOUR ACCESSIBLE MARKETPLACE

A key to a successful law practice is being honest about your marketplace and then identifying the resources that will allow you to "penetrate" it with cost-effective marketing of your legal services. Some lawyers have been successful at just doing "good work" that allows them to enjoy a continued influx from their reputation. The way they get started varies. Perhaps they practiced in a different format, built up a reputation and then opted to open their own firm with the hope that some clients may follow (considering any ethical issues) , or new clients will be developed from their reputation. Others may start that way but enter into more aggressive marketing through clubs and organization, media advertising, internet presence or other sources of "getting the word out."

The best start for this process is to develop an honest,

straightforward and readable website. Avoid clutter. Have a website that in a 30 second review sends the message about what your firm offers. Add as part of the message why your firm should be chosen rather than any competition. This should be a positive "sell" not a negative. That is, this part of your website should promote the reasons for choosing your firm over others.

Social media platforms offer a resource for promotion of special services you provide, or other reasons why your firm can be differentiated from others. But in your approach be aware of what you cannot say to follow the rules of good marketing.[27] Overall, resist the temptation to "over-promote" credentials and stick to factual statements that are within the ethical rules and present a professional, and indeed dignified, portrayal of your firm and the legal services it offers. The ethical guidelines for lawyer advertising is a separate area which you should understand if you engage in a promotional program for your services.

California's lawyer advertising rules are governed by the California Rule of Professional Conduct. Chapter 7, Information About Legal Services, states under Rule 7.1: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading."

These rules ensure that lawyer advertisements, including websites, print and digital marketing, are truthful, not misleading.

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27 https://www.amberlo.io/blog/law-business/rules-for-advertising-lawyer/

Some of the requirements include:

- There can be no untrue or misleading statements, including any deceptive or misleading statements due to omitted facts.
- There can be no statements guaranteeing results. Many lawyers use a "disclaimer" in their promotional materials to ensure they do not guarantee results.
- Ads must name a minimum of one lawyer's name and the address of that lawyer.
- Certain written ads must include the words "advertisement" or "solicitation."
- Lawyers cannot call themselves a "certified specialist" in a practice area unless certified through a Board of Legal Specialization and the name of the certifying organization is included in the advertisement.
- Lawyers cannot promise or give anything of value in exchange for a recommendation. Fee sharing with other lawyers is permitted under certain circumstances.[28]
- Advertisements should avoid presenting the ultimate result of a case without facts or law giving rise to the result.

The point of marketing is to be honest with yourself about what will work rather than what you hope will work, and to stay

28 See Rule 1.5.1, CRPC.

within a budget for promoting your firm.

And any marketing must be within the rules of ethics and limitations that apply to lawyer promotion and advertising.[29] This point cannot be stressed enough as lawyer advertising is not "freewheeling" and without restrictions; you must comply with the rules.

BE SURE TO TAKE CARE OF EXISTING CLIENTS

The most effective marketing approach is a satisfied client. Satisfied clients will return and provide repeat business. In addition, and even better, is a satisfied client who is willing to provide a statement or testimonial for your website about their positive view of the legal assistance received.[30] Nonetheless, client satisfaction is the best way to market and even promote your firm, whether that client goes "public" or simply tells others. In some cases, a client may not be willing to publicly praise your firm but may be willing to provide a reference to potential clients who are considering your firm.

IMPLEMENT PRACTICAL AND REALISTIC BUSINESS PRACTICES

So, the best way to meet your practice's or firm's business goals is to adopt a realistic marketing strategy as well as attention to case management. If your practice is primarily plaintiff contingency litigation, your marketing strategy will focus on lay

29 See generally, https://growlawfirm.com/blog/lawyer-advertising-rules-you-need-to-know
30 See fn. 5, supra.

and professional audiences who either need your services or can recommend it to others. For some practices which serve a more defined marketplace the goal is to find ways to "penetrate" that marketplace and develop a presence in it. However, it is also important to be aware of and understand the ethical restrictions on lawyer advertising as noted above.

One warning, however, is to avoid the temptation of engaging marketing services that do not focus on a realistic assessment of that marketplace and how to engage it. There are firms which tout their marketing services that, frankly, lump you into a category and simply give you some exposure in a saturated marketplace that does not give you the opportunity to develop clients because you are obscured by others who are vying for the same clients. If you engage a marketing consultant, be sure you ask and understand how that consultant will realistically develop your marketing strategy that will have the greatest potential for yielding clients.

WATCH YOUR CASH FLOW AND BORROWING

Other than my colleagues and staff in my firm, my best professional friend is my CPA. Two important points here are: First, keep in touch with your CPA who can provide a periodic assessment of your income and expenses so that you can add if needed but trim where required. Second, obtain an honest and ongoing assessment of the profitability of your practice. The latter should not just be a year-end review but at least quarterly to make sure your cash management and budgeting are in line with your income potential.

TAKE CARE OF YOUR BUSINESS

To any of us who are responsible for maintaining a law practice and do not or cannot rely on others to manage the business side of our practice, we must develop resources to provide an ongoing assessment of how the business side is doing. It is easy to maintain the practice in the face of a challenging revenue situation, i.e., one that is declining or static, and not take steps to allow the practice to meet its expenses and provide a reasonable profit. If you do not have a staff to provide an ongoing and realistic assessment of how the practice is doing, then develop outside resources, most importantly a CPA or accountant who can provide that, along with a marketing resource that will help you develop a productive strategy to attract new business.

But I say again, in this process the most important function is to carefully select new clients and once they become a client, serve them professionally and well.

Chapter 19
Deposition Preliminaries and Use of "Admonitions"

Deposition "preliminaries" and "admonitions" are more important than they are given by many lawyers. This is the time during the beginning of deposition when counsel taking the depositions sets the stage for how it is going to proceed. In my view, few lawyers know how this process should work and what needs to be done.

The common beginning goes something like this:

Q. Mr. Witness, have you had your deposition taken before?

A. Yes, I have, a few times.

Q. So you are familiar with the process?

A. I believe so.

Q. Since you are, can I dispense with the "usual" comments and admonitions?

A. Sure, ok.

Now, ask yourself: What has been accomplished by this exchange? Does the lawyer who is taking the deposition know if the witness understands the process? Of course not. This line of questions and answers leaves a great deal of ambiguity in what will take place after.

Instead, I believe the best practice is to review the basic principles that apply to depositions *with any witness*, even experts, to ensure that your record in this deposition is clear as to what the witness understands is the way in which depositions proceed. This insures that if the deposition is used at trial the witness, or opposing counsel, cannot utilize the failure to do to argue that the witness was naïve, confused, or failed to understand the process.

First, I make sure I have the deponent's full name, and all other names and even "nicknames" by which the witness has been known, plus date and place of birth, and even a Social Security number if the witness will provide it (privacy concerns here). Next, I introduce the witness to the process of how the deposition will proceed, describing the question-and-answer format and advise the witness of the post-deposition process allowing that witness to review and make corrections if appropriate. I may at this point just establish some basic information about the witness including contact information, place of work or business and some initial information.

At that point I then review the basic principles of depositions, which include the following.

1. **Prior depositions.** Ask whether the deponent has ever been deposed before and, if so, the specifics about that lawsuit, the role of the deponent in the lawsuit, and its conclusion. This will show the deponent's familiarity with the requirements of testifying and will determine whether the deponent has been involved in related litigation or proceedings.

2. **The oath effect.** Even though the deposition is being taken in a relatively informal setting, remind the deponent that he or she is under oath, has sworn to tell the truth, and the effect of that oath is the same as if he or she was testifying in court.
3. **Audible answers.** Tell the deponent to answer audibly and only after the examiner has finished speaking, so the court reporter can take down each person's words with only one person speaking at a time.
4. **Don't answer until you hear full question.** Wait until the question is completed before you begin to answer. Do not interrupt the lawyer asking the question and try to answer a question before the full question is stated as you may misunderstand what is being asked.
5. **Clear questions.** Ask the deponent to advise the examining attorney if any question is unclear in any way, after which the examining attorney will reword the question.
6. **No guessing.** Tell the deponent not to guess when providing responses but, if appropriate, provide estimates based on his or her best recollection.
7. **Use words, not gestures.** If a question calls for a yes or no answer, tell the deponent to answer "yes" or "no" rather than with a nod or a shake of the head.
8. **Right to break.** Advise the deponent that he or she is entitled to request a break anytime to confer with counsel, to use the restroom, or for

any other reason.

9. **Heads up on objections.** Explain that other attorneys may make objections to questions or answers; they are objections for the judge to consider later. Advise the deponent that he or she is required to answer unless, as a party, he or she is told not to by counsel.
10. **Recording rules.** Tell the deponent that the court reporter is recording all the questions, answers, and objections and will reduce that information to booklet form after the deposition ends, at which point the deponent will have the opportunity to read the transcript and correct any inaccuracies.
11. **Changing testimony.** Explain that if the deponent makes changes in his or her testimony that are inconsistent with the answers given during the deposition, the examining attorney will be entitled to comment on those discrepancies at trial to question the deponent's veracity.
12. **Effect of Answering**: Explain that if answers the question, you will assume a) it was understood, b) the witness gave his/her best answer, and c) the answer is full and complete based on the witness's knowledge.

SUCCINCT INTRODUCTION

- Full and complete name
- Work/personal address
- Email address for contact purposes

- Phone number for contact purposes
- Prior Deposition
- Deposition procedural rules/admonitions
- Do you have any questions about these?
- Are you under any medication which would prevent you from giving full and complete testimony today?
- Is your hearing ok?
- Do you have any hearing impairment?
- Do you have any listening impairment?
- Do you have any difficulty expressing yourself in English?
- Do understand these?
- Do you have any questions about them?
- Are you ready to proceed?

Chapter 20
Cross-Examination of the Adverse Expert

Confronting the expert who is adverse to your client's case provides an opportunity for you to demonstrate cross-examination skills that are "text book". In most cases, the primary goal will be to ask disciplined and focused questions that prevent the expert from avoiding any elaboration, and which will contribute to the process of neutralizing, if not restricting, the expert's influence on the outcome of the case. Rarely does the skill of cross-examination lead to a "destruction" of the adverse expert as a factor in the case. We leave that result to the movies or tv[31], although there are

31 "Inherit the Wind is an excellent movie portraying the 1927 Scopes "Monkey" trial in which the state of Tennessee prosecuted a teacher for teaching evolution. The names are changed in the film, but to my astonishment many of the details are completely accurate. "At one point in the movie the defense attorney calls the prosecutor to the stand as a witness to question him on the Bible. He does this since he was banned from calling any witnesses on evolution (e.g. scientists). Instead, he indirectly makes his point about freedom of thought by making a fool of the prosecutor by trapping him with questions about basic religious tenets. This actually happened. More than that, the prosecutor was one of the most famous men in America, the former Secretary of State and two-time Democratic presidential candidate William Jennings Bryan. I thought the movie made this up for dramatic effect, and I was shocked to learn it was real when reading about it later."
https://www.reddit.com/r/iwatchedanoldmovie/comments/ofyd39/i_watched_inherit_the_wind_and_cant_believe_it/?rdt=60332.
There are several excellent movies based on courtroom events. "Inherit the Wind," "12 Angry Men," "Witness for the Prosecution", "Judgement at Nuremberg", and "Anatomy of a Murder" are all very good movies, and they all came out within a four-year period! For more examples of cross-examination which are on "film" see: https://www.google.com/search?sca_esv=dc77d35e499118ec&udm=7&sxsrf=ADLYWILuOKsKSppx0eBSZWzDhKb_91SSCA:1732513362865&q=cross+examination+in+the+movies&sa=X&ved=2ahUKEwi2sb-c4_aJAxUVFjQIHfe2AhcQ8ccDegQIEhAH&biw=1452&bih=653&dpr=1.75

occasions in "real life" where this can be the result of any effective cross-examination. So, let's discuss the basics of this aspect of trial work and see what the best tools are for accomplishing what I have described. Remember with an expert you are taking on a witness who presumably knows more about the subject matter that you do, so factor that in while planning your approach to that witness. It may be best to focus on peripheral areas of weakness (such as qualifications, familiarity with the opposition, misunderstanding of the relevant facts) that allow you to chip away at the basis for the opinions stated.

THE FUNDAMENTALS

In my experience, cases are "won" on direct. Usually and at best, cross-examination will be used to "neutralize", shed doubt or discredit the defense. There are certain techniques that are key to approach. They are well tested and passed on by experienced counsel.

To start, the key to an effective cross-examination of the adverse expert (and most adverse witnesses as well) is *control*. That is, you must use a skillset that allows you to keep the adverse witness to short, focused answers that agree with the proposition you have stated in your question. Usually, the questions are posed with a phrase followed by a word asking for the witness to agree: "So, Dr Jones, Mr. Smith (plaintiff) did not suffer from a concussion, correct?" The answer to the question is "Yes" or "No" and counsel is entitled to that answer. Seldom is it beneficial to your client's case to allow a witness to expound on a response to a well worded question on cross-examination which is intended to elicit an admission to what the question states. Being able to phrase these questions properly to as to accomplish the goal of an

admission is a skill that needs to be developed as part of your skill set as a trial lawyer.

This approach is used to challenge the accuracy of the expert's testimony, the assumptions relied on, or the credibility and objectivity of the witness or to gain favorable admissions of fact that help your client's case.

RESEARCH AND PREPARATION BEFOREHAND

There is so much you can and should do in preparation for cross-examination of the adverse expert. Among the tasks are:

- *Know the subject matter*. Study and research the area of expertise. Also, talk with consultants who can help you understand the subject matter and identify vulnerabilities in the adverse expert's views.
- *Know the expert*. Who is this witness, are there transcripts of testimony, and what is that witness's online presence and background. Also, look for jury verdicts which are reported and include a list of experts who have testified. This gives you information on who to contact and where to look for possible transcripts of relevant prior testimony.
- *Check "expert" websites for a presence*. Many experts "advertise" on sites devoted to helping lawyers find experts in particular fields. Search for ads, but also review the details on the site for grandiose representations and "puffing" which should be fodder for cross-examination.

- *Talk to lawyers who have been adverse to the expert*. This can lead you to transcripts, reports and other information which can be fodder for cross. Plus, you may get some tips on how to handle this expert at deposition or trial.
- *Go to "specialty" websites and licensing sites for general information on the expert*. Is the expert licensed with a governmental agency, and if so what is the history portrayed? License status, suspensions, complaints and other information should be available from this source.
- *Research articles, publications, news releases, teaching and speaking engagements, and other sites associated with the field and the expert.* These can provide a host of information and sources for learning about the expert's activities in the field.

The point is to dig into the background of the expert so you can plan the challenge to the expert's views and bases for those views.

SETTING UP THE ADVERSE EXPERT AT DEPOSITION– LOCK IN THE TESTIMONY

Aside from getting background, other cases in which the expert has testified, plus information regarding the expert's retention and involvement in the case at hand, there are key questions you must ask to tie down the expert on the opinions and bases for such in the case.

At the deposition you should ask "open ended" questions designed to "unpack" the witness to obtain all opinions and their bases. But after "unpacking" you need to "lock in" the expert that there is no more. So towards the end of the questioning, I ask these questions until I get a full and complete answer that there is "no more." And I do it in more than one way. That is, I rephrase questions but make the same point to emphasize the point (a common technique of a trial examiner when successful on cross-examination with an adverse witness).

- Q. Mr. Expert, have you provided me with all opinions you have been asked to reach in this case?
- Q. Are there any other opinions you will offer at trial other than the ones you have testified to in this deposition?
- Q. Have you also testified to all the reasons for reaching these opinions?
- Q. Are there any other bases for reaching these opinions other than what you have testified to today?
- Q. Do I now have all the opinions you will offer at trial in this matter?
- Q. Do I now have all the bases for your opinions?

As noted, I ask these questions in several ways to make sure I have "locked in" the witness to his anticipated trial testimony and to avoid any "surprises."

CROSS-EXAMINATION AT TRIAL

Once you have reached this point you should be prepared to outline your agenda, areas of questioning and key points you wish to make to do as much as you can and are able practically to "neutralize" the adverse expert's influence on the case. It is important to start and finish well in this process, so select two areas for the beginning and end where you can make some headway and get the trier of fact's attention. Start with a couple of admissions that are helpful, then hit your areas with clear transitions from one to another so all can follow. As you reach a good point to end your examination, find at least two more admissions or key points to make with the expert, and then sit down while you hope you are "ahead" in the process. You have made your points with emphasis!

A critical point is to be realistic about what you can accomplish during cross-examination. Keep in mind that with the expert, you are dealing with a witness who purports to know more about a subject than anyone else in the courtroom at that time. Be careful what you challenge. Direct challenges on the subject of the expertise may be difficult, so think about working around the "edges" of the witness's presentation. Make your point and move on and do not risk losing the impact by asking one question too many and allow the witness to wiggle off the hook or embellish an answer that is not helpful to your client's case. Be satisfied with any modest success and concessions. As they say, "Less is more."[32]

32 See, https://www.phrases.org.uk/meanings/less-is-more.html for the origin of this phrase..

Chapter 21
Organizing and Presenting Witnesses at Trial

The presentation of witnesses at trial, court, jury or arbitration, can be frustrating for many reasons. Many challenges are presented. You may have a lay witness who has important testimony to your client's case but are concerned about that witness' ability to tell the story – correctly – because the witness is easily confused, cannot keep on track or simply cannot follow a questioner and is prone to get off track.

The basic operating principle is to start well and end well, which means a positive and perhaps "safe" (*i.e.* not vulnerable to challenge on cross-examination) approach. Of course, that is in the "perfect world" in which we do not operate or even live! Nonetheless, if you are going to trial, then assess a witness order that gives you the best chance to put your client's story together in an understandable way. This may be chronological and then by liability and damages, which is a logical sequence. This puts the story in a time sequence that a court and jury can more easily follow. Even if it is not perfect and a witness is out of order, you still can maintain a logical connection as you proceed by making the court or jury aware of the order of witness testimony. Also, you can consider video recording or using live remote testimony if necessary to keep the presentation moving and orderly.

Thus, there are choices to be made such as whether the witness should appear live or not, or how to deal with more than one

"good" witness or overlap of experts.

These are all choices that come up. How to handle them presents more topics than we can cover here. But the topic leads to thinking about how our client's case is best presented so that the court or jury can follow the story, absorb the issues and begin the decision-making process as the case unfolds. (Yes, that process starts before the end of the case, so recognize that "fact" first and foremost.) I call it a prestation in the "theatre of the real".

FOR PLAINTIFFS – WHEN DO I PUT MY CLIENT ON THE STAND?

Here there are two basic decisions": first, where does your client's testimony best "fit" for the story to develop, and second, when is your client most comfortable to tell that story. No doubt it is unique for a client to talk about tragic events and personal health items in front of strangers. So, your should present this testimony at a point in the case at which your client is as comfortable as possible relating it. Do what you can to find that point. As noted, it will not be perfect. But your confidence in your client and reassurance in the client's ability to tell the story will help that client be more comfortable in that process.

DO I CALL THE DEFENDANT AS AN ADVERSE WITNESS AND WHEN IN THE ORDER?

Most likely a defendant will exhibit behaviors that will manifest a "defensive" posture: anger, reluctance, bitterness, testiness, guarded, etc. These are normal responses to the accusations in the case, particularly if the defense is one of "no

liability" or "joint fault". You should be able to use these "defenses" to your advantage but be careful in doing so. You want a court or jury to be reluctant to accept the defendant's story and not be sympathetic to the plight. So, leaning on the defendant who tends to generate some sympathy will likely backfire. In those cases, concentrate on the facts favorable to your case that you can elicit from the defendant and move on at a point where you have done what you can with the target of your client's case.

WHEN DO I PROFFER THE TENTATIVE WITNESS?

It seems in every case there is one witness (maybe more) that causes some angst in presenting this testimony. Will the witness hold up or not? Perhaps the witness is mostly favorable but is reluctant to allow any preparation. Or maybe the witness lacks good communication skills or is uncertain. So, you need to adjust your approach to confidence-building. Here your best personal skills are tested in establishing a relationship that will allow you to get the best out of this witness.

The first principle is to keep the examination as brief as possible. Once you have the essential facts established, stop, sit down and hope the witness holds up on cross. Second, you will need to explore how the witness will respond to that cross-examination. Here, I suggest a "soft" preparation approach, exploring areas that will be covered with a goal of *listening* to how this witness responds. Then use your good personal skills to help the witness understand where this testimony fits into the story you are trying to tell. If this witness understands where this testimony "fits", the witness will understand why this testimony is important to the case. That will lead to a feeling of being a part of your client's presentation. That is, this should have a positive,

cooperative impact on this witness.

HOW SHOULD I PRESENT EXPERT TESTIMONY?

This is a topic of a full article, so just a comment or two here. First, try to present this testimony when all the facts needed are already part of the case, so the underlying facts upon which this expert is relying have been already "heard" by the trier of fact. Second, make sure the expert is comfortable with participation in the case. Your expert should understand the role played in the presentation of the client's story.

Because an expert usually gives testimony on a subject that may be unfamiliar to the trier of fact, it is important that you introduce this testimony in your opening remarks and explain where it fits. This way the trier of fact should understand why the expert is there and what your goal is in presenting this testimony. Then present this testimony at the most logical point in the case that you can, whether it be live, a video deposition, or live remote presentation.

WHO SHOULD BE MY LAST WITNESS?

This is normally the hardest choice. If your client is a very positive part of the story telling, then recall that client for a brief "supplemental" examination to give the trier of fact one more "look" at the "victim" of the wrongs committed.

If that is not a good choice, then perhaps a damages witness is the next best choice to "cap off" your client's case.

In choosing, try to find a witness who has a positive impact on

the case and is not vulnerable to an effective cross-examination. It does not have to be a powerful finish but just a positive one.

Here is final note to keep in mind on this topic which comes from Vince Lombardi, the well-known Green Bay Packers quote who once said: “Perfection is not attainable, but if we chase perfection, we can catch excellence.”

Chapter 22
Trial Briefs and Other Briefing During Trial

I am a big fan of briefing during trial, but there are some fundamental principles that I follow. The local rules or even the judge's own operating rules may give you guidance as to how any briefing should be prepared or submitted. Of course, those should be followed.

Here are some thoughts on how you can make your written efforts more effective.

DO NOT RELY ON MOTIONS *IN LIMINE*

Keep in mind that motions *in limine* are "preliminary in nature." So, while a motion *in limine* might help streamline a trial by forecasting the judge's view on the evidence at issue, merely making a motion *in limine* does not preserve an issue for appeal if the [party] fails to further object to that evidence at the time it is offered." So, when the evidence is offered during the trial, make a clear objection, and refer to your written presentation and incorporate it into your objection. I also recommend restating the key points in that written presentation orally even if your restatement is repetitive just to make sure the record is clear.

YOUR TRIAL BRIEF

First, remember the trial judge does not have much time during trial to read long presentations, so what you submit has to be short, to the point, and topically oriented.

Prepare a main or initial trial brief that gets to the point. You do not need to include an extensive discussion of the facts of the case, just a quick summary. Then address the main issues topic by topic. There may be evidentiary issues, issues relating to witness availability (maybe a witness needs to testify remotely), or expert issues (*e.g.* the nature and scope of the expert's opinion). The brief should give the judge a feel for what the key issues are in the case – legal or factual, or both – that is the focus during the trial.

Also include a topical table of contents with page numbers where each topic begins. That way the court can look for a discussion and authorities related to an issue that is being addressed. Also do not clutter this brief with extensive case quotes. Instead, attach a copy of key cases and highlight the key areas for easy reference. Here it is the case law not your interpretation that the court wants for reference, so this approach accomplishes that.

My rule is to keep the opening brief, even in more complex cases, to 7-10 pages excluding the topical outline.

SUPPLEMENTAL TRIAL BRIEFS

Hold back any more elaborate discussion for a supplemental, topically oriented brief which you can submit during trial. These are usually "mini" briefs, sometimes called "pocket briefs" which address a key issue that the court needs to resolve. Keep them short

— usually 3-5 pages — with, again, quotes from cases attached so the court has a copy of the most relevant authorities at hand. Also they should be lodged with the judge and made part of the trial record as noted next.

BRIEFS THAT MAKE A RECORD

I am a proponent of briefing that preserves legal issues for appeal. Seldom do I rely exclusively on my verbal presentation. A brief accompanied by a stated ruling by the court on the record – and written is better -- should be enough to preserve the issue and the ruling (in this case adverse) for appeal[33].

Generally, to preserve an issue or argument for appeal, trial you must both raise the argument or objection on the record or formally in writing and provide specific and precise reasons for the argument or objection, so that the trial court may rule on it. In addition, as noted, be sure you get a ruling that specifically addresses the issue and provides the reasons behind it. Do not be bashful in asking the judge to clarify the ruling if it is unclear or there are any ambiguities in how the court announces it.

SOME MORE THOUGHTS ON THE TOPIC

It is easy to get "lost" in trial preparation, particularly jury trials, and forget the need to educate the court on issues that require rulings. The judge needs to be prepared for those sufficiently in

33 Preservation of error means objecting, raising issues, and making arguments during the trial that are reported and included in written or oral record that the appellate court will later review. Failure to preserve will almost always result in waiver or forfeiture of your legal arguments on appeal.

advance so the court can plan and fit any hearings out of the presence of the jury into the calendar without disrupting the flow of the trial and wasting jury time for hearings on legal or court only issues.

So, plan in advance and let the court know what issues will require rulings so that there is at least an opportunity for the court to consider how to schedule the time. There are enough unanticipated events during a trial, particularly jury trials, that this advance notice and opportunity to plan ahead will avoid unanticipated down time and significantly improve the flow of the trial.

Chapter 23
Story Telling in the Theater for the Real

"Once upon a time…"

I doubt any trial lawyer starts an opening statement or closing argument with this statement, but this is how each could begin. Why? Because a trial is a *story* – a *story* that is told about real events. Stated another way, it is a portrayal of your client's claims based on what happened and how. So, what is the best way to tell this *story*? How should a client's claims be told in the environment of a courtroom which I call the "theater of the real"? Here are my thoughts.

KNOW THE *STORY*

First, you have to learn the *story*. The first source for this learning process is usually the client or a client's family or close friends who are close to the events surrounding that *story*. This is where you begin to develop the *story* that you will eventually weave into your case. That may not be so easy as the *story* the client wants to tell may not translate immediately into the "legal story" that needs to be told. So, it is your job to "unpack" the facts that are pertinent to that *story* that will be told in the Complaint and developed more as the case progresses. The end is *story* telling in the courtroom, which is where the "theater of the real" is portrayed as your client's *story* of fault and injury are revealed to the trier of fact.

ASSESS THE STORY TELLERS

A major challenge in the process of developing your client's *story* is to find the ones who can best relate it, and who are credible so that you can have confidence in what they tell about the events. Some will be eager to contribute but in reality, do not know all they "think" they know. Others may be reluctant to come forward to talk. That means it is up to you and your colleagues, investigators or others who are assisting you to find the ones who can provide accurate information in an understandable way. In some cases, the *story* may develop readily from reliable sources, but for others this process may take time, so patience is a virtue in pursuing the facts that can be converted to courtroom proof of your client's claim.

In addition, verify the facts if there is doubt or ambiguity of the accuracy of what you learn. You should have a good reliable *story* developed by the time the Complaint is filed. That is a worthy goal; however, there are some cases in which the full *story* is not known because all the facts are inaccessible. In this case you must assess if the case is likely to develop in your client's favor which justifies pursuing the lawsuit and then relying on discovery to develop the *story* to a "courtroom" form.

CONSIDER HOW TO DEVELOP THE *STORY*

As the s*tory* begins to unfold, you need to assess how it will be told. There will be portions of the *story* that might be more relevant than others during the progress of the case when discovery disputes arise or there is an issue about its scope. Nonetheless it is important to develop a succinct sentence or two that define what

the case is about that can be the first sentence in a brief or your first sentence in any hearing before the court so there is a succinct statement that alerts the reader or listener understands the basics of the *story.*

For example:

Your honor this an action by my client, Homer Smith for personal injury arising out of an accident that occurred in July 2024 at the intersection of 9th and Judah in San Francisco when the car he was driving was broadsided by a fast-moving pickup truck that hastened through the intersection in violation of the Vehicle Code. Plaintiff suffered series injuries requiring long term hospitalization and recuperation. . His economic damages include substantial medical bills and significant impairment to his earning capacity.

No mystery there. In less than a minute the court will know about the case, whether this is stated orally or in a brief. Of course, more complex cases will require you to refine its initial factual description into a short introductory sentence or two. But try to refine a statement that suits your case, indicates its level of seriousness, and gives the court or mediator in a mediation statement a snapshot of what the case is all about. From that point whoever is listening to your statement or reading your brief should have an overview of the matter so any issues can be put in perspective and addressed.

TEST THE *STORY*

Seldom do I take a case without testing its *story* with others. It may be a colleague, a lawyer friend or even a family member.

My test "audience" depends on the type of case, and where I think it will eventually be heard – in a court or jury trial, an arbitration or even a mediation. My choice of audiences is dependent on how I believe the case will progress and where it will be decided. The point is to present a succinct description of the *story* to see how your selected "audience" reacts. Make note of the response and factor it into your plan of whether you take the case or how you should proceed with it if it is already in your inventory.

Make sure you include in your testing issues that may be key to the case or a hurdle to overcome. For example, your client may have a drinking history and a spotty attendance record at work as a result. Nonetheless, the serious injuries have now added to a burdened sole, who now has to deal with his troublesome habits on which a difficult recovery process is superimposed. It will be important in that process to find out how this *story* is likely to be received in the decision process.

Your informal testing of the case may very well lead to some insights that lead to a more refined and effective approach to its development. Why not try this? No harm will result, and you will likely learn more about how others will react to the *story*.

Question: Did I say the *story* was important?

Chapter 24
General Damages Claims in Personal Injury Claims

Life goes from a challenge to a struggle when a client suffers a serious personal injury. This is reflected in that client's general damages claim, which is the subject of a jury instruction which reads:

The key instructions for general damages in CACI are 3900, 3902, 3905 and 3905A.

CACI 3905A sets forth the following:

> *PHYSICAL PAIN, MENTAL SUFFERING AND EMOTIONAL DISTRESS (Non-economic damage)*
>
> *(1) Past and future physical pain, mental suffering/loss of enjoyment of life/disfigurement/ physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress [insert other damages].*
>
> *No fixed standard exists for deciding the amount of these non-economic damages. You must use your judgment to decide a reasonable amount based on the evidence and your*

common sense.

To recover for future non-economic damages, the plaintiff must prove that he or she is reasonably certain to suffer that harm.

For future general damages, determine the amount in current dollars paid at the time of the judgment will compensate [name of plaintiff] for future pain and suffering. This amount of non-economic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.

Given this discretion of the finder of fact what do you consider in proving and arguing for damages caused your client for the trauma, injury and limitations an injury has caused?

First, you need to let a jury know what the claim is all about. I suggest using the language of the jury instruction quoted to let the jury know what the nature of the claim is. Then give the jury some examples of the impact the injury has had on your client. Do not be bashful. But be honest. Focus on the real impact on the lifestyle of your client. Refresh the jury's recollection of what your client and other witnesses said about the impact of the injury on your client's life. How is it different? Have others noted the difference? What has this done to your client's emotional state, image, self-confidence and self-perception? Is your client now reclusive rather than outgoing as before the injury? Has your client's social activity changed? Was that client actively employed but now relegated to a life of loneliness and absence from the

stimulation of work and those relationships? How is life now different – and less enjoyable – from what it was before? How has it changed and what is the impact on your client who is now faced with a new and less enjoyable life?

What follows is a checklist of areas which you might consider in assessing and defining the areas which impact your client's general damages claims.

DAILY TASKS

First, review the daily routine of your client, and determine how it has changed. What are the challenges now that were not there before. They may be physical difficulties or emotion ones, or both. Also ask those close to your client how this normal routine has changed. There is a whole host of daily activities that a person engages in, so go through the day from first waking up to bedtime, including activities relating to person care. Have the client relate the frustration will normal grooming and self-care issues which are impacted by the injuries.

Also, a client may be restricted in other daily tasks such as errands, driving, moving about a home, and just getting from place to place during the day. This is a good point to do a "day in the life" review, which can be captured in a video for illustrating your client's frustration from the inability to navigate a "normal day" in that client's life.

FRUSTRATION

With these changes your client is likely to be frustrated with the effort to face and overcome them. Trying to recover to where

the client was before the injury and be frustrating if the client cannot "get there". "As before" will never be again, and the realism of that fact can be enormously hard for any client to accept. Once was will never be! This is another area that needs to be explored in detail, so a jury will understand how normal tasks and relationships are in the past. Everything is just harder and, in some cases, impossible to complete or enjoy. The includes r*elationships* with spouses, family, friends and colleagues.

SELF-PERCEPTION

These challenges are likely to impact your client's self-image. Where before a client may go through the day with normal effort, the exertion needed now is likely to draw attention, and exhibited frustration noticed. This can be embarrassing and can contribute to the overall emotional impact of a client.

HOBBIES AND INTERESTS

Examine any hobbies or interests a client cannot now enjoy because of changed circumstances. This can include recreational activities and simply "downtime" when a client seeks to recharge batteries. It may be difficult or even impossible for a client to escape the impact of the injury caused by the wrongdoer. Spend time getting your client to talk about the impact this has on that client's emotional state. Recreational activities may now be restricted. What did the client enjoy as an "escape" from the pressures of the day? We all have something we try to do to ease the pressures of life. Are these now unavailable or limited now, which can increase the frustration from these changed circumstances?

WITNESSES

I find that the general damages claim is sometimes best told by others rather than the client. Of course, your examination of the client on these issues can be compelling. Some are better at relating this aspect of their testimony than others. If they are shy, reluctant or just cannot "get the words out", then family members, close friends or work associates are even more critical as witnesses in this component of your client's case.

PERCEIVED BURDEN ON OTHERS

Most of us do not want to depend on others as we want to take care of ourselves. So, when a client is injured and has to look to others, particularly close family members and good friends. This is understandably can be demoralizing. This is another avenue of worry, anxiety and frustration, plus the inconvenience of the need to have others do for you what you formerly did for yourself. This help does not always come when the client needs it but when others can provide the assistance.

FUTURE/RETIREMENT PLANS:

Obviously, a serious injury is going to interfere with "life's plan". We all have anticipations of how life will unfold. It is basic human nature to think about this. Whatever your client's thoughts are on this topic, they are impacted by a serious, enduring injury. The disappointment in not being able to fulfill these plans will be evident in most cases. If not, draw them out by encouraging your client to talk about them and the impact the injury has had on the thoughts of the future.

THE "WORRY AND FRET COMPONENT"

This emotional category includes the ongoing "fret and worry" that will likely persist in a victim's mind. It is always there and never retreats. It can be the first thought upon waking and the last thought before dosing off. It can result in sleep disturbance, and lack of concentration particularly if the client is not fully occupied and must endure time alone or with nothing to do. The mind is not "occupied" and will draft at this point, but the lingering thought of this changed life will be there to remind your client of what happened and how life has dramatically and suddenly worsened.

Overall, the proof of your clients' general damages claim should focus on how life is different post-injury? What has changed that is a result of the injury to your client? This is the part of the case that needs to be explored and portrayed to give your client the best chance for a significant general damage award for this aspect of the injury claim. Dig deep with your client so the full story of the impact of the injury is heard by the court and jury and tell that part of the story so a jury essentially "feels" the impact of the injury on your client's life.

Chapter 25
What are the Limitations on Closing Argument

The time has come for you to finally argue your client's case to the jury. Whether a short or long trial, this is where we use our skill at summarizing our client's case in a manner that is persuasive, organized and effective in convincing a jury (or court for that matter) of the merits of a client's matter. Frankly, the door is open to "have at it" – the rules are broad in allowing counsel to speak on behalf of client. However, there are some limitations, so let's go over them.

WHAT ARE THE BASICS?

To review, the closing argument in a civil case is the final statement made by counsel to the judge or jury at which time they summarize the evidence presented during the trial and persuasively argue why the jury should rule in favor of their client. The goal is to explain how the evidence supports the client's theory of the case and apply the law to the facts to reach a favorable verdict. It is the last opportunity to convince the jury before they begin deliberations.

Key points about closing arguments in civil cases:

The objective is to synthesize the admitted evidence, highlight key points, and persuade the jury to adopt the most beneficial interpretation to your client's position.

The organization should be simple:

- **Introduction**: Briefly restate the case's main issues and the burden of proof.
- **Evidence Review**: Summarize key evidence presented during the trial, emphasizing aspects that support your client's case. Make sure you anticipate the arguments of your opposition and address any weaknesses that will be addressed.
- **Legal Analysis**: Explain how the evidence aligns with the relevant laws and jury instructions. Here you should orient the jury to the instructions that are the most relevant so when the jury hears them, they will recognize the importance.
- **Closing Appeal**: Make a strong final plea to the jury, asking them to reach a verdict in favor of their client based on the presented evidence. Generally, you should let the jury know what it is your client seeks as damages in the case (see below).

So let me elaborate on a few key points:

First, presence and dress are important. I prefer a modest presence with a dark suit, while shirt and conservative tie. I always wear a white appropriately aligned lapel handkerchief, which adds a bit to the formality and importance of the presentation. And my coat is appropriately buttoned. My stance is firm and confident. Also, I prefer to have nothing between the jury box and me. If a lectern or podium is required, such as in federal court, I usually stand next to rather than behind it. During the argument, I try to

stay in the general vicinity but that depends on your use of exhibits, visual aids, computers for visuals, and related items.

As noted, the start and finish should be strong. How you do this depends on your personal style. It does not have to be dramatic but should let the jury know you are confident in your client's position.

Second, there is always a "thank you, jurors, for your time" in your presentation. I insert that right after the opening portion. I pause then and say. "My client and I very much appreciate your service in this case. I know the court and all counsel do. While this is time for my summary of the case, I do want express my client's and my appreciation for your time devoted to this case. Thank you." Something like that should be sufficient.

The structure of closing should be logical and easy to follow. An easy structure is as noted above, but it may need to be altered depending on the case.

What is not allowed includes the following:

- Presenting new evidence not introduced during the trial.
- Making personal attacks against opposing counsel or witnesses.
- Stating opinions or beliefs not supported by the evidence.

Otherwise, you are given wide latitude in arguing your client' case with some limitations as noted below.

WHAT IS NOT PROPER[34]

Here is a short list of what is improper[35]:

Personal Views: You cannot inject your own opinion in closing argument. You cannot say, for example, "I personally believe there is no doubt as to the defendant's guilt." Likewise, you cannot personally vouch for a witness.

Personalizing a Jurors Response: Likewise, it is improper to ask how a juror might respond if that juror suffered the same injury.

The Golden Rule Argument: The "golden rule" in closing arguments refers to the prohibition against asking jurors to put themselves in the shoes of a party in the case. This is prohibited. You cannot directly ask the jury to decide the case based on how that juror would feel if a victim, as this is considered improper and can lead to biased decision-making. This is all part of prohibiting the personalization of the case to someone other than the victim of the claimed wrongs.[36]

34J. Battaglia, "To Object or Not to Object to Closing Argument," https://www.fbasd.org/post/objections-during-closing argument#:~:text=You%20must%20act%20quickly%20since,Otherwise%2C%20the%20objection%20is%20waived.

35 Legal support for these statements can be easily found with basic research.

36 J. Blumberg, "The Golden Rule: Invoking Empathy Without Violating the Golden Rule," Plaintiff (www.plaintiff magazine.com), May 2024, p. 48.

OBJECTING DURING OPPOSING COUNSEL'S ARGUMENT

You must act quickly since objections must be "timely". So what does that mean? Courts generally hold that an objection to improper argument must be made before the judge submits the case to the jury to deliberate—*i.e.*, during argument or immediately following perhaps even at a break. Otherwise, the objection is waived. That is, you must act "promptly". What is "prompt" in these circumstances? The problem is that it can appear as "bad manners" to a jury if you interrupt counsel during a closing, so how do you avoid that perception and notify the court in a timely way that you object to counsel's statement.

Sometimes it is better to simply ignore any comments that are brief and perhaps of little impact. However, objections to serious misconduct should be made promptly and stated on the record out of the presence of the jury. In serious cases consider interrupting opposing counsel's argument, requesting a very brief side bar to note the objectional conduct (on the record) and later confirming the side bar objection at the first break out of the presence of the jury. The court will respond and if the objection is well taken, will advise the jury accordingly and request they disregard the objectionable comments. In objecting it is important to remember that both an objection *and* a request for a "curative" instruction for the jury to disregard the comments must be made to preserve the error for appeal. *Sabella v. Southern Pacific Co.*, (1969) 70 Cal. 2d 311, 318 ("'Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection *and* a request that the jury be admonished [to

disregard the statement in argument]'" (emphasis added).[37])

A FINAL THOUGHT

Do not forget the basics: Closing argument is the lawyer's final opportunity in a trial to tell the judge and/or jury why they should prevail. They do so by explaining how the evidence supports a client's case and pointing out how a resolution of the issues favors a client. The best presentation stays within the evidence, puts the case in perspective, and traces your client's plight in a sequence that is easily understood and remembered as the jury adjourns to deliberate. You can accomplish this by a thoughtful assessment of what best fits your skills and personality. This is a lofty goal but one that we can achieve on behalf of our clients by focusing on what I have suggested.[38]

37 For an example of serious misconduct of counsel, and what to do about it, see Love v. Wolf (1964) 116 Cal. App. 2d 378. The case was reversed because of the conduct of plaintiff's counsel. It was eventually retried and another appeal resulted. In a second appeal, Love v. Wolf (1967) 249 Cal.App.2d 822, the issue of offset was not raised until a motion for new trial and even at that time the affected defendant made no request for reduction of the judgment on such basis.

38 See J. Thigpen, "The Closing Argument: Creating a Masterpiece Every Time", Advocate/Article/2021-January/The-Closing-Argument.

Chapter 26
Selected Ethical Issues for Trial Lawyers

Facing ethical issues in "trial work" is nearly an everyday occurrence. Investigating a client's cases, meeting with and interviewing witnesses, preparing a client for testimony, negotiating a client's case, appearing at mediation and before the court in hearings and at trial all involve ethical dilemmas that we are bound to confront. So, decisions have to be made to avoid violating the ethical requirements which govern our efforts on behalf of our clients. What I have included in this article are just some of the basic considerations for ethical dilemmas which we likely will face and the general ethical principles that guide us. These principles distinguish our profession from others where the "rules" are not so well defined. In some areas there is wide latitude which requires sound professional judgment to avoid ethical misconduct. In some areas the rules are clearly restrictive.

The general ethical principle guiding our profession is found in Business and Professions Code section 6106 which provides that lawyer may be disciplined "for a commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise…"

In this article I will discuss six areas that are commonly faced in our civil litigation practice.

ISSUES RE SOLICITING AND "SIGNING UP" CLIENTS

Marketing a lawyer's services in this era of permissive advertising is challenging for all of us. The "open door" invites abuses. It is easy to cross the line of what is impermissible by overly "puffing" credentials, case successes, and client satisfaction. But here are the basics.

Under Rule 7.1 of the California Rules of Professional Conduct, advertising must not involve "false, misleading, or deceptive" communications."[39] This rule emphasizes that all representations made in legal advertising should accurately reflect the factual and legal circumstances of the services provided and the results achieved. The U.S. Supreme Court has held that lawyer advertising is protected commercial speech but may be subject to reasonable restrictions. *See Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383-84. While it may seem obvious that advertising may not mislead, still the limitations on lawyer statements for promotional purposes may not be considered misleading in other advertising contexts but may be misleading in the legal context. *See Edenfield v. Fane (1993)* 507 U.S. 761, 774-76 (1993).

The basic principle is to avoid misleading the public as to competence, credentials, experience or results relating to a lawyer or his firm. A lawyer may advertise specialized areas of practice but may not purport to be a "certified specialist" unless the lawyer holds a certificate issued by the Board of Legal Specialization or another entity accredited by the State Bar. Rule 1-400(D)(6).

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39 See Bus. & Prof. Code §6157,1.

The State Bar Act also prohibits specific types of communication such as any guarantee, warranty, or suggestion that the lawyer can obtain quick settlements. Cal. Bus. & Prof. Code § 6157.2(a), (b). It restricts advertising methods such as impersonations and dramatizations. *Id.* § 6157.2(c). An advertisement stating the lawyer will represent the client on a contingency fee basis is also prohibited if it fails to mention that the client will be responsible for costs. *Id.*

If an advertisement in electronic media conveys a result in a specific case, the advertisement must state either: (1) the factual and legal circumstances that justify the result, including the basis for liability and the nature of injury or damage sustained, or (2) the result was dependent on the facts of the case, and results will differ. *Id.* § 6158.3.[40]

Most of us cannot afford the expensive tv and radio campaigns we routinely see or hear, so we look to other ways to get the word out about the legal services. Whatever the medium you use consider these basic rules which we must follow to avoid ethical violations.

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40 Certain types of communications are subject to a rebuttable presumption that they are false, misleading, or deceptive. For instance, the State Bar Act establishes a presumptive violation for advertisements in any medium that: (1) describe the ultimate result of a specific case without adequately presenting the facts or law giving rise to the result, and (2) refers to or implies money received by or for a client in a particular case, or to potential monetary recovery for a prospective client. Cal. Bus. & Prof. Code § 6158.1(a), (c).

ISSUES RE PREPARATION OF YOUR CLIENT FOR TESTIMONY

The difference here is between hearing what is "said" and "saying" what to hear. It is a separation of assisting the witness to tell an accurate story versus coaching the witness to tell a favorable story. You should know the difference.

To avoid "putting words in my client's mouth," I "unpack" the witness first. Use the words and questions that urge your client to tell the story – in their own words. "Tell me about…" or "Then what happened?" I avoid suggesting any answer to the question, *e.g*. "Did Mr. X tell you… ?" (suggesting in the question what you hope to hear rather than what your client has to say.)

The principal applicable here was stated in the recent ABA Formal Opinion 508 (adopted August 5, 2023) which provides:

> *A lawyer's role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct1 governing the client-lawyer relationship and a lawyer's duties as an advisor, the failure adequately to prepare a witness would in many situations be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is*

> *ethically permissible. Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.*

So, the rule is broadly permissible and in practice subject to abuses resulting in coaching, horse shedding, or sandpapering[41] the client (and even witnesses) into a version that is helpful to a client's cause rather than truthful. It is the difference between helping your client who may have difficulty telling the story and relating the facts in contrast to "feeding" the story to a client. As lawyers we should know the difference, but there are violations by those who cross the line.[42] So, know the limits and stay within them.

ISSUES RE DEALING WITH INDEPENDENT WITNESSES

Here, there is a wide range of situations as witness personalities and their opportunities for accurate testimony and willingness to cooperate will vary. Some may meet willingly,

41 See, e.g., J. Gaal and J DiLorenzo, "Horse-Shedding the Witness: When Does Witness Preparation Cross the Line?" https://www.bsk.com/uploads/Burton-Award-Article-Horse-Shedding-a-Witness.pdf.
42 Id.

while others are reluctant or refuse to do so.

However, what is said about client preparation applies here. The rules are clear: Any effort to unduly influence an independent witnesses' testimony is an ethical violation, and because there is no "privilege" which protects your communications with that witness, any unethical efforts are likely to be exposed if opposing counsel takes a comprehensive pre-trial deposition or conduct such at trial.[43]

ISSUES RE USE OF "AI" IN RESEARCH AND BRIEFING

I need to stress here what may be obvious: AI is in its infancy, there is plenty of room for abuse, and as lawyers, self-restraint is the key principle. There are no clear rules yet as to what the limitations are. The biggest issue I see is that when going to AI data bases we have no idea where the AI webpage obtained the information we find unless it is stated. Obviously, if we see something favorable, we cannot just "lift it" and copy it in a brief, motion or demand letter without verifying its accuracy. So that is the first principle of using AI – *verification*.

We cannot rely on just what is presented and there to read. That should seem obvious. That is, in a field that requires accuracy, AI-generated factual inaccuracies can be serious risks for legal professionals. That is why it is critical that we use our professional judgment, knowledge and skill to independently confirm the accuracy of any data provided by an AI tool. Enough said. You get

43 C. Pastore, "Ethical Witness Preparation and Unethical Witness Coaching: The ABA Weighs in on the Good, the Bad, and the Ugly," Mar 2, 2024, https://lacba.org/?pg=lacba-news&blAction=showEntry&blogEntry=103927.

the message.

ISSUES RE REPRESENTATIONS IN MEDIATION

Because of the mediation "privilege" there is plenty of opportunity for abuse in a mediation regarding what is said and what is left unsaid. In a sense, this can be "unchecked" advocacy, leaving the parties to say what they will with the hope that the other side will not verify the information (which in itself calls up a lawyer's professional duties). The temptations are there for abuse. In my view, there is no room for doubt. Truth in advocacy is required. That does not mean that you must open your file, but it means that you should not allow your opposition to believe something is true that is not or attend with your knowing they are assuming "half-truths". So where is the line?

First of all, let's distinguish between "bluffing" or "posturing" and outright lying or concealment. The former is likely regarded as "good advocacy" while the latter should be professionally unacceptable. Again, you should know the difference.

Second, you have a safety net: the mediator. If you or know or suspect the other side does not know the "truth", then discuss that with the mediator and consider with that mediator how to approach this circumstances. It may be a question of ethically correcting "the record" or strategizing how to proceed from an advocate standpoint. The message here is to let the mediator know what misunderstandings the other side has about the case, why they exist and what to do about it. Most likely, the mediator will want to get accurate facts before the parties to have productive negotiations. It may be that the opposition has not fully investigated, discovered or prepared the case, and it is time to get

the cards on the table. Strategic if not ethical decisions need to be made. But what is clear is that lying, knowing misstatements of the facts, and misleading statements are not ethically permitted even under the "confidentiality" protections of the mediation privilege. Plus, full and honest disclosure is likely to lead to a resolution which is the purpose of attending in the first place![44]

ISSUES RE REPRESENTATIONS TO THE COURT AND COUNSEL

Not telling the truth or allowing the court or opposition to rely on facts or information you know or reasonably believe is not true is professionally – if that not ethically – inexcusable. Yes, one can say using "good judgment", "following your instincts" or just "doing what is right" is a good rule of thumb to follow. These might be good basic concepts, but they work only if the lawyer has the foundation underneath them and the developed instincts to know "right" from "not so right". Alternatives to test the situation include talking to a trusted colleague, calling the State Bar "hotline", or getting a "second opinion" from an ethics expert just to make sure you do not cross the line. Taking some extra time to make sure you stay within the ethics guidelines makes sense when you are faced with an ethical dilemma that challenges your judgment.

44 J. Schau, "Secrets and Lies: The Ethics of Mediation Advocacy and Scrabble," Feb. 27, 2006, https://mediate.com/secrets-and-lies-the-ethics-of-mediation-advocacy-and-scrabble/#:~:text=When%20confronted%20with%20this%20scenario,falsely%20and%20remove%20all%20doubt!%E2%80%9D.

ABOUT THE BOOK

This is collection of Mr. Kornblum's columns on civil litigation and trial strategy which have been published in FORUM, the bi-monthly journal of the Consumer Attorneys of California. The columns focus on all aspects of civil litigation as Mr. Kornblum provides his insights based on his extensive experience over 50 yeas of what he describes as "trial and litigation work". This book is written for those who want to learn more about the strategy and preparation for handling civil litigation. It is designed to provide ideas which will contribute to a lawyer's thought process in handling litigation for a client in the civil arena.

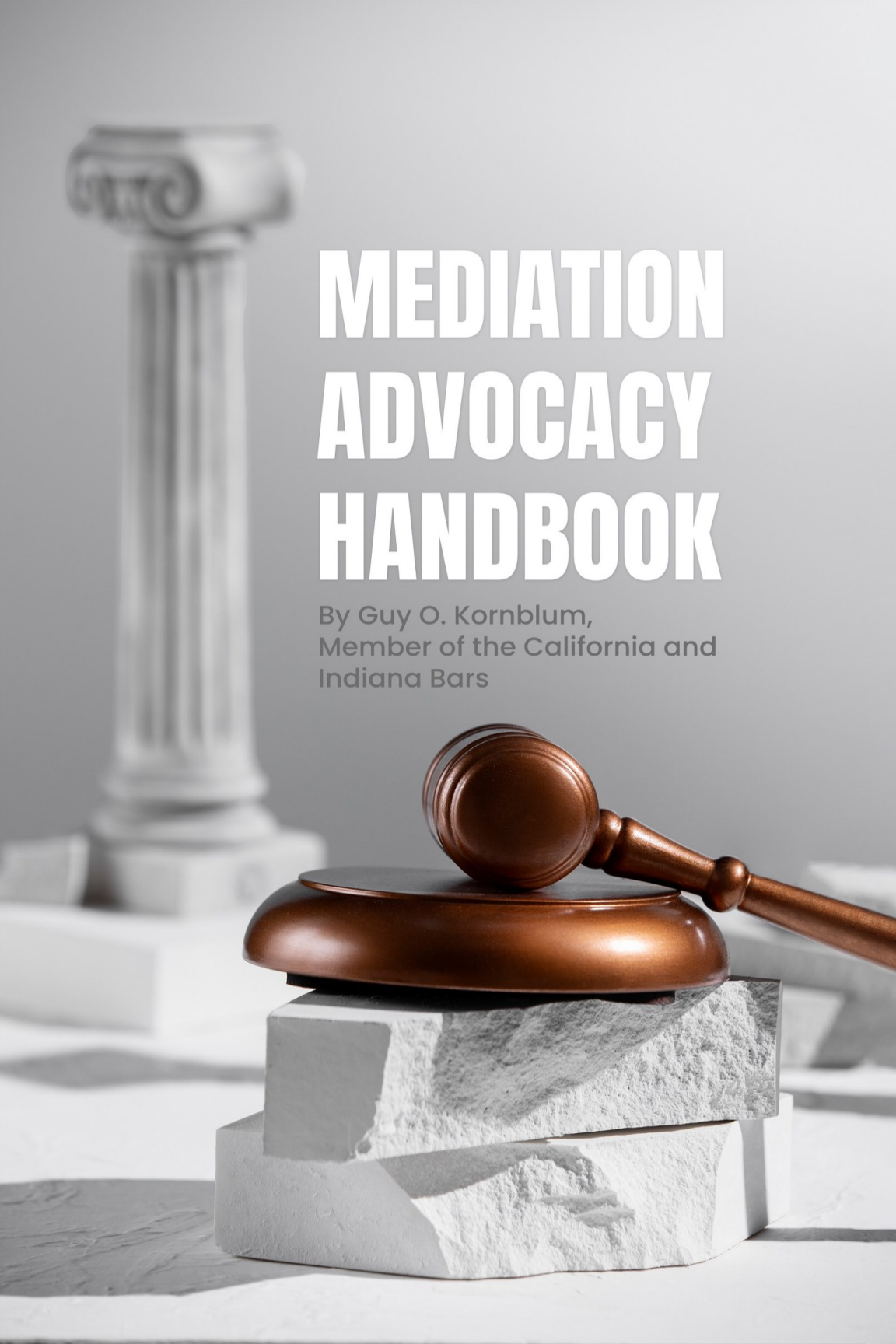
ABOUT THE AUTHOR

Guy O. Kornblum is the principal in Guy O. Kornblum, A Professional Law Corporation, with offices in the San Francisco Bay Area, where Mr. Kornblum has practiced for over 50 years. He is Certified in Civil Trial Law by the National Board of Trial Advocacy. He has been trying civil cases his entire career and has taught at the then Hastings College of the Law, University of California (now UC Law San Francisco) where he obtained his law degree. Once on the defense side, he has been a plaintiff's lawyer for the past 25 years.

Mr. Kornblum has authored a book: "Negotiating and Settling Tort Cases: Reaching a Settlement," which is in its 5th edition (2025), The book has been in print for over 10 years and is regarded as a prime guide to the negotiation process in tort cases. Contact the Thomson Reuters publishing company for more information about Mr. Komblum's book an negotiation, Mr. Korblum is also co-author of two texts on insurance law and bad faith claims, and has over 150 published articles on various topics related to civil litigation and insurance and injury claims. He also is an expert witness in insurance claims and legal malpractice cases.

MEDIATION ADVOCACY HANDBOOK

By Guy O. Kornblum,
Member of the California and Indiana Bars



Mediation Advocacy: Winning Ways to Settlement as Your Client's Advocate at Mediation

Guy O. Kornblum
Member, California and Indiana Bars

ISBN:

Dedication

To my family who has supported me in my career, and to all my colleagues from whom I have learned so much.

About the Author

GUY O. KORNBLUM is the principal in Guy O. Kornblum, a Professional Law Corporation with its office in San Francisco, California. He has specialized in civil litigation for over 50 years. His firm specializes in a wide range of civil litigation, including serious injury and wrongful death, medical and legal malpractice, financial and physical elder abuse, and all aspects of insurance litigation "bad faith" claims. Mr. Kornblum himself has handled over 4,000 litigated matters to a conclusion and has several million dollars plus cases to his credit. He has represented hundreds of clients, small businesses, individuals, and large Fortune 500 corporations over his years of practice. He is highly regarded for his litigation skills, and his representation of his clients in settlement negotiations and mediations, where he has a strong track record of successful settlements.

Mr. Kornblum is certified in Civil Trial Law and Civil Pretrial Practice Advocacy by the prestigious National Board of Trial Advocacy, and is a Charter Fellow of the American College of Board-Certified Attorneys. He is also a Life Member of the MultiMillion Dollar and Million Dollar Advocate's Forum, for those attorneys who have achieved multi-million dollar awards or settlements for their clients; is a Charter Fellow of the Litigation Counsel of America Trial Lawyer Honorary"; is a "Top 100" Trial Lawyer; and is listed in the "Top 10" in the Personal Injury and Insurance Litigation fields. He is listed in the 23d Edition of "The Best Lawyers in America." He has been selected as a Super Lawyer each year since 2006 and is a Top Attorney in North America. Mr. Kornblum is the author of “Negotiating and Settling Tort Cases: Reaching the Settlement,” published by the Thomson

Reuters Publishing Company now in its 5th edition (2023), co-author of two texts on insurance law and bad faith claims, and over 150 published articles on various topics related to civil litigation and insurance and injury claims.

Mr. Kornblum has been lecturing on continuing legal education programs for over 45 years on a local, state, and national level. He has taught programs for numerous providers and regularly lectures for the San Francisco Bar Association, the National Academy for Continuing Legal Education, the National Business Institute, and other CLE providers. He has also taught law school students at the University of California College of the Law, San Francisco (formerly the UC Hastings College of the Law), Santa Clara University Law School and San Francisco Law School.

In addition to his civil litigation practice, Mr. Kornblum has also qualified in both state and federal court as an expert witness on insurance claim handling, settlement value, negotiations and case value, and on the standard of care applicable to lawyers in civil litigation.

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Chapter 1
Some Thoughts on Dispute Resolution

There has been considerable recent publicity about resolving lawsuits through private mediation services. What is this all about?

First of all, the "litigation explosion" has cooled down these past several years, our court systems are still struggling to keep their calendars current and to move cases along. Actually, our San Francisco Superior Court has done a commendable job of administering its case load, thanks to attentive judges, volunteers from the San Francisco Bar Association who assist in serving as mediators, and case management that forces the parties to bring their cases to a conclusion or be ready for trial within a year or so. Getting a Superior Court case to trial in a year requires careful planning and effort by the parties' lawyers, so there are real advantages to trying to settle early. Early settlements, of course, mean fewer costs for the parties in attorneys' fees and litigation costs. The true lawyer professionals will make a real good faith effort during the initial stages of litigation, and even before a lawsuit is filed, to resolve their differences.

Both our state and federal courts encourage early settlement. There is an Early Neutral Evaluation and Settlement Program ("Alternative Dispute Resolution," Rule 16-8 of the Local Rules of the United States District Court for the Northern District of California) in our federal courts and initial Case Management Conferences in state court cases at which settlement and other

resolution alternatives, such as arbitration and mediation, are explored.

Settlement efforts can be conducted in several ways: a) informal negotiations through the parties' lawyers ("the old fashioned way"); b) court supervised mediation and settlement alternatives; and c) private mediation. In my practice I use all of these. However, I find that in state court, the judges are so busy, they really do not have the time to devote long hours (the better part of a day) to the more involved cases. In that case, a Bar Association volunteer lawyer may be available. In federal court, the magistrate judges (lawyers who work full time to assist the judges) usually handle settlement efforts and have more time to do so.

Despite these court supervised programs, another and often used alternative is the private mediator. These services emerged in the 80's and have grown to the point of offering the public, at a cost, settlement, mediation and arbitration services that can be tailored to suit the particular case. The American Arbitration Association is one of the early services which, while originally devoted to mostly arbitration, now offers mediation and settlement programs. The Judicial Arbitration and Mediation Service (JAMS) has offices nationwide with retired judges and trained lawyer mediators, many of whom specialize in particular types of cases. These services, and others like them, provide a valuable resource for resolving disputes. I would say that my firm uses private mediators in at least half of the cases in which we represent a party, usually a plaintiff or claimant. This past year we have privately mediated a case at least once each month and possibly more.

Private mediation services are not controlled by the courts.

The parties use them voluntarily; they cannot be forced to go to them. However, because they offer the parties a mediator or arbitrator who can dedicate time and effort to a case (rather than being distracted by other assignments), they offer a very desirable alternative for the mediation process.

The Judicial Council of California issued comprehensive ethics standards for contractual arbitrations (where the parties agree in a contract to arbitrate any dispute arising out of the contract). ("Ethical Standards for Neutral Arbitrators in Contractual Arbitrations.") These resulted after a series of articles appeared in the San Francisco Chronicle, along with an editorial, all harshly criticizing unethical arbitration practices. The standards require neutral arbitrators to make detailed disclosure of any financial relationship or conflicts of interest between arbitrators and companies, attorneys or parties involved in disputes. These apply to arbitrations where the arbitrator has the decision making responsibility, which is often binding on the parties and not appealable except in limited instances. The New York Stock Exchange and the National Association of Securities Dealers have sued to set aside the standards. The California legislature also passed various bills geared to clean up what appeared to be arbitral ethical abuses.

While these standards technically do not apply to mediators, who do not have decision making responsibilities since they use their skills to try to get the parties to agree to a resolution of a dispute, mediators should also disclose to the parties any potential for conflicts. This is so that the parties can select a mediator who truly is a "neutral" and even though innocently, may have interests that create a perception of a conflict.

Usually the parties meet in an initial joint session during which the mediator explains his role as a "neutral," confirms that the negotiations are confidential (what is said or written cannot be used in court), asks questions to clarify issues and positions (usually written "briefs" are submitted beforehand by the parties), and asks if any party wishes to make an initial statement (which is not required).

The parties then go to private rooms and the mediator moves back and forth discussing issues, resolution alternatives, offers to settle and counteroffers, and tries to get the parties to a point where they agree. It is often a difficult and frustrating process, and sometimes it seems as if the parties are not working towards the goal of trying to resolve the case. There usually is a point in time when it appears that the case will not settle, then there is a break through, and the matter resolves. The settlement is then confirmed in writing.

It is the mediator's job to get the parties to that point. Trained professional mediators – retired judges or trained lawyers, and sometimes lay persons (such as in family law matters) – are very good at using their training and skills to accomplish the goal of resolution. However, it often requires the parties to put aside their emotions (often anger, which is the most powerful emotion), to reach a solution acceptable to all parties.

In my practice, I stress early mediation. I use both the court supervised and private services, selecting the one that I believe will have the best potential to achieve the goal of an early settlement. If I can get my client's case resolved early, without the high expense of litigation and the time and risk involved in full blown litigation, I have done the very best for that client. I believe the true

professional lawyer shares this goal of an early settlement. With the growth of court supervised programs and the private services, the parties have resources to explore settlement at an early stage with trained professional mediators who take pride in bringing parties together before they really "take off the gloves" for full blown litigation.

Chapter 2
A Look Back At the Process of Dispute Resolution

I grew up in the Midwest; the son of a lawyer who specialized in defending tort and insurance cases. My Dad, also Guy, was General Counsel for one of the first regional insurance brokerage houses that handled claims for its insureds locally. It was innovative for a brokerage to have that authority, but it worked. My Dad ran the claims operation for several decades until his "retirement" in his late 70's. He was an excellent negotiator and stressed the importance of resolution before trial as usually the best solution. Oh, he knew some cases had to be tried but he subscribed to the line from the Kenny Rogers song, "You got to know when to hold 'em, know when to fold 'em," a phrase that is occasionally heard from my colleagues when talking to a client about settlement.

When I started law practice in the mid 1960's the word "mediation" was not commonly used. I am not sure I heard the word more than a couple of times while in law school.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and negotiated "the file" directly with the plaintiff's lawyer. Often the first real opportunity to negotiate a case was the "Mandatory Settlement Conference," which later became part of the court rules,

and which ordinarily was held quite close to trial. Other than direct negotiations, there was little involvement by the court in settlement talks before then. At that time there were no Case Management Conferences. Courts were ordinarily not very active in the case until a Pre-trial Conference was held, at which time the court might inquire about what settlement talks have taken place, and if the parties were interested in a judge, other than the trial judge, meeting with them to see if some settlement efforts could result in a resolution.

The federal courts were required to provide for ADR procedures in civil actions under the Alternative Dispute Resolution Act of 1988 (28 U.S.C. sec 651 et seq.). Prior to that in 1985, California provided for Mandatory Settlement Conferences in Rule 222, California Rules of Court.

The words "alternative dispute resolution" or "ADR" were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected or appointed to the bench and stayed to retirement. They did not leave these careers until that time. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification for mediators will soon be common, if not required. Standards have been set for mediators in the conduct of a mediation. (See, e.g., Cal. Rules Court 3.850 et seq.) While it seems that there are more mediators than lawyers,

the litigation process seems to demand this resource for dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

Also, lawyers are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning mechanism. That is good because it forces the parties to think about where they are going, what the results might be, and how much it will cost. That is, a "cost/benefit" analysis is part of the initial planning process and evaluation of the case.

One of the very important skills of a true trial lawyer or "litigator" is to know how to leverage a case to the point at which the parties are motivated to discuss settlement. I describe this point as a "plateau for resolution." That is, it is a point where the parties have an opportunity to see what has occurred, evaluate the results for motions and discovery, and then look down the line at what will be done as the case progresses towards trial and a "forced resolution." Does your client want to proceed? Does it know the risks? Is it aware of the significant costs involved? What is the potential settlement range versus the "net" that is likely to result if the case is tried?

Recognition of this plateau and then communicating with the client about the case – both past and future – is an essential ingredient of qualified trial counsel. It is our duty to explore the out of court resolution and advise the client about the several alternatives for direct negotiation, mediation, or other alternatives to dispute resolution, such as non- binding arbitration, submission of the case to a neutral evaluator (or panel) to get a read on the merits and value, or even focus groups to gain information as to

how a jury might perceive a case which can contribute to a client's willingness to negotiate or mediate the matter.

Chapter 3
The New Lawyer: How Settlement Strategies and Opportunities Have Affected Our Responsibilities and Functions as Litigation Counsel

How will our judicial system work toward dispute resolution in the future, say five, ten or even twenty years from now? What can we expect if we are forced to resolve a legal matter in the state or federal court systems? Will the system find ways to efficiently process both large and small matters? Or, will it remain costly, involving pre-trial depositions, expert witnesses, and trials? Will the courts establish alternatives to full-blown trials that will prove to be effective ways to resolve disputes?

Anyone who has been involved in the dispute-resolution mechanism knows what a laborious and often mysterious process it can be. Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results. Because of the mediator's neutrality, the settlement resolution is more likely to be perceived as just. Mediation is a defined process that is recognized by attorneys and judges. It is a voluntary, non-binding forum in which the parties agree to conduct negotiations using a neutral intermediary who guides the parties through the legal process. The mediator has no decision-making authority. Rather, it is the mediator's duty to work with the parties to agree on the terms for conflict resolution.

During mediation, the attorney's responsibility is both as an

advocate and counselor to the client. When advocating an issue, the skills used by an attorney are different than the approach used in a courtroom. An attorney also counsels the client on issues during the mediation.

Mediation helps litigants achieve settlement. When compared to the expense of prolonged litigation, mediation may be the best deal. The client has present use of funds, rather than the hope of financial recovery later, while also saving money on pre-trial and trial costs, as well as possible appeal. Litigation costs often surprise clients, particularly if expert testimony is needed. The fees for experts are quite high, usually involving several hundred dollars per hour. During the amount of time experts need to prepare, testify at deposition and appear in court, several thousands of dollars in costs may be incurred quickly. Thus, at an early mediation, a major factor in considering whether to settle is the future expense of proceeding without settling.

If possible, it is important to work toward mediation as early as possible so that the client may reach his or her goals. Bear in mind that the client is not going to push early mediation. It is the attorney's responsibility to recognize the advantages of an early mediation and resolution for the client.

Judges rarely are the source of mediation information for litigants because doing so might interfere with the attorney-client relationship. Additionally, judges typically see the litigants only late in the litigation process. Given the central role of attorneys in the litigation process, attorneys may be the most appropriate persons to provide litigants with information about the mediation process.

Research shows that a key factor in litigants' willingness to use mediation is the recommendation and encouragement of their attorneys. For example, "a majority of parties in domestic relations cases (68 percent men and 72 percent women) who chose to use mediation said their attorneys had encouraged them to try it, whereas less than one-third (32 percent men and 18 percent women) of those who rejected mediation had been encouraged by their attorneys to use it." (R. Wisler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 Pepp. Disp. Resol. L.J. 199, 204.)

Mediation involves an objective intermediary who negotiates with the parties to avoid or end the highly confrontational and tension-filled process of litigation. From the plaintiff's perspective, it is a means of essentially selling the lawsuit to a defendant, who buys off the expensive and exposure of ongoing litigation. It involves an exchange of offers and counteroffers made in more of an informal business environment, rather than a formal courtroom.

Hostility, anger, finger pointing and accusations are not part of the mediation process. Diplomacy, salesmanship and patience are the bywords. The parties and their lawyers may be firm, tough and even hard-nosed at times, but they need to do it politely and diplomatically. The parties need to be prepared for mediation by having the appropriate attitude before attending the mediation. Unlike a deposition, this is where the client enters the business process of resolving disputes and essentially steps outside of the courtroom.

It is advisable to have a pre-mediation conference several days before the mediation occurs. The attorneys or mediator should describe the role of the mediator; explain that it is the client's decision to settle; and that what takes place at the mediation is confidential. It may not be brought up during a court trial. Many times, the client's perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision making process.

Also, the mediator will often comment on issues and give his or her views on each side's case. The mediator may offer the pros and cons of settlement versus proceeding further. This provides an objective, third-party view of the matter, which may be very valuable.

As the future unfolds, more and more courts will be creating ways for litigants to enter the mediation process at an early stage. The San Francisco Superior Court recently instituted an early mediation program. The San Francisco Bar Association also has a program for early mediation. The federal court has a program of early mediation and "early neutral evaluation" for several years. The future litigation process will rely more on courts and counsel directing litigants to a mediation alternative to litigation – the earlier the better.

One concern is the reluctance of counsel to guide a case toward the mediation process because of the economic motive of being able to continue to bill a case and earn revenues. Frankly, I have seen evidence of this with opposing counsel in some of our cases. It is indeed troublesome when counsel will not even

communicate about mediation even weeks in advance and even after I have offered to work together to get a discovery plan, or an exchange of information so that we can each have access to what we need to evaluate the case before we discuss resolution. In these troubled economic times, when law firms are folding or letting staff go, there is a concern that the motivation for economic survival will override the professional obligations to work towards a timely and efficient resolution of a dispute.

There is nothing to lose by mediation and only much to gain, and it is our duty as lawyers to see that a case is tested in that process. Who knows, a good result on both sides may mean more business rather than less.

Chapter 4
What Is A Resolution Advocate?

At our firm we describe ourselves as "Resolution Advocates" and our services as "Resolution Advocacy." Why? Because that is what our clients want. They want their disputes resolved in a timely manner. In fact, I stress Litigation Management and consider settlement efforts as a high priority in that process. Resolution by settlement is seldom anything but a positive result. If the case is meritorious, then the other side needs to know that. If there are disputed issues that create uncertainty in the outcome, then the parties should recognize that the end result is not guaranteed and that should drive them to discuss resolution by settlement, including mediation. If the case goes sour after it is worked up, then the client needs to know that, and a resolution short of trial must be considered to avoid a catastrophic result by trial.

Resolution advocacy includes being prepared to try the case and pursue an appeal if that is the only alternative. But it also means that alternatives to trial must be considered, and the case managed so that it can reach a plateau at which direct settlement discussions or mediation are appropriate for all.

I teach our lawyers to actively manage their cases and to look for resolution alternatives in that process. I define "Litigation Management" as follows: The effective planning, organization, delegation, and supervision of litigated matters so as to gain the advantage crucial to achieving an ***acceptable and timely resolution*** of the dispute.

We are experienced and trained in managing our cases to gain the advantage and finding the best and most effective path to resolution, whether through mediated settlement, trial or arbitration.

We use our skills and experience as trial advocates to provide the vision to see how the case can best be managed for an early and effective evaluation and prepare it for settlement. Most of the time this is done through mediation. Our goal is to persuade our adversaries that direct negotiation or mediation is preferable to challenging our client's cause at trial.

Of course, it is the client's choice whether a settlement is in his, her or its best interest. But our task is to get to that point where the client has the choice after being fully informed on the potential outcome at trial and the cost and burdens of proceeding. Our job is to get the case and the client to that point and to fully advise the client on the merits and demerits of proceeding versus resolving short of trial. And it is our job to get the case to that point in a timely manner, using all the tools available in managing the case to that end.

In doing this, we provide the litigation expertise through consultants and experts who assist in that process, whether evaluating fault or damages, or determining the financial impact a settlement will have on the client personally so that the client can plan for the future. This planning is not possible if the uncertainty of trial is hanging over the client's head. Planning requires certainty to present circumstances. That certainty does not exist if a dispute significantly affects the client and the client's family or business.

Resolution advocacy is a process that allows us to use our litigation skills to assist the client in charting the future and bringing the client's life into focus and on a positive course.

This is what we do, and we should strive to do it well.

Chapter 5
California Supreme Court Speaks On Mediation Confidentiality

The California Supreme Court, Justice Marvin Baxter, one of the court's known conservatives writing the opinion, has spoken on mediation confidentiality. The Court held that the mediation privilege prevents a client from using testimony regarding what his lawyer told him or did during a mediation in a legal malpractice case by the client against the attorney. The point is that a lawyer can commit malpractice at a mediation and no one will hear about it! Fair? Unfair? The reaction is divided. (See, Kichaven, "Mediation Confidentiality and Anarchy: The California Nightmare," The Los Angeles Daily Journal, February 17, 2011, p. 4.)

In *Cassel* v. *Superior Court*, 51 Cal. 4th 113, 244 P. 3d 1080 (January 13, 2011), the client brought an action against attorneys who represented him in a mediation in a malpractice, breach of fiduciary duty, fraud, and breach of contract action. At trial the attorneys made a motion in limine using the statute relating to mediation confidentiality (Cal. Evid. Code §1119(a), (b)) to exclude all evidence of communications between the client and the lawyer that were related to the mediation, including what was discussed in pre-mediation meetings and private communications between the client and attorneys during the mediation. The trial court granted the motion; the client sought a writ of mandate, which a Court of Appeal granted. The Supreme Court granted review and reversed the Court of Appeal.

Essentially the Supreme Court upheld a broach protection of mediation communications between a client and his lawyer: mediation related communications and discussions between a client and his lawyer are confidential, and therefore were neither discoverable nor admissible for purposes of proving a claim of legal malpractice.

It also held that the application of mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds.

So there; that is that! Done, over.

In so holding, Justice Baxter said up front in the opinion:

> "We have repeatedly said that these confidentially provisions [the Cal. Evid. Code cited, *supra*] are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where there is a competing public policies may be affected. (Citations omitted.)"

The ruling also could affect other types of tort or contract claims arising out of mediation practice, including mediator malpractice and insurance bad faith. The ruling has been criticized because it a) prevents the truth from being known, and b) it violates the basic principle that for every wrong there is a remedy. These are points that Mediator Kichaven makes in the cited article.

While Justice Baxter has surrounded the mediation process with an aura of strict confidentiality, his view contrasts with the Uniform Mediation Act (www.nccusl.org). In this Act, a "mediation communication is a privileged." Section 4(a). However, under Section 6(a)(6), "There is no privilege under Section 4 for a mediation communication that is . . .sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation." So, under that approach, the testimony of Cassel, the lawyer, is both discoverable and admissible. It is not protected, and is available in a legal malpractice case, mediator misconduct action or insurance bad faith case. Makes sense to me. It also made sense to the National Conference on Uniform State Laws and those serving on the Advisory Committee on the Uniform Mediation Act and its Reporter, Professor Nancy Rogers of the Moritz College of the Law (a former dean of the law school), and Associate Reporter, Professor Richard C. Reuben of the University of Missouri Law School. If the rule were otherwise from what Justice Baxter and his colleagues (Justice Chin concurred "reluctantly"[1]) held, would the exception to confidentiality discourage mediation? Mr. Kichaven covers this point and quotes Professors Rogers and

[1] "The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorneys actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. (See Maj. Op., ante, at p. 28, fn. 11.)"

Reuben who seem to think not. Also Mr. Kichaven points out that settlement conferences held under the auspices of the court system are not be subject to the mediation privilege in California[2] [although there is a confidentiality as to what takes place which prevents disclosure at trial of the offers, counters and discussions[3]]. So the lawyer could be sued for malpractice for conduct at a court supervised settlement conference but not a private mediation. That does not seem to be right; it is illogical and cannot be rationally justified.

Coincidently a couple of weeks after this case was handed down, in walks a client with a potential legal malpractice claim against his attorney who allegedly sold the client "down the river" at a mediation, which the client did not find out about until after the deal was done. But the client is now foreclosed from pursuing that claim – or even considering it. An injustice?

Who knows as the client will never find out; he cannot.

And, lurking beneath all of this, is another issue: Does the decision raise an ethical problem under Rule 3-400 of the California Rules of professional Conduct, which states: "A member shall not (A) contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice. If a lawyer accepts representation in a case and as part of that representation recommends, and attends, a mediation with the client, is the lawyer in violation of Rule 3-400? In such circumstances, I think not. The insulation from liability results not

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[2] Cal. Evid. Code §1117(b)(2), which expressly excepts "settlement conferences" held pursuant to the California Rules of Court.
[3] Cal. Evid. Code §1152 relating to "Offers to Compromise."

from the lawyer's contract but from the legislature's adaptation of Evidence Code §1119(a). So the lawyer has not contracted with the client to avoid malpractice. Instead the legislature has simply found that what happens at the mediation cannot be used to prove malpractice. Thus, very simply, does not result from the lawyer's act but a policy implemented by the legislature.

So what will happen now in California? Will there be groups in California who will mount a campaign to the California Legislature to amend the statute to overrule Justice Baxter. With a democratic governor, and a lawyer, Governor Brown, there may be a good chance of altering this rule which puts the clamps on claims that arise from a client's participation in mediation. There is no reason to protect anyone from a sound legal claim if they do not do their job or breach their duties to those to whom they are owed. Professional responsibility is just that – a responsibility to conduct ourselves in any process relating to our representation of a client.

What is more important than the mediation process, which is designed to allow clients to explore a settlement alternative to trial. There is no reason to allow any protection from professional responsibility and the standards that we must meet in such an important aspect of the overall litigation process.

I agree with Mr. Kichaven: it is a bad decision, is against the weight of thought and analysis as manifested by the Uniform Mediation Act, and needs to be overruled by the Legislature.

Chapter 6
Empirical Research Confirms That Negotiated Results Are Superior to Going to Trial

A recent published report of empirical research confirmed that settlement is preferred to trial because the potential result is statistically found to be a better economic result. The newly released study reviews the results on a large number of cases that did not settle after mediation and eventually went to trial and addresses how those cases fared in comparison to the last settlement offer or demand.

The September 2008 *Journal of Empirical Legal Studies*[4], a joint venture of Cornell Law School and the Society of Empirical Studies, has published the results of a quantitative evaluation of "the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations." The study entitled, "Let's Not Make a Deal: An Empirical Study of the Decision Making In Unsuccessful Settlement Negotiations[5]," was done by two faculty members and a graduate student from the Wharton School of Finance, University of Pennsylvania. The study

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[4] Vol. 5, No. 30, pp. 451-491; available at http://www.blackwellpublishing.com/jels.

[5] The study is the subject of an August 8, 2008 article in the *New York Times*, "The Cost of Not Settling a Lawsuit, 'available at http://www.nytimes.com/2008/08/08/business/08law.html.

analyzed 2,054 California cases[6] in which the plaintiffs and defendants participated in settlement negotiations unsuccessfully and proceeded to arbitration or trial and compared the parties' settlement positions with the award or verdict. As the study states, it "reveal[ed] a high incidence of decision-making error by both plaintiffs and defendants in failing to reach a negotiated resolution[7]."

The study actually builds, as is noted below, on prior research in three studies so that the cases analyzed totaled 9,000 in the past 44 years. It compared the results in selected cases in which the parties exchanged settlement offers, rejected the offers of the other side, and proceeded to trial or arbitration. While the large group of cases were jury trials, court trials and arbitrations were included. The study was based on the report of results from California Jury Research (formerly California Jury Verdicts Weekly), which the authors found reliable.

As it states: "The parties' settlement positions . . . [were] compared with the ultimate award or verdict to determine whether the parties' probability judgments about trial outcomes were economically efficacious, that is, did the parties commit a decision error by rejecting a settlement alternative that would have been the

[6] These were cases in which results were reported in the thirty-eight month period between November 2002 and December 2005. They involved about 20 percent of all California litigation attorneys.

[7] The study was an update of three prior studies of attorney/litigant decision making. It increased the number of cases used by three times and expanded on the analytical format and variables of the previous studies. As the study states, "Notwithstanding these enhancements, the incidence and relative cost of the decision-making errors in this study are generally consistent with the three prior empirical studies ..."

same as or better than the ultimate award."

Prior studies were reviewed and summarized as follows:

- Priest/Klien (1984-1985): Trials occur in "close cases," and plaintiffs and defendants equally make mistakes; plaintiffs win about 50% of the cases that proceed to trial; this is referred to as the "fifty percent implication";
- Gross/Syverud (1985-1986): 529 cases from June 1985 to June 1986 were studied; they questioned the validity of this type of research because the context of the negotiations and relationship of the parties and counsel affected the behavior of the parties;
- Gross/Syverud (1990-1991): Here, 359 cases were studied, and the results conflicted with the 50% distribution of "mistakes"; they found plaintiffs were more likely than defendants to reject a settlement opportunity that was more favorable than the result;
- Rachlinski (1996): He compared final settlement offers with jury awards in 656 cases. His findings were that plaintiff had a higher percentage of error (56.1% of the cases), but the average cost was $27,687, while defendants had a lower error rate (23%) but a greater risk of a bad result, with an average cost of $354,000. He concluded that plaintiffs were risk averse while defendants were risk seeking; that is, the risk of trial in these scenarios benefitted plaintiffs but it cost the defendants significantly[8].

[8] These findings are consistent with the latest study reported here.

Here is what the researchers found in the most recent study:

- Comparing the actual trial results to rejected settlement offers, the study found that 61% of the plaintiffs obtained a result that was not economically better than the settlement offer, i.e., it was either the same or worse than what was offered;
- In contrast, 24% of the defendants obtained a result that was not economically better;
- However, although the plaintiffs experienced more results that were not as economically good as the last offer, the risk of defendants rejecting the last settlement demand was higher;
- When the plaintiffs rejected an offer and went to trial, and did better, *it was not that much better* – an average of **$43,100** over the last offer;
- However, when the defendants rejected the last demand and went to trial, and did worse, *it was much worse* – an average of **$1,140,000** worse! The study also found that the cost of "decision errors[9]" in failing to accept the opportunities to settle increased between 1964 and 2004. In 1964, plaintiffs obtained worse results at trial than were available through settlement in 54% of the cases, while in 2004 it rose to 64% of the cases. During that same period, the range for defendants went from 19% in 1964 to 26% in 1984 and then declining to 20% in 2004. And, the cases in which neither party committed a decision error decreased

[9] A "decision error" takes place "when either plaintiff or a defendant decides to reject an adversary's settlement offer, proceeds to trial and finds that the result at trial is financially the same as or worse than the rejected settlement offer-the 'opps' phenomenon. In absolute terms, the attorney and/or client made a decision error and

> from 27% in 1964 to 14% in 2004. Adjusted for inflation, the researchers found that a plaintiff's decision errors increased 3 times, but a defendant's errors were much more costly – increasing 14 fold.

Another interesting aspect of the study is the effect that statutory offers and cost shifting procedures had on the eventual results in cases going to a final decision making process. In California, under Code of Civil Procedure section 998, either party may make an offer of settlement which, if rejected by the other, can shift certain costs, including those of experts to the other if the result is less favorable than the statutory offer of judgment. The researchers found that instead of encouraging parties to consider settlement because of the cost shifting consequences of statutory offers, these offers had an opposite effect – instead, the parties were more likely to take aggressive settlement positions, resulting in "financially adverse outcomes," than the other parties in the study. The "decision errors" for plaintiffs who rejected these statutory offers was 83% compared to the 61% plaintiffs who were not subject to such. Defendants made "decision errors" in 46% of the cases when facing a statutory offer, whereas the rate was 22% who were not faced with such.

Another finding that may not be surprising is that in cases in which litigants were represented by attorneys who had mediation training and experience, the parties experienced lower rates of "decision error." Indeed, plaintiffs in these cases had a "decision error" of 21%. The authors suggested more research in this area.

It is quite apparent that the most recent study has dispelled the notion that the "fifty percent implication" rules applies. It has established a new dimension of risks for both plaintiffs and

defendants in rejecting opportunities to settle. Plaintiffs risk the further costs of litigation and a result that is not that much better, which likely does not justify the investment of time and money in taking a case "to the mat." Defendants, on the other hand, have a huge downside by risking large verdicts against them if they do not appreciate the opportunity they have by a negotiated closure.

The 40 page review of the study's results is worth careful reading. It may also be important in reviewing the advantages of settlement versus trial with our clients[10].

[10] See also R. Kiser, "How Leading Lawyers Think: Expert Insights Into Judgments and Advocacy," Springer-Verlog, Berlin Herdelferg, 2011 (www.springer.com); "Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients," (same publisher), 2010.

Chapter 7
The Three "C's" Of Negotiations

Three basic principles are at the heart of settlement negotiations, whether they are direct or supervised in the more formal setting of a mediation: candor, communication, and confidentiality.

The level of candor required depends on the parties, their relationship and the forum. That is, the parties may be more guarded in direct negotiations, whereas in a supervised mediation, the presence of the mediator and the use of such as an intermediary may persuade the parties to be more candid about their case during the negotiations.

Communication is critical to the process. Once the parties stop talking, then there is no chance of a settlement even with a mediator. As long as the parties are talking to each other, even if through a third party, there is a chance for a negotiated resolution.

Confidentiality is also critical to the process. It encourages both communication and candor. The parties must understand that they will not be prejudiced by their exchanges, and that such will not be used against them in subsequent proceedings in the litigation. This assurance of confidentiality is at the heart of negotiations, whether direct or supervised.

These are the three essential underlying principles which allow the parties to reach a point where they together decide if the matter can be resolved. It is the policy that the decision making rests with the parties that requires that the three "C's" underlie and

support the process of negotiation.

Without an assurance of confidentiality, the parties are not going to candidly exchange information. Without confidentiality, communication and open discussion are stymied, as the parties will believe that whatever is said may end up being part of the other's case at trial. The integrity of the process of negotiation in any format can only be assured if the parties are confident that their exchanges, disclosures and bargaining will be protected from being used against them in subsequent proceedings. The parties must believe that they will not be prejudiced if they engage in any settlement exchanges.

As the Preface the Uniform Mediation Act states, ". . .[T]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings." Not all states treat confidentiality in the mediation process as a "privilege." However, the UMA likens it to the attorney-client privilege. Moreover, the parties themselves have the opportunity to negotiate exceptions to confidentiality or to the use of "evidence" that is likely to be admitted at trial with the understanding that the use in mediation, or negotiations, somehow shields it from us at trial because it has now become "confidential" because of its use in a mediation or negotiation.

The Federal Rules of Evidence do not contain any specific provision relating to communications during mediation. Rule 408 protects some communications during negotiations, but does not address a mediation itself. District courts have specific rules

adopted to protect what takes place during a mediation and serve the purpose of carrying out the policies of encouraging candor and communication in supervised negotiations.

The protection of rules and statutes relating to direct negotiations is narrower than the confidentiality which attaches to the mediation process. For example, California Evidence Code section 1152 applies to an offer for compromise or to furnishing something for value to another person who has sustained, or claims to have sustained, loss or damage, and also applies to "conduct or statements made in negotiation thereof…"

Despite the legal niceties, the parties should approach any negotiations with the understanding that they will all cooperate in implementing a principle of confidentiality so that the negotiations can progress towards an agreed upon resolution of the case.

Chapter 8
Direct Negotiations V. Mediation: Why the Mediation Process Offers More

The old fashioned way was that a case either settled because the lawyers negotiated that settlement directly, or it settled on the court house steps at a settlement conference overseen by a sitting trial judge, other than the trial judge, a day or two before trial. It is different now. Court systems are designed to encourage settlement well before any last minute efforts to resolve a case, and also to encourage these settlements by offering different alternatives to resolution. The most common alternative is mediation, either under a court sponsored program or through private mediators. The latter is an aspect of our profession that has flourished over the past 25-30 years as mediation has become the resolution method of choice.

This process of mediation has also been helped by more aggressive court management of cases with regular status and case management conferences. Rarely does the agenda for these conferences with the court and counsel not include a discussion of setting the case for mediation using either the court services or a private mediator.

What happened to direct negotiations? What has failed in this more informal process – the old fashioned manner of settlement. I have several thoughts.

First, while there are instances in which the lawyers can resolve a case through direct negotiations, a mediation allows the

parties to have a period of time – a half day or more -- to devote to a discussion of the resolution of one case, one matter, *without interruption*. In this process the parties and their counsel are forced to get ready – prepare by getting to know the case, conducting discovery or exchanging information informally beforehand, and reviewing the matter with the client for purposes of assessing the case's value. In other words, there is some pressure, like a trial date, to force the parties to consider the case and whether settlement is the better alternative than incurring the expense and risk of trial.

Second, the mediation process allows a party to educate the other parties in the case about that client's case. I can tell you that I have been to many mediations when I knew the other side did not have a full appreciation for my client's case. Once they read the mediation statement, saw the visual presentation, and studied the case, they were much better educated about its value. That would not have happened if we had continued litigating and negotiated haphazardly. Simple demand letters are not always well accepted no matter how comprehensive they are. The mediation process involves a better means of fully educating the parties about the case, if the lawyers and their client do their respective jobs of educating those involved and presenting their case.

Third, a neutral is involved who collaborates with the parties and often performs an evaluative role, giving the parties views on the issues in the case and communicating from a neutral perspective. This gives the parties a *"outside" resource for evaluation* of the case that is presumably unbiased. It brings an additional source of information to the process of negotiation, rather than having two lawyers discussing and trying to settle from their "adversarial" perspective.

Fourth, a mediation provides a *verification* to the resolution process. That is, if a settlement is reached, the fact that it was negotiated through a neutral provides more credibility to the chosen result. An insurance claims representative can report to his employer that this was a mediated resolution through a competent neutral who brought the parties to the point of settlement. That looks good in the claims file and in the final report on the case to a claims persons' supervisors. This verification process can also be helpful to an attorney who is representing an unsophisticated or reluctant client. It can help that lawyer gain and maintain client control if the mediator can provide a balanced, neutral and persuasive evaluation which supports the lawyer's recommendations.

Fifth, a mediation provides a forum not only for discussion but for memorializing the essential terms and conditions for settlement, and places controls on the closing process. That is, not only are the terms and conditions of the settlement memorialized in a written memorandum of understanding, but the parties can outline the time for presenting closing papers, filing dismissals, and payment of consideration or execution of the terms of settlement.

This is important. Recently I was co-counsel in a case in which other lawyers I was working with handled the negotiations directly with opposing counsel. The negotiations were sporadic, the process was delayed because there was no timetable for presenting closing papers, and it took weeks to bring the matter to a final conclusion because of this process. Very simply, counsel lost control over the negotiation process and it just got away from them.

If the parties are present at the same place on the same day, the whole process can be ironed out and the settlement can be concluded efficiently.

I am not saying that all cases should be mediated. What I am saying is that a mediation provides advantages to the process of closure that are not present in direct negotiations[11].

[11] For more on how mediation has affected the process of direct negotiations, See R. Kiser, "How Leading Lawyers Think: Expert Insights Into Judgment and Advocacy," Springer Verlay (www.springer.com), Chapter 16, "Mediation," Section 16.1.

Chapter 9
Five Factors That Suggest a Case Is Ripe For Mediation

Anyone who has been involved in the dispute-resolution mechanism knows it can be a laborious and often mysterious process. Somewhat over simplified, here is a good way to remove some of the labor and mystery, and describe how mediation fits into the system:

- **Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results.** Because of the mediator's neutrality, the settlement resolution is more likely to be perceived as just. It is a voluntary, non-binding forum in which the parties agree to conduct negotiations using a neutral intermediary who guides the parties through the legal process. The mediator has no decision-making authority. Rather, it is the mediator's duty to work with the parties to agree on the terms for conflict resolution. Only if they want to do the parties settle.

So what types of cases are likely to settle at mediation? Here are five factors that, if present in the case, suggest it is one which should be mediated:

- **The parties recognize they have more to lose than if they don't settle.** There is high risk if they do not settle. This means not only must there be a downside risk, but also the parties and their lawyers must recognize and understand that risk. If a party and/or

counsel have their head in the sand or are refusing to acknowledge the loss possibility or probability, then this leads to an unrealistic evaluation of the case and a failure to appreciate the benefits of a negotiated result. It also leads to unrealistic demands or offers and responses to such.

Lastly, it means a mediator is not talking or listening to reasonable minds. This state of affairs costs the parties in many respects, including the time and money for a trial that may very well fail to result in a "win" for anyone.

- **There has been cooperation among the parties and their counsel during the litigation process**. This is key. No doubt a case has a greater potential for settlement when the parties are "firm but fair" with one another. They cooperate without compromising their clients' rights or position. They exchange what they know is discoverable and they diplomatically but firmly protect what is not. They prepare their client for participation in the litigation process. For example, I try not to intervene at my client's deposition. He or she is prepared to tell the story, and tell it truthfully. I don't need to make inappropriate speaking objections or interfere with my opponent's questioning unless counsel is violating the rules, being rude, harassing my client, or asking questions about irrelevant or privileged matters. Then, rather than arguing on the record and creating useless transcripts, I state my position and deal with this bad behavior appropriately as the rules permit. But, if we are conducting the case within and in accordance with the rules, the

prospective of a cooperative discussion about resolution is highly likely.

- **The parties have engaged in sufficient discovery and an exchange of information so that you know the facts of the case.** You have reached a plateau in the case; each side can look towards the door of trial court and see how the case is likely to play out. Experienced trial lawyers can do this. They "hear" the evidence, they play out the examination of witnesses in their minds, and they anticipate the argument of their opponent. They know how these arguments will sound and how a jury, court, or arbitrator might respond to them. Perhaps the parties have conducted focus groups and obtained some insight into how a jury might decide. It is the ability to anticipate the "end result" that allows a trial lawyer to properly advise his or her client as to the alternatives of resolution by trial.
- **The parties have non-lawsuit reasons to settle**. There may be non-lawsuit related reasons to settle. The existence of the lawsuit or a "bad" result may trigger losses in business relationships or a negative impact on a business marketing plan. The parties may also have an ongoing business relationship, which would be costly to terminate. There are lots of business and personal reasons to settle, and if these are present they will motivate the parties to seek a negotiated result.
- **While the liability, damages or collection issues remain, there is no clear barrier to recovery and payment of any judgment by the plaintiff.** A lawsuit is a three legged stool: liability, damages and collection. All three have to be present in order for the case to have value from the plaintiff's perspective. If

any of these three legs are missing, the plaintiff has problems and needs to assess what course is the best way to move forward. Indeed, a modest settlement may be in order in such a case. But if there is no clear barrier to the plaintiff and the stool has some strength in all three legs, then the parties should be talking seriously about resolving the lawsuit. There may be a disagreement over the numbers, but that is why mediation is attractive at a timely point in the litigation process – to save the time and expense of trial, and eliminate the risk of a disappointing result.

Chapter 10
Ten Basic Principles to Follow in Getting Your Client's Case Settled Early

The mediation process is an opportunity to get results and avoid putting your client through the litigation 'mill.' Mediation is a positive process, but only if you, as the lawyer, have the right approach. You can get great satisfaction by obtaining a good settlement early in the case before large litigation expenses are incurred. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation, which more often than not would only add to the emotional injury already caused by a serious accident, injury or illness which led to the litigation in the first place.

Mediation is a voluntary process in which the parties agree to conduct negotiations of a dispute using a neutral intermediary in a non-binding process. The mediator has no power to decide anything. The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom. The principles below will explain why that is and what you can do as your client's representative to facilitate the mediation process so you can get to the 'goal line' of resolution.

Bear in mind that the client is not going to push early mediation. It is the attorney who must do this, recognizing the advantages of the potential for an early mediation and resolution for the client.

In order to get good results early in mediation, below are the basic principles that should be followed.

PRINCIPLE 1: UNDERSTAND WHAT A MEDIATION IS ALL ABOUT

The first principle sounds easy. You have a date set for mediation; you are prepared to submit a 'brief' outlining your client's cause, so you are read. Not so— wait a minute. Do you really understand what mediation is all about, and what it is not about?

First of all, it is not about courtroom advocacy, at which you are likely highly skilled. It is about a process of using a mediator to get your client into a position of ending the highly confrontive and tension-filled process of litigation. It is a means of essentially 'selling' your client's lawsuit to a buyer, who buys off the expense and exposure of an ongoing lawsuit. It involves an exchange of offers and counteroffers made in more of a business, rather than a courtroom, environment. The whole process should be to work with the mediator and the mediation process of 'giving in' and 'giving in' again to reach an acceptable solution to the dispute.

Hostility, anger, finger pointing, and accusations are not a part of the mediation process, even for you as your client's advocate. Rather, you can be firm, tough, even hard nosed at times, but you can to it politely and diplomatically.

PRINCIPLE 2: PREPARE YOUR CLIENT FOR THE MEDIATION PROCESS

Given this process as I have described it, you and your client need to have the appropriate attitude before you even go to the mediation. You have to prepare your client for a mediation, not a deposition or trial. This is where the client enters the business process of resolving disputes and essentially steps outside the courtroom. Conduct a pre- mediation conference several days before the mediation. Here is an agenda that will set the client in the appropriate frame of mind to attend and participate in the mediation process:

- Outline how a mediation proceeds.
- Describe the difference between mediation and trial.
- Stress the confidentiality of the session with the other side and in private.
- Stress the fact that the client is not testifying or 'on the record.' • Advise the client not to speak unless in private session with the mediator.
- Describe the non-binding nature of the process.
- Prepare the client for the 'give' and 'take' of negotiations.
- Discuss the weak as well as the strong points of your client's case.
- Orient the client to the 'economics' of settling versus litigation.
- Stress the fact that the goal is to try to settle, but in an appropriate amount.
- Discuss what happens if the case does settle.
- Discuss what happens if the case does not settle.

It is just as important to prepare you client for the mediation

as to do the other preparation. A prepared client is a client whom you can control during the mediation process and with whom you will have the highest level of credibility. It is a big mistake to overlook this aspect of getting ready for a mediation.

PRINCIPLE 3: PUT THE PRESSURE ON THE DEFENDANT TO COME TO THE MEDIATION TABLE

From the plaintiff's perspective, there is a reason to want to mediate early—it means early compensation for the client and the end of litigation. A defendant may not be similarly motivated. My rule is: Put their feet to the fire. How do you do that?

Upcoming trial dates will force the parties into mediation, but usually those dates are too far away to encourage mediation in the early stages. I do it another way. First of all, file the complaint and serve it on all the defendants. I seldom negotiate before filing. The defendants then have to consider hiring lawyers to defend them and incurring the expense of litigation. At the same time, your client's case is on the docket moving towards trial. Second, work up the case and get discovery, both written discovery requests and deposition notices, ready to go, serving them as soon as the procedural rules permit. Third, provide the defendant's representative (even fore the defense lawyers show up) with a letter giving an overview of the case (with a copy of the complaint) and suggesting mediation. You may offer to exchange discovery. For example, I might offer to put up my client for deposition (or interview) for a half day so that the defense can find out information that they might need to evaluate the case, or even produce other witnesses under my control such as treating physicians, for the same purpose. Usually this is without prejudice

to a continued deposition of a plaintiff or witness on other issues, if the case does not settle. In return, you may request a deposition or relevant documents from the defendant.

The point is to not be afraid to be aggressive and eager to get to mediation. An interest in settlement is not demonstrating weakness. To the contrary, it can show confidence and strength, a belief in your client's case, and a willingness to get the facts out on the table. (Of course, this assumes that you have carefully chosen your cases and decided that your client is a worthy plaintiff and has a worthy cause.)

And of course, there is always an early motion to dispose of the case or issues that you believe are favorable to you case. Whatever it takes to put pressure on the defendant will help encourage your opposition to come to the mediation table.

PRINCIPLE 4: GET THE INFORMATION YOU NEED TO MEDIATE

One of the advantages of offering to mediate early and exchange relevant information or discovery is that you have the opportunity to request information that you need to evaluate your case. Of course, you should have whatever is available through independent sources before you have filed your lawsuit. We all know that you cannot always have all that you want before filing, and you often need the power of discovery to obtain additional information from the defendant or third parties.

You cannot afford to go to mediation without the necessary information to outline you case on liability and damages. Thus, a *quid pro quo* for going to mediation is your adversary producing

what it is you need to assist you in evaluating both liability and damages. Do not be bashful. Either get the information informally or promptly send out discovery requests.

PRINCIPLE 5: GET TO MEDIATION EARLY, NOT LATE

Litigation is a business. You maximize your client's recovery by resolving your case at the point at which you have the leverage to get the parties into mediation with the goal of settlement. Some courts, such as the United States District Court for the Northern District of California, have 'early' settlement programs, but even those may not result in a mediation or settlement session for many weeks after the case is filed.

Talk about mediating within 120-180 days of filing the complaint. Even though not all cases can be resolved this quickly even under the best of circumstances, push to get the information and persuade the defense that an early resolution of the case is in the best interests of all concerned.

PRINCIPLE 6: USE YOUR EXPERTS

An important part of any case involving issues that call for expert opinion testimony is to determine early on what those opinions are. Whether a 'percipient expert,' such as a treating physician or an expert retained specifically for the case, it is important to find out what the expert has to say and then use this information in the mediation.

Allow the mediator to listen to your expert. You can schedule a conference call with the mediator and with defense counsel.

Conduct a mini-direct examination of the expert and then allow defense counsel to ask some questions. This process can make the mediator's job much easier.

PRINCIPLE 7: SELECT THE MEDIATOR BEST SUITED FOR YOUR CASE

Sounds easy, but choosing the right mediator may be the hardest part. Do you use a lawyer or judge (usually a retired judge)? If the latter, do you want a retired appellate or trial court judge?

Judges work best in some cases and lawyer mediators in others. For example, if you have a case involving a very specialized area of law, such as medical or legal malpractice cases, it may be better to use a lawyer mediator who is experienced in prosecuting or defending those types of cases. They know the law and the peculiarities of that type of litigation, and that can help. A lawyer mediator experienced in the type of litigation may also be preferred in medical negligence or insurance bad faith cases.

However, in potential jury cases, a retired trial judge (even if he or she also was on the appellate court) may be preferable. If the case needs a high powered mediator to assist with client control then possibly a retired appellate judge or federal trial judge can provide the additional presence necessary to make the mediation process work. Find a mediator who has the proper attitude—a strong desire to settle cases during mediation or even later in a follow-up effort. Some mediators do not care if the case settles; they are just concerned with facilitating communication. The better mediator says, "I want to help you settle this case."

PRINCIPLE 8: PREPARE THE MEDIATOR

This could be the most important principle of all. The mediator cannot work if the mediator does not have the information necessary to put your case in front of the opposition. That means a comprehensive brief, first of all, with key documents, damages calculations, and other essential information which the mediator needs. I recommend exchanging this brief with the other side. Let them see your case outlined and presented so they know what they are facing.

I write a private and *confidential* letter—usually several pages—providing only the mediator with additional information about the case. The mediator may want to either discuss the letter with you in private session or use it during the mediation to add to the information used to persuade the other side to bargain. There are many advantages to this 'private letter.' First, it gets you over the hump of your first private session—that is, you have saved time of the first session that the mediator usually has with your side because you have already outlined some of the information you would provide in that first session.

Second, you get the mediator 'into the case' and start the 'juices flowing.' You can also provide the mediator with some ideas (not the 'bottom line') of what your dollar goals might be, but do not give away your final number or dig in your heels. You may change your mind as the mediation session unfolds.

Be prepared to do a bit of 'show and tell' at the mediation to educate both the mediator and your adversaries (counsel and the insurance company representative). This can be done by using a video to provide a 'clip' of some of the potential testimony from

your client, his or her doctors, or other experts (maybe 10-12 minutes on the important issues) or by a live interaction between you and your client during the mediation if you believe the client can handle it and will contribute to the case's potential for settling.

PRINCIPLE 9: BE THE DIPLOMATIC ADVOCATE AT THE MEDIATION— MAKE "LOVE" NOT WAR

One of the ways to achieve the best results in mediation is to be a diplomat. This is a time to remove the 'heat' from the litigation. Avoid anything that results in confrontation. Generally, you may not need to make any type of 'opening statement' since you have served the parties with a comprehensive mediation brief outlining the facts and law applicable, and your client's perspective. Try to do this in a factual, positive and appropriately argumentative manner without personal comments, hostile accusations, and statements that only drive the parties apart rather than encourage the opposition to consider your client's position.

Posturing is also not appropriate and will only anger the other side and probably the mediator. *You must be seen as a positive element in the mediation process*. This means that you should be prepared to recognize and concede weak points, but at the same time be prepared to emphasize and point to your strengths. Simply digging in your heels, or taking inappropriate positions on liability or damages, will not gain you anything but suspicion and distrust. You need to work toward gaining credibility of the opposition and your mediator. That encourages the other side to bargain and the mediator to work for your client in trying to bring the parties to a point of agreement.

PRINCIPLE 10: KNOW THE NUMBERS AND WHEN THE BEST DEAL IS ON THE TABLE

Evaluating damages before the mediation is an obvious essential. In fact, with the mediation brief, if not before, should be a 'demand,' which is your first volley over the bow. It is equally obvious that the initial 'demand' is not a final number and contains room for negotiation. However, that first demand must be calculated to give you the best chance of reaching your desired goal, or at least you should have a goal in mind at which you hope to be able to settle. The 'hoped for' amount may be higher than a 'realistic sum,' so you should keep that in mind when making your initial demand.

All this is idle talk unless you have numbers and calculations to back up your demand, which you carefully outline in your mediation brief with support. Just numbers do not work. What works is a well thought out demand with reports, calculations, and information to support those calculations. It does no good to hold anything back. Put out a serious number and back it up. That will give your mediator information to work with in getting the bidding started.

During the mediation, you also must be watching and listening as the negotiations go forward. The numbers exchanged should be leading you to a point where you can advise your client, based on input from the mediator, as to the point at which it is likely a deal can be struck. You need to be prepared to advise the client on where the negotiations are likely to go. However, my rule is that as long as the parties are talking, there is hope for a settlement. Do not be persuaded when it appears there is an impasse that a

successful resolution cannot be reached. In addition, never dig in your heels. If the mediation does not result in a settlement, there may be an opportunity down the line to restart negotiations. Thus, hope does 'spring eternal.'

CAVEAT: NOT ALL CASES ARE RIPE FOR EARLY MEDIATION. . .

Not every case can or should be settled in an early stage. There are many disputes that require the parties to conduct discovery, resolve legal issues, or test the evidentiary waters through summary disposition process. But there are many cases that can be settled at an early stage.

So, what is the 'profile' of these cases? Here are some checkpoints for the type of case that should be considered for an early resolution. Bear in mind, however, that as the plaintiff's attorney, it is your job to make the first move by presenting a well-written, properly document 'demand' letter with your first figure for settlement, knowing, of course, that there will be some bargaining:

- Your client's emotional situation is not strong enough to withstand full- blown litigation;
- Your client is in need of financial support;
- Your client has other sources of income, such as retirement accounts or savings which are rapidly being depleted;
- An early settlement will allow you to put a financial plan together with your client's resources (such as a structured settlement with tax exempt monthly or

annual payments) so that an appropriate financial plan can be constructed for the client;

- Damages are provable and can be supported by documentation; these are solid and, while disputed, they demonstrate real compensatory damages;
- Liability of the defendant/s is greater than 50% (which should be the case anyway if you are taking the case);
- The case does not present unique legal issues that are unresolved (which may be a reason to settle as some point, but not early in my experience);
- Your client has considerable documentation and other information about the case which tells a large part of the story which serves as the basis for the lawsuit, so that there are not missing facts to support your claim (the facts may be disputed but you have witnesses or documents to support your claim);
- You are in a position to communicate with someone on the defense side who you believe will be interested and motivated to negotiate early; that is, you anticipate that the defense will not be hardliners (try to get to the insurance company before they refer the case out to defense counsel; in these early negotiated or mediated cases, often the in-house personnel will handle them without outside counsel).

There are other factors that may be present to identify.

A FINAL COMMENT

We can summarize this all in four basic keys to a successful mediation:

- Prepare well by giving the mediator what is needed—key documents, damages information, history of settlement negotiations, verdicts in comparable cases, and the 'confidential' information in a private letter.
- Admit your weak points and deal with them—this buys credibility.
- Make sure you have client control; that is the key to getting a settlement done at the time of the mediation. Preparation of the client for the mediation is just as important as preparing the mediator and preparing yourself.
- Be practical. Know the economics of going to trial versus settlement. Remember, a deal done now is a certainty—dollars today. The old adage, "A bird in the hand is worth two in the bush" rings true when faced with the decision to settle.

All in all, a successful mediation results in appropriate compensation for the client and a reasonable fee for your services. It can be a satisfying experience because you have achieved the goal you set out to achieve when you agreed to represent your client— resolution of a dispute. That resolution is far more welcome at an early stage without protracted litigation. Applying these principles should help to achieve that result in those cases you select to mediate.

Chapter 11
How the Subject Matter of a Mediation Affects the Process

How does the subject matter of a mediation affect the process? Does it make a difference in how you approach the mediation, select the mediator, and conduct the mediation. I think it does in a number of ways. Here are my thoughts.

Selection of the Mediator

This may be the most important factor relating to subject matter. Mediators with subject matter experience likely have an edge over those who do not. I am not saying that someone who is unfamiliar with the subject matter or law that governs the case cannot be effective. But in some cases it really helps to have a mediator who knows how an industry works (insurance for example) or the law (intellectual property or employment disputes). I have been involved in many mediations (sometimes I represent the client in insurance issues but there is an underlying case that is the subject matter of the mediation), and it is really helpful to have a mediator who has already developed a body of knowledge and insight into the area of law which is at issue. It can give the parties – all sides – an edge towards resolution to have a mediator with that special knowledge.

Economic v. Emotional Claims

Cases with simply economic damages – a business dispute for example – require a different approach from those which involve

emotional claims. Some mediators are very good an evaluating business losses, but lack the ability to connect with wrongful death or serious injury cases or other cases in which there is a high emotional component. I am not saying that you should look for a mediator who is a "softie" but some are just more sensitive to cases with emotional issues than others. So what I am saying is that those mediators who have a facility for business cases and who perhaps have less desire to mediate the cases with personal and emotional issues just may not be a good choice for cases in which the latter are significantly involved.

Business Claims

Business cases require a mediator who has a business sense. Judges and lawyers who have been involved in business litigation while practicing or who have been heavily involved in the business side of the practice normally have a better insight into the these cases. I am not saying that those who do not cannot mediate business disputes, but it makes sense in complex business cases to select a mediator who has a head start on getting educated about the case.

Partnership and Closely Held Corporations and Family Business Matters

I do some mediating from time to time. It is not my regular diet as I still enjoy the advocacy of litigation and the challenge of representing clients. One of my most difficult assignments as a mediator, however, was a family business matter involving a closely held corporation. The sister had founded the company and the brother had come in after some time to run it. The sister was

the marketing and sales force, while the brother controlled the financing and administration. The father was also a numbers person and worked with the brother. As time went on, the brother and sister did not see eye to eye about much; they could hardly be in the same room. The dispute threatened to sink the company, and outside investors were involved. I was asked to mediate. What a difficult case. Despite my efforts, I could not bring the brother and sister to a center point. The father refused to help. After premediation exchanges and a full day of mediation, I had to declare an impasse.

My sense is that I would have done better and had a greater chance of success if I had involved another mediator who had experience in family disputes, and perhaps even a non- lawyer. There are professionals out there who specialize in working with families who are wealthy and have ongoing business relationships or who are involved in ongoing businesses in which there are intrapersonal issues that impact the family business.

I tried to get these folks to entertain the idea of involving someone like I have described, but they were so far into the personal issues that it was too late. Had I recognized the severe schism between the brother and sister before the mediation, I may have been able to involve another professional who could help in getting the parties to see the issues and coming to grips with a solution that would save the business.

Next time!

Class Actions

Here, experience counts. There are special issues which arise

in these cases, including damages assessments and evaluation of the class claims, administrative issues pertaining to the evaluation of the individual claims of class members and means of distribution, apportioning the payments among various defendants, and attorneys' fees, just to name a few. While I have not been involved in the mediation of a large class claim, I do know from my colleagues that there are some excellent mediators who have had considerable experience with mediating these disputes. So it seems appropriate to search these mediators out and consider them for class actions.

Injury Cases with Multiple Defendants

I find that injury cases with multiple defendants need a special kind of mediator – one who is skilled in dealing with typical plaintiff/defendant conflicts, as well as disputes between defendants and their carriers. Often there will be coverage issues with some of the insurers for the defendants, so those may be involved as well. Thus, you may have at least three layers of disputes: a) issues pertaining to the value of the plaintiff's claim, b) issues pertaining to the apportionment of the loss among the defendants based on tort or contract concepts (tort as it pertains to the apportionment of the loss and contract based on contractual obligations among the defendants and indemnity provisions), and c) disputes between a defendant and its insurer.

Mediators in these cases must be able to stay organized, keep dialogue going at all levels, and create a plan for bringing all the disputes to a head and resolving them at all levels. These are very challenging cases, and you need a mediator who is willing to roll of up his or her sleeves and stay with the process. Sometimes, the ultimate resolution may not happen all at once. For example, there

can be an agreement to resolve the main case, but disputes remain among the defendants and their carriers. A creative mediator will know how to manage this type of mediation even if the complete resolution is done piecemeal.

Injury Claims with Complex Liens

Lien claims can provide big hurdles to the resolution of an injury case. Workers' compensation insurers, health insurers, and the government all can stick their noses into a case and stymie the resolution process. I have found that it helps if before the mediation, as plaintiff's counsel, to have contacted any lien claimants, advised them of the mediation, invited them to attend, and discussed numbers for resolving those lien claims as soon as it is apparent that the parties are headed for a mediation. Once that is done, you should have a discussion with the mediator before the first mediation session about your progress in trying to resolve these claims, and alert the mediator as to the status of your negotiations. If there are anticipated hurdles then the mediator may want to contact that lien claimant or its counsel before the mediation to identify the issues and prepare him or herself for dealing with them at the mediation session.

Chapter 12
What Type of Negotiation Personality Are You?

Before representing your client in negotiations, particularly in the more formalized environment of a mediation, it is important to assess what type of negotiator you are. You, your client, and any mediator who is used, must work together to seek a voluntary resolution. That takes a different persona than the advocate at trial. You are indeed still an advocate, but one with a different presence.

Recently I attended a mediation in which we represented a local auto retailer that made available rental cars for its customers and also to employees. An employee rented a car and was involved in an accident in which he was killed and his passenger was seriously injured. Both sued. Our client was named in the lawsuit even though there was a separate subsidiary handling the rental operation. There was a CGL policy which sought to exclude rental cars. The client's broker had not obtained proper coverage for our client. Faced with a limits demand, the CGL carrier settled and sought reimbursement from our client. We sued the broker as well.

The broker's attorney was difficult. At a mediation of the cases, he exhibited an antagonist and hostile attitude that interfered with the process. He just did not "get it." It made the process difficult because my client and the carrier wanted to settle the case. I just did not understand why the broker's lawyer had to be so difficult. Fortunately, there was a more responsive claims representative from the broker's carrier present, and based on some excellent skills by our mediator, the whole case was resolved.

Negotiating a case is an active and dynamic process which inserts your personality into the case as an advocate for your client, just as it does at trial. The advocacy, however, is different. Instead of simple persuasion, you are using your skills to cause your adversary and his or her client to recognize the vulnerability of their case, and to voluntarily enter into the process of trying to find a point of resolution before trial. Your adversary must be motivated to seek that resolution, and your approach and personality are parts of the process of that motivation.

Each of us presents a personality in negotiations. There are some lawyers I know who are excellent in most all respects but have a hard time switching hats from pure advocacy to negotiation advocacy, which is a much different process. They are tough, hard-hitting lawyers who can push a case, work it up for trial, handle the motion practice, and try the case. However, when it comes to changing gears to a "negotiator," they just don't seem to understand the process well enough to be very effective. As a result, they end up with cases that do not produce good economic results: verdicts between offers and demands, or simply cases where the necessary expense of trial is not warranted, i.e., cases where liability may be strong but the damages or collection of the judgment does not justify a full-blown trial.

My sense of the personality types – generalizing of course – is as follows. Bear in mind that some present a combination of these, or in rare cases, all of these:

- **The Aggressive Type** – no mater what the discussion, this type tries to take over and control everyone by being very aggressive.

- **The Angry Type** – everything seems to evoke an angry response, sometimes raising the temperature of the negotiations. Not good, obviously.
- **The Hostile/Confrontational Type** – wants to give an opening statement in the first caucus to show his or her clients what a great advocate he or she is and how he or she can get in the face of the other side.
- **The "I Cannot Work in this Process" Type** – just does not understand the process and how one must engage in the "give-and-take" of negotiations. It is a compromise, but this type does not understand that.
- **The "Close to the Vest" Type** – wants to keep everything confidential; will not exchange mediation statements. For some reason, believes that exploring the issues is harmful.
- **The "Unprepared" Type** – just is not ready, and may simply be looking for a way to resolve the case and earn a fee, rather than work the case up.
- **The "Unrealistic" Type** – for many reasons, including lack of preparation or ability to evaluate a case, does not understand the issues or damages; or simply has an highly inflated view of the value or a very low deflated view of the exposure of the client.
- **The "Doesn't Understand the Case" Type** – here there is a lack of legal analytical skills and an understanding of what the case is about – legally and not emotionally, usually is the problem.
- **The "I Get Frustrated with the Process" Type** – has a hard time with the process of "give-and-take" because of impatience, and also lacks a sense of how to move through the process and engage the other side in the negotiation process.

- **The "I am Trying to Get the Case Cheap" Type** – this applies to the insurance company that believes if it goes to mediation, it will get a "good deal," and that its representatives are attending a "fire sale," not a real supervised negotiation. Carriers often approach early mediation this way, rather than taking a serious look at the carriers "down the line" costs plus exposure. Often an insurer will not spend the money to allow its counsel, panel counsel, or coverage counsel to evaluate the case in the real light of day.

You probably can describe others, but each of these represents an impediment to the process, frustrates the other parties and mediator, and simply stands in the way of resolution. For the most part these are "negative" personality types that make it difficult to resolve a case. Those who are not successful in either the negotiation or mediation process most likely exhibit traits of one or more of these types of lawyers in the negotiation setting.

The more positive personality types include:

- **The "I Understand the Process and Can Work in It" Type** – they know how it all works. Their clients are ready to make decisions and they have provided both the mediator and other side with a solid, well organized statement of the case.
- **The "Diplomatic" Type** – can present the case forcefully in the calm environment of negotiation process.

- **The "I Will be Up Front" Type** – "Candor is a lovely virtue."12
- **The "Well Prepared" Type** – refreshingly well versed in all phases of the case. Could start trial shortly because he or she knows the case.
- **The "I Understand the Value of My Client's Case" Type** – realistic about the cost of going to trial vs. settlement; knows the verdict ranges; understands the "present value" of money; has let the client know what the financial benefits are of settlement at this time.

The successful negotiators present a combination of these positive traits. There may be occasional lapses where each of us exhibits one or more of the negative traits during the negotiation process. However, the successful negotiators are aware when these lapses occur, recognize them, and return to exhibiting the positive ones that improve the chances for resolution.

A major problem is presented when we have an adversary who truly falls into the negative personality types and is stuck

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[12] See *Carr v. Pacific Telephone and Telegraph* (1972) 26 Cal.App 3d 537, in which Justice Gardner of the Court of Appeals dissented from the majority which judgment for defendant which the trial court overruled objections to evidence that defendant's absence from the family for a period of time, resulted from his being in jail and also evidence of his extra marital carousing or his "value" to his family. "A defendant, even a rich, soulless corporation, is entitled to show the disposition of the decedent to contribute financially to support his heirs and to show his earning capacity and his habits of industry and thrift since all have a bearing on the value of his life to his wife and family. (McDonald v. Price, 80 Cal.App.2d 150, 181 P.2d 115.) If the decedent had been a hard-working, law-abiding citizen and a paragon of all the virtues of honesty, thrift and probity who supported his wife and children and afforded them a stable home, the plaintiff would be entitles to so prove. If on the other hand, he was irresponsible, philandering, check- kiting jailbird, the jury would be entitled to so know. The jury is entitled to the whole picture-warts, wrinkles and all- not a sterilized, unreal, retouched portrait which amounts only to a shadowy silhouette of the real man. As Mr. Moto, that well-known Japanese philosopher of the 1930's one said, 'Candor are a lovely virtue.'

there. My experience is that usually this type is reluctant to go to mediation; but if it happens, then you need to have a very candid discussion with the mediator beforehand to discuss how to approach the mediation. It may be that the mediator has to exercise some strong influence on your adversary and his or her client to assess how to approach the mediation process.

Chapter 13
Clichés That Apply to Negotiation and Settlement

You don't have to go to the law books to find the basic principles which apply to negotiation and settlement. In fact, these basic principles may be ones you learned growing up, and possibly used before you ever entered law school. They are from clichés[131] that we all have heard and probably used in our personal lives, but do they apply to our work as trial lawyers and litigators? Here are some I apply regularly:

1. You Can't Get Blood Out of a Turnip

"'You can't get blood from a stone.' You can't get something from someone who doesn't have it. The proverb has been traced back to G. Torriano's 'Common Place of Italian Proverbs.' First

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13 cli·ché also cliche (kl -sh) n.
A trite or overused expression or idea: "Even while the phrase was degenerating to cliché in ordinary public use . . . scholars were giving it increasing attention" (Anthony Brandt).
[French, past participle of clicher, to stereotype (imitative of the sound made when the matrix is dropped into molten metal to make a stereotype plate).]
Synonyms: cliché, bromide, commonplace, platitude, truism
These nouns denote an expression or idea that has lost its originality or force through overuse: a short story weakened by clichés; the old bromide that we are what we eat; uttered the commonplace "welcome aboard"; a eulogy full of platitudes; a once-original thought that has become a truism.
The American Heritage® Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company. Updated in 2009. Published by Houghton Mifflin Company www.freedictionary.com/cliche target as a defendant, either because of insurance coverage or assets

attested in the United States in the 'Letters from William Cobbett to Edward Thornton.'

The proverb is found in varying forms: 'You can't get blood out of a stone; You can't get blood from a rock; You can't squeeze blood from a stone; You can't get blood out of a turnip, etc. ... '[14]" The application to the negotiation and mediation process is that you have to have a flush that are reachable through any collection effort. This is the third part of the three legged stool analogy of selection of lawsuits: liability, damages and collection!

2. You Get More Flies with Honey than Vinegar.

"...The proverb has been traced back to G. Torriano's 'Common Place of Italian --- Proverbs.' It first appeared in the United States in Benjamin Franklin's 'Poor Richard's Almanac' in 1744, and is found in varying forms. ... "[15]

The importance of this one is that diplomacy is critical to successfully negotiating a resolution to a lawsuit. Some might thing that the vigorous advocate who attacks like a pit bull will get his or her way. In my experience, that does not work in mediation, and maybe even in litigating a case. The most successful lawyers at negotiation base their "power" in negotiating on a high degree of knowledge about their case and the law and facts applicable, as well as personal skills of persuasion. Those who bang the table, and conduct themselves like attack dogs gain little respect. The diplomatic negotiator gets others to listen, believe and reach

14 Random House Dictionary of Popular Proverbs and Sayings, Gregory Y. Titelman (Random House, New York, 1996).
[15] Id.

agreements.

Leave the vinegar bottle at home, and take your biggest honey jar to the negotiation table.

3. It Ain’t Over ‘Til The Fat Lady Sings.

The meaning: Nothing is irreversible until the final act is played out. **“Just** to get this out of the way before we start: is it *'til*, *till* or *until*? You can find all of these in print:

It ain't over 'til the fat lady sings
It ain't over till the fat lady sings
It ain't over until the fat lady sings

“You might even find versions with *isn't* instead of *ain't*. Grammarians argue about *'til* and *till*; I'm opting here for *till*. Okay; so who was the fat lady? If we knew that, the origin of this phrase would be easy to determine. Unfortunately, we don't, so a little more effort is going to be required. The two areas of endeavor that this expression is most often associated with are the unusual bedfellows, German opera and American sport.

“The musical connection is with the familiar operatic role of Brunnhilde in Richard Wagner's *Götterdämmerung*, the last of the immensely long, four-opera *Ring Cycle*. Brunnhilde is usually depicted as a well-upholstered lady who appears for a ten minute solo to conclude proceedings. 'When the fat lady sings' is a reasonable answer to the question 'when will it be over?', which must have been asked many times during Ring Cycle performances, lasting as they do upwards of 14 hours. Apart from the apparent suitability of Brunnhilde as the original 'fat lady' there's nothing to associate this 20th century phrase with Wagner's

opera.

"All the early printed references to the phrase come from US sports. Some pundits have suggested that the phrase was coined by the celebrated baseball player and manager, Yogi Berra, while others favor the US sports commentator, Dan Cook. Berra's fracturing of the English language was on a par with that of the film producer Sam Goldwyn but, like those of Goldwyn, many of the phrases said to have been coined by him probably weren't. Along with 'It's déjà vu all over again' and 'The future isn't what it used to be,' Berra is said to have originated 'The game isn't over till it's over.' All of these are what serious quotations dictionaries politely describe as 'attributed to' Berra, although he certainly did say 'You can observe a lot by watching,' at a press conference in 1963. In any case, 'the game isn't over till it's over' isn't quite what we are looking for, missing as it is the obligatory fat lady.

"Dan Cook made a closer stab with 'the opera ain't over till the fat lady sings' in a televised basketball commentary in 1978. Cook was preceded however by US sports presenter Ralph Carpenter, in a broadcast, reported in *The Dallas Morning News,* March 1976: *Bill Morgan (Southwest Conference Information Director)*: 'Hey, Ralph, this... is going to be a tight one after all.' *Ralph Carpenter (Texas Tech Sports Information Director)*: 'Right. The opera ain't over until the fat lady sings.'

"Another US sporting theory is that the fat lady was the singer Kate Smith, who was best known for her renditions of 'God Bless America'. The Philadelphia Flyers hockey team played her recording of the song before a game in December 1969. The team won and they began playing it frequently as a good luck token. Smith later sang live at Flyer's games and they had a long run of

good results in games where the song was used. Sadly, Ms. Smith sang *before* games, not at the end. If the phrase were 'It ain't started until the fat lady sings,' her claim would have some validity.

"Whilst printed examples of the expression haven't been found that date from before 1976, there are numerous residents of the southern states of the USA who claim to have known the phrase throughout their lives, as far back as the early 20th century. 'It ain't over till the fat lady sings the blues' and 'Church ain't out till the fat lady sings' are colloquial versions that have been reported; the second example was listed in *Southern Words and Sayings*, by Fabia Rue and Charles Rayford Smith in 1976.

"Carpenter's and Cook's broadcasts did popularize the expression, which became commonplace in the late 1970s, but it appears that we are more likely to have found the first of the mysterious fat ladies in a church in the Deep South than on the opera stage or in a sports stadium."[16]

Here the application of this phrase to negotiation and mediation is consistent with the meaning set forth above. As long as folks are talking to each other about resolution, there is hope. Thus it is critical in negotiations to keep the dialogue ongoing. I recently was involved with a co-counsel whom I reluctantly let lead the negotiations in one of our cases. Instead of following this principle of continuing to communicate, he consistently dropped the ball and insisted that it was the other side that should call. The dialogue was inconsistent and often nonexistent, and he took no advantage of the momentum that was built up from time to time in

[16] www.phrasres.org.uk/meaning/it-aint-over -until-the-fat-lady-sings.html

the direct negotiations. The case took forever to resolve (several months), when it should have been resolved in a several days of talks, and it took a mediation and more legal fees to finally get it done.

Communication in settlement is the key. Trying to settle cases is no longer viewed as a sign of weakness. Make the overture of, "Let's talk." Then keep the talking going until the case is resolved or each side says "I have given you my last, best and final offer," and the case cannot settle.

4. Know When To Hold 'Em, and Know When To Fold 'Em.

This is an expression that emanates from the Kenny Rogers song, "The Gambler." It refers, of course, to the skill that a successful poker player has in knowing when to stay in or drop out of a hand. We use it in all kinds of business and personal situations to describe the decision to stay in the battle or drop out and fight another day.

> The words go:
>
> "You got to know when to hold 'em; know when to fold 'em,
> Know when to walk away; know when to run.
> You never count your money when you're sittin' at the table.
> There'll be time enough for countin' when the dealin's done."

No doubt this refers to the skill of knowing when the right deal is on the table and making the judgment of settlement vs. trial; a

skill which all of us wish we had developed to a perfect sense of predicting the future of how a case will end up when it is tried, appealed and the final gavel is dropped and judgment entered. While none of us has the crystal ball to use in advising our clients, we use our education, experience and skills to provide our clients with our best judgment of whether a settlement opportunity provides the preferred result rather than going to trial. The uncertainty of the future and the eventual decision making process emphasizes the need to make a concerted effort to settle.

5. Here Today, Gone Tomorrow.

"This phrase was coined by Aphra Behn (1640-1689) who Virginia Woolf, in 'A Room of One's Own,' canonized 'as the first professional English woman writer.' From 'More Than A Woman: A few of our favorite unsung heroines,' Page 62-63, B*tch - feminist response to pop culture, Issue No. 35, Spring 2007.

"Wikipedia also cites Virgina Woolf in stating this 'fact' (she doesn't say it as quoted however, if that's what those quote marks mean (http://etext.library.adelaide.edu.au/w/woolf/virginia/w91r/chapter4.html)."[17]

The point for us here is that negotiations can get cold and parties can back off if the negotiations seem to be going nowhere, or there is no ongoing communication. Keep talking; try to resolve terms as you proceed. The more you can agree upon as you proceed, the greater the chance there will be success at the end of the discussions. So an offer on the table needs to be answered with

[17] www.phrases.rog.uk/bulletim_board/53/messages/1005.

an acceptance, counter or some additional basis for discussion.

6. A Bird in the Hand is Worth Two in the Bush.

"This proverb refers back to medieval falconry where a bird in the hand (the falcon) was a valuable asset and certainly worth more than two in the bush (the prey). The first citation of the expression in print in its currently used form is found in John Ray's A Hand-book of Proverbs, 1670, which he lists it as: 'A [also 'one'] bird in the hand is worth two in the bush.' By how much the phrase predates Ray's publishing isn't clear, as variants of it were known for centuries before 1670. The earliest English version of the proverb is from the Bible and was translated into English in Wycliffe's version in 1382, although Latin texts have it from the 13th century: Ecclesiastes IX – 'A living dog is better than a dead lion.'

"Alternatives that explicitly mention birds in hand come later. The earliest of those is in Hugh Rhodes' The Boke of Nurture or Schoole of Good Maners, circa 1530: 'A byrd in hand - is worth ten flye at large.'

"John Heywood, the 16th century collector of proverbs, recorded another version in his ambitiously titled A dialogue conteinyng the nomber in effect of all the prouerbes in the Englishe tongue, 1546: 'Better one byrde in hande than ten in the wood.'

"The Bird in Hand was adopted as a pub name in England in the Middle Ages and many of these still survive. The term bird in hand must have been known in the USA by 1734, as that is the date when a small town in Pennsylvania was founded with that

name18."

A deal done in negotiations means finality, certainty, and conclusion, rather than no closure, uncertainty and no resolution. You have to consider the impact that money or accepted terms have on the future. Your client can now put his/her/their life back together as best possible, recovery can begin, and the drain of litigation is over. What a relief for most people!

[18] www.phrases.org/uk/meansing/a-bird-in-the-hand.html

Chapter 14
Some Basics of Negotiating At Mediation

When I started law practice in the mid-1960s the word "mediation" was not commonly used. I am not sure I heard the word more than a couple of times while in law school at Hastings College of the Law, University of California. If I did, it meant something different than it means today – some type of evaluative process that was not necessarily related to bargaining to get a settlement.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and Negotiated "the file" directly with the plaintiff's lawyer.

The words "alternate dispute resolution" or "ADR" were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected and appointed to the bench and stayed to retirement. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification will soon be available and standards will be set. While it seems that there are more mediators

than lawyers, the litigation process seems to demand this resource for dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

The mediation process is an opportunity – a time for you, as the legal representative of your client, to avoid putting your client through the litigation "mill" (aka: process) and get results. I see mediation as a definite positive process, but only if you, as the lawyer, have the right approach. I enjoy trials and arbitrations, court hearings, and appeals. But, after all these years, I get great satisfaction when I am able to get a good settlement early in the case before we incur large litigation expenses. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation, which more often than not would only add to the emotional injury already caused by a serious accident, injury or illness which led to the litigation in the first place.

To put this in perspective, we are talking about how to get your case resolved early in the more formalized process of mediation. Mediation is the voluntary process in which the parties agree to conduct negotiations of a dispute using a neutral intermediary in a non-binding process. The mediator has no power to decide anything. The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom.

Also, lawyers – and courts -- are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning and case

management mechanism. That is good because it forces the parties to thing about where they are going, what the results might be, and how much it will cost. That is, a Acost/benefit@ analysis is part of the initial planning process and evaluation of the case.

In order to get good results in mediation, there are basic principles that I have found should be followed. Here are the "Ten Principles for a Successful Mediation":

- **Principle 1**: Understand What a Mediation Is All About
- **Principle 2**: Prepare Your Client for the Mediation Process
- **Principle 3**: Put the Pressure on the Defendant to Come to the Mediation Table
- **Principle 4**: Get the Information You Need to Mediate
- **Principle 5**: Get to Mediation Early, Not Late
- **Principle 6**: Use Your Experts
- **Principle 7**: Select the Mediator Best Suited for Your Case
- **Principle 8**: Prepare the Mediator
- **Principle 9**: Be the Diplomatic Advocate at the Mediation: Make "Love" Not War
- **Principle 10**: Know the Numbers and When the Best Deal Is on the Table

Effective resolution of disputes should be our goal. Perhaps that is trial, but more often it will be a negotiated result. And, in most of those cases, from what I can see, there is an intermediary, "a mediator" who will assist the parties to that end. I encourage all to make sure that all cases are tested in the negotiations arena.

Chapter 15
Do Lawyers Really Understand What Is Necessary to Prepare for Mediation?

Recently I was invited by our local legal publication to be one of five persons on a Mediation Roundtable to discuss mediation techniques. We were interviewed by a moderator on various topics about mediation. I was the only lawyer in private practice on the panel. The others were all mediators, three were lawyers who are now doing full time mediation and the other was a retired trial court judge who for the last seven years has been mediating privately with a local service.

What I heard shocked me: Lawyers don't know how to prepare for a mediation, and most of the lawyers who attend mediations just are not doing a very good job. The mediators all explained the hurdles they had to overcome. Their chief complaints could be listed as follows:

- There is no strategy or plan by the lawyers for their clients;
- The briefs submitted are "too brief," and cursory;
- The lawyers have not prepared the client for the process; the clients have little understanding of how a mediation works and what can be accomplished;
- The parties are hostile to each other, or the lawyers are, which detracts substantially from the need to candidly communicate;
- The clients are not prepared to discuss "the numbers"; the client has no idea what the value of the case is;

- The lawyers have not discussed mediation as an alternative to trial – i.e., the "present value" of money (i.e., a settlement) versus the uncertainty of a recovery in the future;
- The client believes that the mediator is going to decide something and does not understand the role that the mediator plays as a neutral;
- The mediators spend too much time (one said 30%) of the initial time doing what the lawyers should have done to educate the clients;
- The lawyer is impatient with the process, so the client is as well.

So there you have it. The perception of at least these mediators was that we are not doing a good job for our clients by taking advantage of the mediation process, participating in it and educating our clients so that they have a real opportunity to resolve their cases. They seemed to uniformly agree that the "mediation process" begins with education by us of the client about that process and how the client can gain from the dialogue about the case and perhaps achieve a resolution of the dispute.

In my experience, the "mediation process" begins when the client first meets with our lawyers and staff to discuss the case. It is important for us to factor in mediation as part of the Litigation Management Plan, and make it an event in the process of representing the client just like a deposition or hearing on a key motion. We discuss mediation as a way of testing the case as well as posturing it for resolution. We also advise the client how a mediation works, what its advantages are, and alert the client to mediation as part of the evolution of the case – a main event for which we will prepare just like we prepare for trial. I also stress

that our advocacy is not comprised by our participating in a mediation. Indeed I tell clients (after I agree to take the case) that offering to mediate is a show of confidence and strength in our position, BUT that mediation involves looking realistically at the issues – liability, damages and collection of any judgment – and the costs of going to trial in comparison to the value of a settlement.

Since courts are sending many cases to mediation and parties seem more interested in participating, we need to be more mindful that clients need to be educated from day one about this important part of the litigation mechanism. While many courts require lawyers to inform their clients about this process at the outset, it seems that at least my mediator colleagues believe we need to pay more attention to, involve and educate our clients, and make this a part of the ongoing discussion of the case.

Chapter 16
Are You Ready for Mediation?

Getting ready for direct negotiations or a mediation session begins when you first meet your potential new client. A lot goes on in the first meeting. First of all, you have to assess if this is a case you want. I call it passing the test of the "three legged stool" of a good lawsuit: strong liability, solid damages, and an ability to collect those damages from wrongdoing defendant(s) (who hopefully has large assets or sufficient insurance coverage).

Of course, you may not know all there is to know about the collection aspect if you do not yet have the relevant insurance information. Fortunately, the procedural rules provide a means of determining what coverage may apply, but a lawsuit has to exist first before the information is obtained. It is rarely volunteered! (See, e.g., Fed. R. Civ. P. 26(a)(1)(A)(iv).)

Other assessments have to be made, including determining if this is the type of client that your firm can work with, wants to represent, and for which you can provide the necessary legal services. Can you help the client reach his, her, or its goals by representing that client in the disputed matter? Is a negotiated resolution likely? If so, is the client interested in that instead of litigating for principle or vindication (not good reasons to litigate in my view with the exception that some cases need to be brought to clarify the law or establish a legal precedent)?

I believe that most cases should be mediated if direct negotiations are not successful or are not practical. For example, there may be several parties and the only way to achieve a "global"

resolution is to bring all the parties together before a single neutral.

After making these assessments and accepting the case, what else needs to be done to work towards the first goal of seeing if the case can be settled? If mediation is contemplated, then here are some items to ponder about your preparation for the mediation process. Remember you have to prepare your client, yourself, AND the mediator. The mediator will only know the positives about your client's case from what you disclose about the case in your mediation presentation. This can be done in a well drafted and organized mediation statement, a private letter to the mediator written in confidence, and any visual information such as mediation video (which I almost uniformly prepare).

The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom. You have to assess how you will approach the prospect of settlement and what the best strategy is for getting to mediation. What is the best plan for getting the other side interested in negotiating, and how can I best implement that plan so as to get them to accept that "invitation" earlier rather than later?

Here are some thoughts:

- What is the attitude of the other parties and their counsel to the case? Are they rational and realistic, or are they hardball players who want to drag the case out? Can I deal with them? If not, what do I need to do to get them interested in exploring settlement?

- What documents do I need to assess my case and to decide on an approach to settlement and possible mediation?
- What depositions do I need to take?
- What will the other side need to be able to asses the case? Should I try to provide this information informally?
- Should I have a dialogue with opposing counsel about conducting some discovery to bring us to a point where a meaningful mediation can take place?
- Are there any parties to align with me in this process? How should I approach getting that party to work with me in getting to a point at which mediation is an attractive alternative to trial?
- What does my client need to know to be able to make decisions regarding settlement? How should I approach this process and what should I do to get it started? (I like to keep my client very closely informed about the case using telephone and voice mail, if necessary, and email as means of communication.)
- What eventually is the mediator going to need to be effective in a mediation? Will I be able to provide this, and how should I go about getting what is needed?
- Should I involve consultants or potential experts in this workup of the case towards settlement? (I frequently get my experts in the case early or use consultants who may or may not eventually become expert trial witnesses to assist in determining what information is needed, how to get it, reviewing documents, preparing for depositions, and assisting in getting the case ready for mediation.)
- Do I need court assistance in getting the parties to a meaningful mediation if they are not interested in

direct negotiations? If so, how do I approach getting it? (Usually I ask for assistance at the first Case Management or Status Conference.)

- What is the time line that will help us achieve the goal of direct negotiations or mediation?
- What materials will I need for a mediation? What will my Mediation Statement look like?
- Will I need a private letter to the mediator?
- Will I need a video, and what should it include?
- Where does this all fit into my Litigation Plan for this case?
- How can I best achieve my client's goals in this process?

On balance, getting yourself ready for mediation is the best way to prepare for trial if that is eventually what takes place. I often find that planning and preparing for direct negotiations or a mediation forces me to think about the case early, consider my theories and the defenses that I will face, look at my client to determine the impression that client will have on a court or jury, assess the strength of the evidence, and focus on getting the case ready for whatever alternative is used for resolution.

Chapter 17
Preparing Your Client For Mediation: Winners Win, Whiners Lose!

Martin Peterson, Ph.D., is a long time colleague of mine. He is a litigation consultant who has been providing these services for 30 years. He tells this story:

In a recent case, our 25 year old female client had been sexually harassed on a work site by having a work elevator dropped on her while working underneath it.

This was intended to teach her a lesson! The elevator crushed her spine. The other side continued to discount her, offering a low settlement. We went to mediation.

She waited in another room until everyone had assembled for the start of the mediation. She then wheeled into the room, directly approaching the defendants' attorney.

She leaned forward out of the wheelchair, extended her hand and said, "Thank you so much for coming here today. I appreciate your concern and efforts."

She then wheeled around the room, shaking everyone's hand and thanking each person for taking time to come to the mediation. When she got beside her lawyer, she said, "Time to get to work" and wheeled herself out of the room.

Her demeanor and behavior added another $1Million to the

settlement.

Winners help their attorney win; whiners hinder their attorneys.

Well, my good friend and professional colleague is very correct. The client is a key to a successful mediation in many ways. While the story that Dr. Peterson relates is unique in my experience because of the ability of this client to impact the mediation environment, it is important that our clients be well prepared for the mediation process. This does not mean preparing them to make a presentation, or influence the other side in the way that Dr. Peterson relates, but it does mean making sure the client is ready to participate in the process. This means also making sure the client understands what the process is designed to do, and how it works.

In some cases, the other side may have already seen and heard from the client in deposition. I would be reluctant to participate in a mediation as a defendant unless I had some insight into who the plaintiff is and what impression that plaintiff will have on the fact finder, court or jury. Whether a deposition is the proper means of assessing that depends on the case. I have often offered up the client for a limited deposition to the defendant for this purpose, or even an informal interview.

In some cases, like wrongful death for example, where you have a surviving widow and children, or parents in a case involving a death of a child, an interview may be all that is needed – a "looksee" is enough. The same may be true with a catastrophically injured plaintiff. These are highly emotional cases, and it is just a matter of assessing that level of emotionality and its influence on the outcome. So, I welcome a brief deposition session or interview

of my plaintiff client for this purpose.

But there are other aspects where preparation of the client is required. It is just as important to prepare the client for the mediation as to do the other preparation. A prepared client will be able to make decisions as the mediation progresses on what terms and conditions of a settlement are to be considered and acceptable. Often, the client's perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision-making process.

Here are some thoughts:

- **Prepare for the Process**: Your client needs to be prepared for the process by having the appropriate attitude before attending the mediation. I usually have a pre-mediation conference several days before the mediation. During this conference I describe the informality of a mediation, that it is not a trial as the mediator has no power to decide anything, and that the mediator's role is to facilitate negotiations and resolution. I also describe the "give" and "take" of the process, and tell the client not to be discouraged by this bargaining process, nor be offended by it.
- **Understand Confidentiality and What that Means**: I also make sure the client understands that what takes place at the mediation is confidential. I stress that nothing which is said or done during a mediation can be brought up in court during the trial of the client's case. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.

- **Get Down to Business**: This is where the client enters the business process of resolving disputes and essentially steps outside the courtroom.

I stress that it is the client's decision whether to settle, and I make sure the client has all necessary information to make an informed decision about whether or not to settle.

- **A Chance for an Objective View of the Case**: I explain that the mediation is a chance for us to get an objective view of our case, so we should listen carefully to what the mediator says. The mediator will often comment on the issues and give his or her views on each side's case and the pros and cons of settlement versus proceeding further. This provides an objective, third-party's view of the matter, which can be very valuable.
- **Using the Proper Words:** The proper words should be used in getting the client ready for a mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or words of war and combat have no place in getting a client ready for mediation and setting the right tone for the negotiation process. This is not war; this is negotiation and compromise, so words appropriate to that process should be used. I prefer words like, "educating the other side about our case," "working with the mediator [and the other side] to resolve the dispute," "resolution," "settlement," and "compromise." I also stress that we are not giving in, and these words don't mean that. I remind the client that it takes all parties having the same attitude to get a settlement that works for all.

- **Settlement is Voluntary;** There is No Decision Unless All Agree: Some clients think a mediation is an arbitration and the neutral will decide the case. I stress that no one is forcing the parties to settle. A deal will be done only if all agree to all terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort may be used to make clear what a settlement means in the client's case and how the client can benefit from this process.

Here are some more thoughts:

- Do you give the client your views on the settlement value of the case, or do you reserve that for discussion during the mediation?
- What do you tell the client about the expectations at the mediation?
- Clients will often ask: What is my case worth? What will the other side offer? How much should I expect to get? What should I be prepared to settle for? Why should I take anything less than full value?

I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement.

There are three ways to approach this:

- Don't give the client a number at all, but tell the client that a "demand" should be made first (if you are the plaintiff), and you and the client need to see how the

defense responds and what the mediator says before you line up any numbers;
- Give the client a reasonable but fairly wide range for settlement, suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to the higher number;
- Just set a rock bottom "walk away" number and work from there.

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement, whether directly negotiated or resulting from a mediation:

- The costs of further proceeding;
- The certainty of a settlement versus the uncertainty of a result by trial or arbitration;
- The emotional drain on the client and family or business partners;
- Adverse publicity that might result;
- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;
- The present value of money in hand versus the chance of a greater gain at trial [which can very much effect, and in fact lower, a client's unrealistic expectations];
- The positive impact on life planning of having money now rather than the long wait through trial and appeal.

I try to go over the major points in favor of a mediated resolution. I point out that a mediated result is a business-like way of resolving a dispute through a third party neutral who may

comment on the issues in the case. The client should be ready to engage in this process and understand that this can be a productive, positive way for resolution. And, the client has control over the outcome! That is not true if the case is left to a jury's discretion.

Chapter 18
The Lawyer's Role in Preparing the Mediator for Mediation

Let's not forget that as our client's advocate at mediation we have a job to do in preparing the mediator. Before the Mediation starts, the mediator knows only what he learns from the submissions of the parties beforehand. He can learn more about the parties' respective positions during the mediation, but it is important to give the mediator as much information about the facts of the case, the opinions of experts, the legal issues, and your client's position in advance so that the mediation day can progress without the mediator having to probe counsel for more information that was not provided initially.

Mediation Statements

I am frequently surprised at the skimpy mediation statements that my adversaries submit. Often they submit just a few pages which outline not much more than the answer to the complaint, or they misstate or mislead the mediator as to the facts or law.

Seldom are our mediation statements less than 30 pages. They contain a detailed factual recitation that is usually in a chronological order with headnotes broken down by date range, event or some description. We try to make the factual recitation interesting so that it tells a story. In short, we tell the mediator: "This is what the court and jury are going to hear about our client's case!"

We also include summaries of what our experts are going to say about liability and damages, often in a separate section of the mediation statement with a separate topic heading devoted to "Expert Opinions."

Then we outline the law focusing on key cases (often attaching one or two cases with key parts highlighted for the mediator). Most often our discussion of the law is based on the jury instructions that we believe will be given by the court. If we are mediating either before a dispositive motion is filed or after it has been filed and before any hearing, we will use a separate section of the brief to advise the court why our motion will be granted or a defense motion will be denied. If our brief has been filed, we will submit a copy of key moving papers to the mediator.

The opening of our mediation statements is usually entitled, "What is This Case About?" In two or three paragraphs we try to outline the essence of the case and the claims of our client – how our client has been irreparably injured by the conduct of the defendant.

We construct our mediation statement so that after the mediator reads this introduction and the first new pages, he/she will say: "I got it."

Exhibits

The proof of the pudding is in the eating. That is what exhibits are all about. They not only establish facts but verify the statements in a mediation statement. We include exhibits, which are organized as they are referenced in the mediation statement. Again, we highlight key portions which verify our story about the case. While

we do not want to overwhelm the mediator with more than can be absorbed in a reasonable amount of preparation for his/her role as mediator, we also don't hold back if we need to verify the facts or expert opinions that support our client's case.

Videos

Seldom do we attend a mediation without a mediation video. These videos can include family photos (in a death or serious injury case), videos of locations where an accident takes place, a series of photos of damaged vehicles or products that are the subject of the case, reenactments and computer simulations, news segments from television reports, interviews of witnesses (such as family members about the value of the lost relationships in death or serious injury cases), key documents with important portions highlighted or enhanced, and event interviews of expert witnesses.

Material that is specially prepared for the mediation and that is not otherwise available to the parties may be labeled as confidential. We always put an admonition at the beginning and ending of our video that it has been specially prepared for the mediation and is deemed a confidential mediation submission. We cannot protect inclusions which are otherwise discoverable or admissible, but we can protect our work product from being used at trial. (Cal. Evid. Code § 1119(b); *Stewart* v. *Preston Pipeline Inc.*, 134 Cal. App.4th 1565, 1576 (2005) ["videotapes…were…covered by the mediation- confidentiality provisions of section 1119 to extent that they were prepared for the purpose of, in the course of, or pursuant to, the mediation in the underlying action."].

Private Letters

The confidential, private letter to the mediator is an effective tool in preparing the mediator before the mediation. We use this letter as a means of:

- Advising the mediator who will attend the mediation on our client's behalf, giving a brief description of their role (client's family, consultants/experts and our attorneys);
- Providing the mediator with additional information about our experts and consultants (e.g.. medical reports from consultants who have evaluated a part of the case and advised that their opinions would not support a particular damage claim);
- Demonstrating structured proposals;
- Submitting written statements from witnesses that the other side has not obtained in discovery;
- Providing information on insurance and our comments regarding the carrier's position and approach;
- Providing comments on apportionment of liability among several defendants;
- Providing comments on prior dealings with defense counsel and/or the parties or carriers involved;
- Relaying thoughts on how the negotiations might progress.

The private letter assumes that the formal mediation statement will be exchanged.

I am an advocate of exchanging mediation statements. Maybe it will not tell the other side everything, but it will put your case before your adversary. Unless the adversary knows that case, how

can its counsel evaluate your position?

Pre-Mediation Conference

I am also a fan of a pre-mediation conference with the mediator. This serves several purposes. First of all, the mediator can outline what is important to him/her (i.e. what information is deemed important for the neutral). Second, the mediator can advise the parties of the date for a timely submission of the written submissions. Third, the parties can exchange ideas on how the mediation should be approached. And, if the parties need additional information before the mediation, they can request such.

Timing of the Mediation Submission

I also believe that any mediation submissions should be provided at least week before the mediation. In fact, weeks before is not too early. It is not effective to submit a several page statement a day or two beforehand. If counsel cannot do better, then the mediation should be continued to a date that will allow the parties to have a full and timely exchange of information, and the mediator will have what he/she needs to give them the best chance for resolution.

Chapter 19
Does Your Adversary and His/Her Client Have the Right Attitude on Mediation Day?

Last column I discussed whether you, as counsel for your client had the right attitude going into mediation day— but what about your adversary and his/her client?

What do you know about the other side's willingness to settle the case and interest in real resolution? He/she may simply be interested in getting "free discovery" or in trying to convince you and your client to take less than the case's "good faith" value.

Obviously if the opposition – either the client or client representative (aka: claims person) or his/her lawyer—is not fully engaged in the process of mediation, the chances for wasting the day are high. To avoid such waste, find out beforehand the temperature of your opposition, to encourage a focused mediation. This will increase the likelihood of settling the case. Here are some ways to get a read of the folks on the other side:

- **Direct Contact**: There is nothing wrong with a face-to-face discussion or a phone call to discuss how best to approach the mediation. Too often we rely on email to conduct our case discussions. Email is fine for routine matters and confirming dates for case activity and calendar items. I, however, am a bit "old school"; I like to talk to counsel personally face-to- face or by phone to gauge the level of interest. There may be

some puffing but if you have a professional relationship with your adversary, you should be able to break through and determine if there is a real interest in settlement.

- **Talk to the Mediator**: Most mediators I know want to settle cases. It is how they gain a reputation as a "closer." If you have doubts about the sincerity of your opposition in reaching a reasonable settlement, and direct contact is not in the cards, talk to the mediator. I have found mediators willing to contact opposing counsel and have a private and preliminary discussion to test the waters. Timing may be an issue, as your opposition may have other work, may be preoccupied with other matters, or simply cannot reach his/her client; a later date than you had hoped for may be preferable.
- **Talk to Others**: Find out who has mediated with your adversary previously and call them. I often use a listserv for the San Francisco Trial Lawyers Association (but make sure your adversary is not tapped into it) or I call colleagues to learn if anyone has some background on opposing attorney and his/her client.
- **Read the "Tea Leaves":** Sometimes you can discern an adversary's interest in a mediated result by reading the papers in your case. If there is hostility, mediation may calm the waters and focus the parties on resolution rather than further fighting. Briefs or discovery responses can reveal hostility, bitterness, anger or other emotions that serve as a barrier to a fruitful mediation.
- **Put Some Pressure On**: Don't underestimate the power of pressure – significant written discovery

requiring your opposition to reveal its case, focused requests for admission that require the other side to admit or deny key facts (and reveal the facts about any denial), or deposition notices can gain your adversary's attention. These tactics can result in an enhanced interest in negotiations. Sustained pressure can get a case to mediation quickly, but that pressure must be consistent. If you serve discovery, be prepared to "meet and confer" and file motions to compel if there is unjustified resistance, meritless objections or evasive responses.

- **Write a Letter or Email**: Face-to-face or direct contact may be too aggressive. If so, an email or letter inquiring about a real interest in negotiating the case is worth a try.
- **Past Experience**: Past experience with the defendant or opposing counsel may be telling. We have had cases against various insurance companies on more than one occasion. I have a good feel for how some of them approach litigation— some are willing to explore resolution at an early stage, some are not. Often they use the same lawyers, so past experience in those cases can give you a good read on the prospects for a successful mediation and the timing for such. The timing may be early, after some discovery (such as your client's deposition has been taken), or after an exchange of information.
- **Check Out Other Mediations Involving Counsel or Parties**: I have mediator friends who have experience with insurance company defendants. They often discuss what they've heard about those companies' attitude and approach to mediation, without revealing confidences. I frequently talk to colleagues about other

law firms and those firms' dealings with certain clients we see in our financial litigation, wrongful death and injury cases in which insurance companies are heavily involved (and other litigation in which there are repeat defendants).

These are just a few thoughts on assessing how your adversary and his/her client may approach mediation. It is a good idea to assess and discuss this with your client before committing to the process.

Chapter 20
Using Experts or Consultants at Mediation

One of the best techniques for settling cases at mediation is to take a consultant or expert witness with you to the session or at least have them available by telephone. I have used this approach in many cases with considerable success. The manner in which this is done varies depending on the complexity of the case, the extent of the consultant's or expert's involvement, and what disputes or unresolved issues depend on expert testimony.

Here are some examples:

- In an insurance long term disability bad faith case, plaintiff suffered from a serious inflammatory bowl disease. There were issues about the nature and extent of her medical problems, and the affect it had on our public defender client, who was frequently under the stress and pressures of her courtroom and client work. Her gastroenterologist was several hours away from the mediation site. We interviewed him on video for the mediation in a mini direct examination and offered the defense the opportunity to talk to him on the phone – with the interview protected by the confidential nature of the proceedings – to ask any questions for clarification. They did. The conversation lasted about 45 minutes, and the case settled well at the end of the day.
- In a complicated tax shelter fraud case involving the use of life insurance in what was touted to be a legitimate tax free deferred compensation program, our life insurance consultant attended the mediation

with us to help the mediator understand the case, evaluate the defense's position, and review the settlement terms. It turns out the representative of the defendant and our consultant had a long time relationship of trust. That certainly helped in achieving a settlement. Even if that had not been the case, our consultant was invaluable in assisting us in getting to a settlement

- In a wrongful death case involving an charming 25-year-old eldest daughter of a Filipino family, we had two consultants – one an "all purpose" coordinating consultant on highway design and other issues (he helped coordinate and interpret the work of the those serving as expert trial witnesses), and another on the Filipino culture and the role of the family in that culture. The second expert was very persuasive on emphasizing the expectations of parents in that culture for the support of their children, particularly the eldest, as the parents grow older and less able to care for themselves. This was an important part of our case for economic and non-economic damages. Both experts were outstanding, and we got an excellent result for our clients in the settlement.

There are other examples of how consultants and experts can be used at mediation. For instance, we often prepare a mediation video with 20-40 minute mini direct examinations of experts or consultants [even if the consultant is not going to be an expert trial witness] to explain our position or provide information to the defense about technical or medical issues in the case. We use consultants in some cases where there may be several expert trial witnesses eventually, but we use a consultant to address multiple expert issues. We have medical consultants who work with our

firm who have broad knowledge and can provide an overview of the case without requiring us to call on several witnesses or treating physicians and incur that expense for the mediation. Sometimes the consultant will use the records and reports of the treating physicians or expert trial witnesses (if they have been obtained) to portray the issues and provide an analysis. Again, we use the protection of the mediation's confidentiality when these consultants are used. In most cases, I get an agreement from the defense that we can bring this consultant to the mediation for this purpose and that the defense will honor the confidentiality protection. I have never had my opposition decline to accept this offer.

To me, using consultants and experts at mediation is a very positive tool in specific cases in which there are medical or technical issues that need to be addressed. In doing so, we need to be efficient so the consultant can provide effective way to assist the mediator and your opposition in understanding your client's case.

Chapter 21
He Top Ten Reasons Why Cases Do Not Settle At Mediation

Here are my top ten reasons why cases do not settle at mediation with some brief comments about each. You probably can add more. But give these some thought.[19]

No. 10: You are not ready. This is an obvious reason, so not much need be said. It is better to postpone a scheduled mediation if you believe that you are simply not at a readiness level that will maximize your client's chance for a productive and successful day.

No. 9: Your client is not prepared. What have you done to educate your client about the mediation process and its important aspects? Is your client prepared to discuss the economics of settlement? Are his/her expectations reasonable? Is your client

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[19] Mr. Kornblum has been a specialist is civil trials, arbitrations and appeals since graduating from Hastings College of the Law, University of California in 1966. He is the principal in his San Francisco based trial firm, Guy Kornblum & Associates. He is certified in Civil Trial Advocacy and Civil Pretrial Practice Advocacy by the National Board of Trial Advocacy and is a Charter Fellow of Litigation Counsel of America Trial Lawyer Honorary, and co-founder of its ADR Institute. He is also a Life Member of the Multi-Million Dollar and Million Dollar Advocates Forum, a Platinum Member of The Verdict Club, and a Silver Member of the Elite Lawyers of America.
He has been a Super Lawyer each year since 2006. He is author of "Negotiating and Settling Tort Cases: Getting to Settlement," published by Thomson West and the American Association for Justice (formerly Association of Trial Lawyers of America; 2d ed. 2013). http://legalsolutions.thomsonreuters.com/law-products/Practice-Materials/Negotiating-and-Settling-Tort-Cases-2013-ed-AAJ-Press/p/100087754?null. His firm's website is www.kornblumlaw.com. Mr. Kornblum is a strong advocate for mediating his client's cases before going to trial or arbitration. He grew up in Terre Haute, and is a 1961 graduate of Indiana University (A.B.).

willing to listen to the other side and the mediator about the issues? Does your client understand this is a non- binding process in which he/she does not have to testify or even say anything, and that the mediator is not a decision maker? Have you explained how the process works, so that your client understands this is not like being in court? Most importantly, does your client understand the concept of confidentiality? Finally, if your client is going to say anything, have you rehearsed what is to be said and planned for it?

No. 8: Your opposition is not prepared or does not understand your case. Sometimes this is difficult to assess. I have on occasion called opposing counsel to determine for myself if he or she understands the case or issues, and also if the claims representative or client representative is well informed on the issues and will be present to participate in the mediation. I want the check writer there. If there are problems in this arena, I call the mediator to see what can be done to insure that the client representative has authority to negotiate in the financial arena into which I believe the case falls.

No. 7: The mediator is not prepared or ineffective. Frankly, I have experienced a few situations in which I was sorry that the chosen mediator was selected. This is particularly true when the mediator a) limits his or her participation in caucuses with your client and you (e.g. does not provide constructive guidance on how to posture demands and responses to offers), or simply wants to be a messenger to transmit demands and offers back and forth. There are some occasions in which the mediator has been ineffective and I have had to guide the mediator during the mediation. Believe it or not, in the couple of instances in which this has happened, we have achieved a settlement. Essentially, however, we were negotiating directly with an

intermediary to carry the mail back and forth. That is not my idea of how a mediation should be conducted!

No. 6: The emotions of the parties or their counsel interfere with the process. We all know that in many cases, the emotions of the parties run high. In those cases, a mediation is likely to fuel them despite the best counsel from a lawyer. First, it is important for you to assess if this will be the situation on your client's mediation day. Second, if that is the case, then obviously you need to counsel the client to see if emotions can be tempered. You might also discuss potential hot points with opposing counsel and involve the mediator so that tensions can be tempered and the day managed with the clients in control. Most important is to be honest in assessing the circumstances so that you can anticipate any problems of this kind interfering with the process.

No. 5: The parties do not understand the economics of the case. This is a common problem in mediation. Clients must understand and be prepared for talk about dollars and cents. What is the realistic potential for damages if liability is found? What are the various scenarios for a jury or court on the damages issues? Given these, what is it going to cost to get there, and what numbers might a party see at the end of the day? The defense must also understand the exposure. I respectfully refer you to the September 2008 Journal of Empirical Legal Studies (Vol. 5, No. 30, pp. 451-491)[20], a joint venture of Cornell Law School and the Society of Empirical Studies, in which there are published results of a quantitative evaluation of "the incidence and magnitude of errors

[20] Available on line at http://www.blackwellpublishing.com/jels.

made by attorneys and their clients in unsuccessful settlement negotiations." The study entitled, "Let's Not Make A Deal: An Empirical Study of the Decision Making In Unsuccessful Settlement Negotiations,"[21] was done by two faculty members and a graduate student from the Wharton School of Finance, University of Pennsylvania. The study analyzed 2,054 California cases[22] in which the plaintiffs and defendants participated in settlement negotiations unsuccessfully and proceeded to arbitration or trial, and compared the parties' settlement positions with the award or verdict. The study "reveal[s] a high incidence of decision-making error by both plaintiffs and defendants in failing to reach a negotiated resolution."[23] I discussed this study in my December column last year.

No. 4: The parties lack credibility. The Three C's of mediation are: Credibility, Confidentiality, and Communication. I work very hard to gain the confidence of my opposition and avoid hostilities. Our clients may disagree, vent, and be angry during the litigation, but counsel must establish a credible basis for dealing with each other. If so, there is a high chance that the mediation day will be successful. If not, then the mediator should know that the parties are having difficulty communicating, and the lawyers are

[21] The study is the subject of an article in the New York Times, August 8, 2008, "The Cost of Not Settling a Lawsuit," Business Day, available at http://www.nytimes.com/2008/08/08/business/08law.html.

[22] These were cases in which results were reported in the 38 month period between November 2002 and December 2005. They involved about 20 percent of all California litigation attorneys.

[23] The study was an update three prior studies of attorney/litigant decision making and increased the number of cases used by three times and expanding on the analytical format and variables. As the study states, "Notwithstanding these enhancements, the incidence and relative cost of the decision-making errors in this study are generally consistent with the three prior empirical studies ..... "

too!

No. 3: The parties are not candid with each other and the mediator. Misleading a mediator or an adversary will only lessen the ability of the parties to work together. Advocacy at mediation is different from advocacy in the ordinary process of litigation. I don't mean to suggest that being dishonest is acceptable in any way at any time. However, the spin doctors don't do well at mediation. It is important to recognize the issues, and discuss them candidly and honestly with the mediator and even the opposition. Open discussion leads to a fair assessment of the case which leads to resolution.

No. 2: Client expectations are too high. This is a corollary to the principle that the parties understand the economics of the case. A plaintiff may have expectations of a recovery which are not justified given the picture regarding liability, causation and damages – and maybe even collection. A defendant may believe that a mediation is a "fire sale" for the plaintiff. On both sides the costs of proceeding must be assessed. Without a clear understanding of the economics of the case, the parties cannot bargain responsibly.

No. 1: Counsel is unable to control the client. We have all had experiences in which a client simply will not process the information we provide, as well as our advice and counsel. Each of us all has ways to get around and pierce through the stubborn exterior of a client. But sometimes we are not as successful as we would like. I do not hesitate to have a private conversation with our mediator about the expectations for client behavior. Often I find a mediator can have a great influence on a client by repeating – perhaps in different words – the message about the case that the

client seems to resist hearing.

Getting the job done at mediation requires a thorough understanding of the process, knowing how to prepare and avoiding the barriers that impede the process and prevent a successful day. What I have outlined should help to focus your attention of effective representation of your client in the mediation process.

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Chapter 22
Listening to the Story as a Tool in Mediating

Being able to listen is an important trait in our profession. We need to hear what our clients recite as "their story" and develop a plan around that story for resolving their dispute or obtaining compensation for the wrong done to them. From the day we first meet our clients we must open our ears to their plight, a tragic injury, a loss of a loved one, a business or investment that has been stymied by wrongdoers. Whatever the matter, it is important that we understand both what happened, how it happened, and what relief is available to bring the clients back to where they were before.

Listening is an important part of negotiations. We must listen to our opposition to understand the other side's views as to the facts or story of the case. Without a clear understanding of their position, we cannot fashion responses, nor put together a plan for representing our clients. What is their story? Who are the story tellers in the "theater of the real" (i.e. the trial court)? How will the sides be viewed by the trier of fact – court or jury? How will the story tellers be perceived? Will the trier of fact hear our story or theirs? Thus, we have to anticipate these questions and answers to the questions in planning the case and managing it for our client.

I often talk about the "laser beam to resolution," i.e. the shortest line to a fair ending of the dispute in obtaining rightful compensation of our clients. That first test of this plan is in direct negotiations. Generally, I try to engage the other side in an early

dialogue about the case, but at that point I am trying to listen to their story. I need to hear their version as soon as I can. I don't just rely on the pleadings or discovery. I want to hear it from them or their counsel.

If direct negotiations don't work, then mediation is next. By that time I may have listened to witnesses in deposition, or heard the oral argument of counsel at a motion or listened to counsel during a deposition with objections that may reveal the other side's thinking. All along the way I am listening to what is being said by those participating, including the judge's comments at case management conferences or hearings.

A mediation provides another opportunity to listen and hear – this time from a neutral whose views are important because they should provide an objective assessment of the stories being told by the parties in their briefs and sessions with the mediator. But it is important to the process for you as counsel for your client to listen and hear what is being said. Then, you need to discuss what has been heard with your clients and, again, listen to how they respond. Are they rational? Do they understand the issues? Are the responses purely emotional? Do they understand the litigation process and how they can lose as well as prevail? What is a "win" in their minds? How does that track with a realistic appraisal of the case and the probable results? Do they understand the value of the opportunity, logic and rationality of resolution by mediation, and how that process can work for them?

All of this requires you, as counsel for your client, to be a good listener, and to hear what is being said. Then you must translate that into a dialogue with your clients, and a mediator if that is the process you are involved in, so that a course can be fashioned

which leads to a positive resolution of your clients' case.

Listening, hearing – important qualities of counsel in providing high quality representation for your clients in the dispute resolution process!

Chapter 23
Using Videos At Mediation

Using videos at a mediation can be an excellent supplement to a mediation statement. It is a great way to provide the visual information that your adversaries and the mediator need to evaluate the case. Over the past several years, I have submitted a confidential mediation video in at least 75% of the cases I have taken to mediation. Personal injury cases are especially susceptible to the use of a video. It is an excellent way to tell your client's story. We seldom go to mediation without a video in serious injury or wrongful death cases.

We have had two highway wrongful death cases go to mediation in the last few months. We used videos in both, and they both settled for top value. Both involved defendants who were governmental entities. Here is how we approached each with video:

Case No. 1: This was a case by a 42 year-old widow with no children whose husband, a law firm accounting employee, was killed when a teenager driving his parents' Mercedes was speeding down a roadway that had a history of cross-over accidents. Because of infighting between a County and City, separate governmental entities, a four lane expressway running for about 2.5 miles between two main streets in San Mateo County, California had no raised median barrier. After a death case a few years ago, a partial six foot raised median barrier was installed but only over about 25% of the roadway. Then our client's husband was killed when the recently licensed teenager missed a curve on

an unlighted section of the road. Fortunately his parents had liability coverage of $1.5 Million, but the case was worth more.

After a period of aggressive discovery during which we uncovered more details about the infighting over who was going to pay for the remainder of the barrier, we scheduled a mediation. Our video contained:

- An introduction to our client and her husband with compelling photos of them at their wedding, on vacation, with family and friends;
- A segment from a news broadcast showing the accident scene;[24]
- Photos of the cars in position after the accident;
- A computer reenactment of the accident demonstrating the speed of the teenager's car, and also providing evidence that a raised median barrier would have still prevented the head-on collision;
- A video of the roadway before the accident;
- Photos of the barrier being completed over the entire segment of the roadway a few months after our client's husband was killed; and more compelling photos of our client, her husband and family.

We were careful not to oversell the message here: Could this accident have been prevented? Should it have been prevented? The video told the story. The case settled with the County, who essentially controlled whether the barrier would be built and was

[24] Not all what we put on a mediation video is admissible. While we try to stay as close as we can to the evidence that we believe a jury will hear, that is not always possible. We concentrate more on telling the video story and not overly concern ourselves with the fine points of admissibility. We assume that at trial, the jury will hear and see most of what we put on the video in some form.

the impediment to it not being fully completed before our client's husband was killed, paying a significant amount to complete the global settlement.

Case No. 2: The second death case was more difficult. An errant driver who was likely having difficulties from insulin insufficiency crossed over on the upward side of a hill trying to pass two vehicles. Clearly he was negligent. He struck a vehicle being driven by the 25 year-old Filipino daughter of our clients. The decedent lived at home with her parents and her sister, who was younger and a student at the University of California at Davis. She was beautiful inside and out, as was her sister. The family was extremely close following the cultural pattern of her heritage.

The problem was the driver had 15/30 coverage. The State of California maintained the road which was an old farm road that had been repaved and redone in a patchwork manner. Over the years it became a major thoroughfare between Interstate 80 and Central California. Despite the heavy increase in traffic, and some major accidents, it was not improved the way it should have been. The stretch where our clients' daughter was killed was particularly dangerous because of a series of hills that impeded drivers going in her direction from having a line of sight for oncoming vehicles, and also because of raised areas along her right that prevented her from escaping safely off the roadway should a car come as the driver's car did. The decedent was essentially trapped in this area, with no way to see far enough ahead and no where to go if she could see a vehicle coming toward in the wrong lane of traffic.

But there was another problem. We had little in the way of economic damages.

Under the California rules (resulting from Proposition 51 passed in 1986; Cal. Civ. Code sec. 1431.2), a defendant at fault is responsible jointly for all economic damages. However, for non-economic damages, a defendant is responsible only for that portion of these damages that is equivalent to its percentage of fault. The State argued for either no liability or a small percentage fault, which would keep the verdict low.

Our video contained segments showing:

- The heavy flow of traffic on the segment of road where the decedent was killed (at 7 a.m. in the morning during "commute" hours);
- Photos of the accident area, and the vehicles (we chose the less grizzly ones; indeed there were some that were gruesome);
- A series of videos showing the path of each vehicle which clearly demonstrate the lack of visibility on the approach to four hills in sequence, and the high bank on the driver's right preventing any exit of the roadway even if she saw a vehicle in time to try to avoid it; the "trap" was clear;
- An interview of the decedent's cousin about the family relationship and the close knit family unit that this Filipino family enjoyed;
- An interview of the decedent's sister showing again the close family relationship; and
- Various family photos from vacations and holidays.

I should add here that the interviews of the family members were outstanding. Both the cousin and sister were compelling – genuine, intelligent, completely credible, and appropriately emotional at the right time. They would have been outstanding

witnesses at trial. Even the State's counsel openly conceded at mediation that we had an excellent non-economic case after he saw the video. He had taken the depositions of the parents, but he had not really touched on the relationship issues as much as we had hoped. We had to bring the evidence on this issue to him.

This case also settled on the strength of the video, plus one our of experts on highway design attended the mediation with outstanding drawings showing the configuration of this old farm road and how it had only been paved but not altered to avoid the dangerous condition that was created by the grades and configuration of the hills in the area where our clients' daughter was killed.

I have other examples of how video has supplemented our mediation statements and other parts of our mediation presentation. Personal injury and death cases are good cases for visual information. Medical cases often lend themselves to video presentations. I often get a treating physician to do an overview of the medical issues with charts, models or other illustrations to supplement the written medical presentation. Strong visual stimuli will assist in supporting your written presentation.

I usually try to keep them no more than 60 minutes. In fact, I often tell my attorneys and staff to keep it to a "classroom hour," if they can.

We also always put appropriate titles on the video and put a statement such as the following at the beginning and end: "This video presentation has been prepared for this mediation and is intended to be a confidential mediation video for the negotiations under the supervision of [mediator] on [date]." Sometimes I cite to

the statutory or court rules protecting this information.

Pictures are definitely worth many words here, and are a great supplement to a well organized and comprehensive mediation statement.

Chapter 24
Mediation as a Discovery Tool

So the case does not settle at mediation! Disappointment perhaps, but there are other benefits to going to mediation. One of them is the exchange of information that takes place between or among the parties. This is particularly true of a mediation that takes place early in the case, or at a certain point in time after the parties have exchanged limited information. Even though a mediation takes place, it is sometimes the case that the parties simply do not know enough about the other side's position or the facts of the case; therefore, productive negotiations just don't happen. Or, it may be that the perception of the parties is just quite different and more information needs to be exchanged before settlement can be reached.

We had an employment discrimination case recently that I thought had some real merit. It was different from other employment discrimination cases in that the employee was still being paid in full; however, he had been reassigned, and had not been allowed to pursue some job opportunities that had been posted by the company. He had documented a series of events that looked as if he had an actionable case, and some very large damages since he was only 55 and had several years of employment left. It appeared he was being shunted aside primarily because of his age, although he was African American and believed race was also an issue.

The employer – a major national corporation that advertised highly its emphasis on non-discriminatory practices – really

wanted to mediate the case before any litigation was to commence. The employer had a program in place for pre-litigation mediation, and offered to pay the cost. A free looksee at their defenses.

We huddled and decided to accept, and I am very glad we did. We found out a lot about our case, and what damages we might claim, and the other side was able to hear from us. As a result, we have all agreed to give the matter a month or so (no statute problems) to contemplate a possible resolution that might avoid litigation and potentially lead to continued employment – a real positive for our client. The early exchange of information allowed us to find out more about the case and assess its merits. Likewise, the employer had the opportunity to do so. We all gained by the early exchange of information and could each reassess our position and possibly avoid a costly and very unpredictable fight.

So, mediation can be very productive as a discovery tool and opportunity to learn more about your client's case, and what the other side has to say IF the parties come in good faith, with a view towards getting the important facts on the table. But if one side is attending simply to demonstrate that it is playing hardball and merely wants the other side to capitulate for reasons that are not meritorious, then a mediation is not worth the time or money.

One issue that you face is how much you tell the other side. For example, what if you have significant negative information on the other party, or impeachment potential; do you share that? Maybe not. Maybe it has to be saved to avoid the adverse party being able to defuse this potential damaging evidence. Or, it might be that you can disclose the essence of this information in a private letter to the mediator, and can go over its substance and level of importance in your case in a private caucus. That is a judgment call

that you as counsel need to make. If you follow this approach and hold it back or disclose it only to the mediator, the mediator might use it if he or she believes it may result in closure. Again, that is something you and the mediator need to discuss to put together a strategy.

My experience is that an early mediation is a valuable tool if the parties are really interested in obtaining a resolution without protracted litigation. Even if the case does not settle, there can be an exchange of information that allows the parties to re-evaluate the case. If necessary, they might fashion out a limited discovery plan, complete that part of the discovery process, and reconvene for a later session at a time when they are more ready to talk about a solution.

If the parties come in good faith, settlement or not, a mediation can be a good means of obtaining more information about the merits of your client's case. A good faith exchange of documents and facts can lead to an early evaluation of the case so that a resolution can be achieved.

Chapter 25

The Opening Statement at Mediation – Yes, No, Maybe!

One question that generally comes up when preparing for a mediation is whether counsel should give an opening statement in a general session before the actual negotiating begins. A subquestion is if an opening statement is advisable, what type of presentation should be given?

What should be the purpose, content and tone?

Should An Opening Statement be Given? Is There a Purpose?

In my view, an opening statement at mediation should not be given if it will create hostility or divisiveness. Sometimes a client will want a preliminary statement to assuage that client's own anger and hostility towards the other side. That is not a valid purpose because it will not contribute to the mediation process. Anything that escalates the tensions between the parties or heightens the temperature in the room is not a desirable tool for mediation. In short, an opening statement should not be adversarial, but should be devoted to demonstrating an attitude of wanting to reach a resolution of the dispute at hand.

Otherwise, whether an opening statement is given depends on its purpose. That is, it must have a purpose first of all, and that purpose must contribute to the mediation process. The best reason for an opening statement is to add information to the process or

explain the position of the party delivering it if the information is not already available, or there needs to be clarification of that party's position. Despite a comprehensive written presentation, there may still be issues or positions that need clarification. If so, an opening statement should be used to provide additional information about a party's case.

One of the occasions where I find an opening useful is to clarify damages claims. There may be questions about the relationship of injuries to an accident, or about special damages, past and future. There may be medical issues; questions about future medical care, rehabilitation efforts, and income earning capacity once the injuries have stabilized. These questions may have come up in a pre-mediation conference, so the parties may want to address those issues with additional information that has developed.

However, an opening statement is not a time to rehash what has been spelled out in a mediation statement or just review what the parties already have had an opportunity to absorb. The opening statement is appropriate if it will help focus the parties on the issues to be addressed at the mediation, and provide additional information useful to moving the parties closer to a bargained result.

What Should be the Tone?

As noted, hostility and an adversarial tone do not contribute to the process. An educational and informational tone is the right one to choose for this type of presentation. Successful "across the table" negotiators do not achieve desired results with this approach in any format. As a voluntary process, mediation will not be

successful if the parties display their anger and bitterness (despite its presence) to any joint sessions. Venting can be done privately, but not when the parties caucus.

Anything less than a high level diplomatic approach will only lessen the chance of settlement. This is not to say that the parties should appear to be begging for a result, but a high level of professionalism and willingness to explore settlement options should be the attitude of all involved once any joint session is over. The spirit should be: Let's try to get it done!

An *appropriate* opening statement can be a valuable tool for working to a positive end result.

What Should It Contain?

The answer to this question is obvious: information that adds to the other side's basis of information, clarifies issues or facts in the case, or makes the position of a party clearer to the mediator and other parties.

I like to use a supplement, either an outline or a PowerPoint presentation. However, these tools should be used simply to give the presentation some structure, not to overwhelm the parties with more paper or numerous slides with crammed detail. The opening statement, as I envision it, is a summary of information so that the issues and facts have a clearer focus, and the mediator and the parties can begin negotiating around their dispute.

One further point: An opening statement is often a good time to concede facts or issues. For example, I have had mediations in which the defendants said in their opening that they were not going

to focus on liability because they had worked towards an apportionment among themselves. This allowed my client to focus on evaluating the case for settlement purposes and discussing damages. Obviously that was good news, and it also made the mediation day a productive discussion of some serious and real damages questions.

Be Creative; You May Involve Others!

You can be creative with an opening statement at mediation. You do not have the constraints that you have at trial. For one, you can discuss the facts without worrying about objections, admissibility or argument, although you certainly do not want to fall into an argumentative statement that will violate the appropriate "tone" that I think should be used.

Second, you can involve others. Frequently I take an "all purpose" expert or consultant with me who can present an overview of the technical aspects of the case. For example, our medical consultants, retired physicians who assist in reviewing the medical aspects of our cases, sometimes attend to explain injuries, comment on causation and answer questions, while recognizing that they are not our expert trial witnesses. I also use consultants whom I regard as good "translators" of technical arenas, and who can give an overview of aspects of the case. They are highly credible, and what they present is done within the confidentiality of a mediation and with the understanding that they are not going to testify at trial, but are serving as consultants. This expert overview can be provided at a lower expense than if you asked two or three experts to attend or provide video statements for mediation purposes only.

Clearing the Opening with the Mediator

On mediation day it is the mediator's show. So, I want to clear the agenda with the mediator before I plan on making any opening statement. The mediator may not want it. He or she may want me to forego an opening initially and save it for later in the day if it is believed some comments in a joint session will help the parties in their negotiations.

If an opening is invited, I usually give the mediator some idea of my approach to make sure it blends in with the mediator's agenda and approach to the settlement discussions. No surprises - at least not for the mediator!

A Final Comment

You should let your client know about the difference between the opening statement at the mediation and at trial. The client may expect a gang-busters trial lawyer's presentation. Perhaps if an opening statement is to be given, you should ask the client what his or her expectations are, and then inform them of the purpose and reasons for your presentation and generally how and what your are going to say. That way the client's expectations are appropriate for the day, or at least for the initial joint session.

Chapter 26
The Opening Demand at Mediation: How to View the First Shot Over the Bow

"Or what king, going out to wage war against another kind, will not sit down first and consider whether he is able with ten thousand to oppose the one who comes against him with twenty thousand? If he cannot, then, while the other is still far away, he sends a delegation and asks for the terms of peace."

Luke 14:25-33

Assessing when and how to approach your adversary about mediating a claim presents a challenge to any of us representing a client in litigation. Even more challenging, I find, is determining what the initial demand should be. As a lawyer frequently representing the plaintiff in litigation, I feel the responsibility to not only provide the opposition with a clear statement of my client's case but also one that justifies considering settlement. You have to start someplace, and it is customary for me – as is usually the case – for the plaintiff to make the first bid – the initial demand for settlement. I also customarily submit that number in an initial demand package, or if negotiations are focused on a mediation, in the mediation statement which I submit at least two weeks – and sometimes earlier – before the mediation takes place.

The question is what should that number be?

Let's talk strategy and let's also talk about how the client views the numbers. First of all, I certainly avoid giving the client

a bottom line number before the mediation or even at the mediation -- or a number which I recommend be the "bottom line" for settlement. Negotiations can change the view about a case. That certainly is true about a mediation. Much can be learned during the day about the case which can change its value.

My San Francisco Bar colleague, Michael Carbone, a full time mediator who writes regularly on the topic of mediation, says this about concocting settlement demands and strategies: "Clients are often fixated on what the bottom line should be. This approach is understandable, but should nevertheless be discouraged. A demand number, a target (or 'wish') number, and a walkaway number can all be discussed with clients, but with the caveat that one or more of these numbers may need to change during the course of the mediation." (M. Carbone, "Resolving It," Vol. 1, No. 10, October 2010.)

So you have to remain flexible regarding the numbers during the mediation.

But back to the initial demand. If it is too high, it invites resistance to negotiations by the opposition. If it is too low, then, of course, you are essentially bargaining below where you should be to drive the case value to an acceptable settlement point. The initial demand has to leave room for negotiation. We all know it is to get the process started, and is not the number that is expected to be the final settlement number. Similarly, the defense is not expected to put its "last, best and final" number on the table in its first offer.

Here are some thoughts on how to structure that first shot.

- What are the economics of the case? Have you presented a strong case and support for the damages to be claimed at trial? Are there soft spots?
- How does the opposition negotiate? Are they hardnosed or cooperative? Will they listen to the mediator? Is every first demand from a plaintiff considered unreasonable, or are they likely to respond to an invitation to bargain?
- Does your case have aggravated liability facts which adds potential to the outcome?
- Do you need lots of negotiating room?
- Is there an expectation that the plaintiff will show considerable movement during the negotiations?
- Who is the mediator and what his the approach likely to be taken by the neutral? No matter what the initial demand and offer, will the mediator work to get the parties into the "field of play" (aka: the reasonable negotiating range)?

In determining that first demand, first look at the hard economic damages which are likely to be viewed as clearly related to the wrongdoing. Second, if there are soft numbers in addition, which may be questionable or have less evidentiary support, they still should be cranked into the demand to provide negotiating room. Third, in a personal injury case, the claims for future medical expenses, and also impairment to earning capacity should be quantified and supported. Fourth, you have to obviously evaluate the potential for general damages, past and future..

Often I have jury verdicts research done to try to find comparable cases with verdicts that can serve as a basis for evaluation.

Once I pencil out these numbers, I then place a value on the case using a range of a low result, mid result and very good result. After that I decide what additional sum I need to add to this number to negotiate given the factors outlined above. Maybe I need to add 30-50% to give me negotiating room, possibly even more if I think the other side is going to expect more give than take on the plaintiff's side.

I also need to dispel the notion that the settlement number is mid point between the initial demand and $0, which sometimes suspect is the perception of the defense. That is rarely the situation from my perspective.

The point is that the first demand must have a rational basis in light of the potential damages claims, so outlining those claims first is critical. They have to appear solid, and not unreasonable or if potentially unreasonable, perhaps just above the line of reasonableness.

The defense will likely advise the mediator that the initial demand as way too high in any event (of course it is high, but it is designed to start the bargaining process), so giving yourself some room to come down without compromising your ability to negotiate is important.

Remember, you can always go down, but not up! So, if you going to err, be it an err that is high, not low!

Chapter 27
Getting Around the Impasse at Mediation

You and your client have mediated for a full day. The mediator has worked hard. But there is no deal and the parties are still a ways apart. An impasse has been reached, and the prospects for breaking through look dim. What happens next?

There are a number of possibilities and skilled mediators know how to deal with what you would hope is a temporary "blip"' in the negotiations.

First of all, your client should be prepared for this. I normally tell my clients that this is our first day of real negotiations. We would not be going if we were not prepared and interested in settling. But we are just one side. The defendant(s) may or may not have the right attitude about settlement, or may be fighting among themselves as to their respective shares.

Second, I have a basic operating principal in mediations. If the parties are talking there is hope, so KEEP TALKING if you are interested in getting the job done and a resolution of your clients' case.

So what are the alternatives if the parties reach the end of the day or it's apparent during the mediation day that they are stuck and the process has bogged down?

No. 1: Use a "mediator's field of play": Here the mediator proposes a "demand" and "offer" which each side must accept. That is, the plaintiff must agree to make the proposed "demand"

and the defense (if more than one then perhaps a joint offer) agrees to the proposed offer. Once that occurs then the parties negotiate further. This approach is used when the plaintiff is holding back and making "demands" that are too high and the defense is standing on an offer that one might characterize as "way too low." That is, each side is being unrealistic. The approach I describe forces the parties into an appropriate mediating range or "field of play" that allows them to get back to mediating.

No. 2: Adjourn and come back another day: This often happens. Perhaps there is more discussion that needs to take place between lawyer and client, or the parties need more discovery. However, if there is real interest in a settlement among all parties, a second session after some time passes and some additional work is done, often can lead to resolution.

No. 3: Separate sessions with the parties: If there are disagreements among several defendants, but overall they have a sense of what collectively might result in a settlement, perhaps a separate settlement session with the defendants will allow them to discuss their respective shares.

No. 4: The mediator works the phones: Here the mediator takes the responsibility of continuing negotiations by calling the parties separately and discussing resolution. This can work in the situation where the parties are close but closure does not occur. Maybe the defendant or defendants need to request additional authority, and cannot accomplish this during the mediation day. Or perhaps the mediator wants some time to talk to the parties separately without the time pressures of a work day. The disadvantage is that the mediator loses the face- to-face encounter, and also has the inconvenience of trying to reach counsel, who are

often occupied during the business day. This becomes more of a problem when there are time differences. But continuing the mediation process is better than abandoning it. Perhaps the mediator can even bring the parties back to a face-to-face process if he runs out of nickels for the phone call!! (I remember when.)

No. 5: A mediator's proposal: This is the last resort for a mediator to settle a case where the parties are reasonably close but are unable to make the final move to closure. Here the mediator proposes a number and the terms of a settlement. Both sides are advised of such and given the opportunity to accept or not. If the parties accept the mediator's proposal, then the deal is done. If not, there is no settlement. In my experience, mediators are reluctant to do a mediator's proposal unless there is a real chance the parties will accept it. These are normally very reasonable proposals which are irresistible in most cases. I cannot remember a case in which a mediator's proposal was not accepted by the parties, but then this approach is not one that occurs with great frequency. Used properly by a mediator it can be an effective tool for resolution.

There are other approaches as a mediation is subject to the creativity of the mediator and the parties. But as long as the parties "keep talking" there is hope for a settlement. After all, as noted in previous columns, history and statistics demonstrate that the parties are likely to do better by settlement than concluding the matter by arbitration or trial. .

Chapter 28
"Settlement" Ain't A Bad Word!

My experience with clients today is that they want (and perhaps even expect) their case to settle. They want to avoid the stress and delay of a trial, and also the risk of an unacceptable result (to them). So the first question after "What is my case worth?" is: "Can you settle my case."

So educating the client about process and prospects of a resolution short of trial should and usually begins at the first client meeting. And its discussion early on is important to successfully settling clients' cases because obviously they hold the authority to settle. So it is important to have a dialogue with clients about the negotiating process and begin educating clients about how this all works and what their expectations should be for a settlement instead of a trial.

Here are some thoughts on how to educate and prepare clients on settling their cases:

- Prepare for the Process: You need to prepare clients for the negotiating process by first educating your client to have the right attitude towards settlement. This means explaining the various alternatives that are available, and when they might be an advisable part of the effort to settle the case. To help accomplish this, I explain the difference between direct negotiations, a court supervised settlement conference or mediation, and a mediation through a private dispute resource.

- The Timing: I also inform the client about the level of preparation needed to posture the case to get the other side interested in negotiating. And explain that this might be accomplished through a "demand letter" or a simple conversation with opposing counsel at the "right" time. Or it might be addressed at a Case Management Conference. No matter how it happens, the client needs to know it does not happen overnight and a good bit of work needs to be done before negotiations can begin.
- "Settlement" Ain't a Bad Word : Hence the title of this commentary. Showing interest in settling is not a manifestation that you don't believe in your client's case. Instead it can show confidence in the facts and the applicable law, and illustrate your experience and wisdom in handling the matter. Also, by reaching out to the opposition, you can begin the process of educating the client.
- Understand Confidentiality and What that Means: I also make sure the client understands that what takes place during negotiations is confidential. I stress that anything said during negotiations, whether direct or through mediation, cannot be brought up in court during trial if settlement efforts are not successful. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.
- Get Down to Business: Settlement is where clients learns the business side in resolving disputes. It is important to talk about numbers at a stage where they become important – usually when costs begin to significantly increase and start to reduce the "net" to the client and counsel. So it is important to recognize

when the cost going forward significantly increases and advise clients accordingly.

- It's the Client's Decision: I stress that it is the client's decision whether to settle, and I make sure the client has all necessary information to make an informed decision about whether or not to settle.
- A Chance for an Objective View of the Case: I explain that an advantage of mediation is that it provides a chance for us to get an objective view of the case. A mediator will often comment on the issues and give his or her views on each side's pros and cons in settling versus further litigation. This provides an objective, third-party's view of the matter, which is valuable.
- Using the Proper Words: The proper words should be used in getting the client ready for mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or war and combat slogans have no place in getting a client ready for negotiations and setting the right tone for the negotiation process. This is not war; this is negotiation and compromise, so words appropriate to that process should be used. I prefer words like, "educating the other side about our case," "working with the mediator [and the other side] to resolve the dispute," "resolution," "settlement," and "compromise." I also stress that we are not giving in, and these words don't mean that. I remind the client that it takes all parties having the same attitude to get a settlement that works for all.
- Settlement is Voluntary; There is No Decision Unless All Agree: Some clients think a mediation is an arbitration and the neutral will decide the case. I stress that no one is forcing the parties to settle. A deal will

be done only if all agree to the terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort is encouraged to illustrate what a settlement means for the client's case, and how the client can benefit from this process.

- Does the Client Need a "Number?" I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement. There are three ways to approach this:
    - Don't give the client a number at all, but tell the client that a "demand" should be made first (if you are the plaintiff), and you and the client need to see how the defense responds and what the mediator says before you think numbers; o Give the client a reasonable but fairly wide range for settlement, suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to a higher number; o Just set a rock bottom "walk away" number and work from there.

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement:

- The costs of further proceeding;
- The certainty of a settlement versus the uncertainty of a trial or arbitration;

- The emotional drain on the client and family or business partners;
- Adverse publicity that might result;
- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;
- The present value of money in hand versus the chance of a greater gain at trial [which after affixing value to the two, can vary greatly, and in fact, lower a client's unrealistic expectations];
- The positive impact of having money now for life planning rather than the long wait through trial and appeal.

I try to explain the major points in favor of a settlement, and that at its core settlement is a business approach to resolving disputes. The clients should be ready to engage in this process and understand that this can be a productive, positive way for resolution, and that the client has control over the outcome! Obviously that is not true if the case is left to a jury's discretion.

Chapter 29
Managing Emotions at Mediation

Any negotiation of a disputed matter is going to bring to the surface the emotions of its participants, some welcome and some not. As I have often said (and written), I prepare my client for resolution from the day we first meet to discuss his/her case. I also try to assess the emotional state of the client at that time, and get a read on his/her "emotional profile". Does the client wear a heart on his/her sleeve?[25] Is my client likely to repress emotions? How is my client expected to deal with those emotions in the intense setting of a mediation? Is my client likely to repress emotions and keep them under control, or will they drive the client into an unwanted emotional state which is likely to interfere with the negotiation process? Is my client likely to maintain control? Does my client exhibit understanding, or defensiveness or hostility? Is my client likely to get angry (anger is the most powerful emotion)? What is the emotional package I am taking on as my client's counselor and adviser in the

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[25] This phrase may derive from the custom at middle ages jousting matches. Knights are said to have worn the colours of the lady they were supporting, in cloths or ribbons tied to their arms. The term doesn't date from that period though and is first recorded in Shakespeare's Othello, 1604. In the play, the treacherous Iago's plan was to feign openness and vulnerability in order to appear faithful:
Iago:
It is sure as you are Roderigo,
Were I the Moor, I would not be Iago: In following him, I follow but myself; Heaven is my judge, not I for love and duty, But seeming so, for my peculiar end:
For when my outward action doth demonstrate
The native act and figure of my heart
In compliment extern, 'tis not long after
But I will wear my heart upon my sleeve For daws to peck at: I am not what I am. http://www.phrases.org.uk/meanings/403000.html.

negotiation/mediation process?

This is important of course, because I am taking on the problems of a human being who has an emotional profile which I must understand in order to communicate with my client and be an effective adviser. I also need to learn how my client's emotions will affect his/her ability to participate in the settlement process, which in most cases will be at mediation.

Negotiating a disputed matter understandably brings out emotional responses of clients. And the mediation process where the client confronts a wrongdoer or the insurance company of that wrongdoer is a forum and format which will be normally a strange one for a client. So it can be unpredictable how the client's emotions will respond and impact this process. The client – the victim – is going to respond emotionally to the process of meeting like this and entering into the focused dispute resolution effort.

From a simplistic, but practical standpoint, primary emotions that can be exhibited in this scenario are anger, sadness and fear. Each of these can combine to produce various reactions: hostility, indecision, lack of trust (in the other side and possibly in the mediator), passive aggressive behavior, and other responses that can interfere with the client's ability to be a willing and active participant in the decision making process. It is critical that I understand how this is going to play out so that I can be prepared to deal with my client, maintain control over our participation together, and also assist the mediator in gaining my client's confidence.

This requires me to be mindful of how my client is likely to respond and also to monitor his/her emotions as the day progresses.

I may have decided that my client needs more emotional support than I can provide. If of, I may suggest that a family member or close friend attend with my client to provide that additional support. I may also suggest that an important person be on telephone standby to talk to my client as the day progresses. This could be a financial adviser; it could be a counselor, or perhaps a confidant whom my client trusts. The client may need confidence builders, or a support network to get him/her through the day.

As time goes by and I deal with my client I get a better understanding of his/her emotional needs and what emotions might be exhibited in mediation. My client may be angered at offers that are viewed as "lowball" and the failure to respect the injuries and losses that my client has suffered as a victim of wrongdoing. The failure to see numbers that approximate my client's belief as to the value of the case is often an issue. This is likely to evoke an angry response by my client. I have to prepare my client for the likelihood that the initial offers may be much lower than desired and may result in my client's angry response and loss of confidence in the process. I have to explain that it often takes time to get the parties into the "field of play." Our adversary may be testing the waters to see if we are going to collapse in the negotiations or are over eager to settle.

This may result in the client being impatient with the process. Here I need to encourage my client to continue to work towards an acceptable resolution, which may take a full day, or even more than one session.

As we progress through the negotiation process it is critical to take a client's temperature and recognize that the circumstances are going to trigger human responses that are part of the emotional

profile of a client. It is our job to gain an understanding of them, be prepared to deal with them, and help the client maintain control over these emotions so that an intelligent and thoughtful decision can be made about resolution.

Chapter 30
Being a Better Advocate in Mediation: A Case Study

We often talk about various aspects of mediation, but how often do we consider our own preparation as advocates at mediation? Of course, preparation is a key, and knowing not only what to prepare but how to prepare it. Is bigger, longer and heftier better for our mediation statement than a more succinct, less "bulky" presentation? Is our video better shorter rather than longer? How are we going to present ourselves at the mediation – are we going to be aggressive in our approach, or should we sit back and see how it plays out, contributing where we can to keep the negotiations on course?

Quite recently, I was involved in a mediation of a complex construction loss case involving insurance issues. The underlying case was "settled" by a stipulated judgment against a contractor defendant who built 16 homes which had defective windows that leaked and other construction defects. The defects were the fault of the subcontractor who performed the actual construction. The contractor assigned its claims against a primary and excess carrier to our clients, who then proceeded, and settled the case against the contractor's primary carrier for the limits of its coverage in one of several years of coverage, thus potentially triggering the excess carrier's coverage. The primary carrier's case was settled after it went to the state's Supreme Court and we obtained a very favorable opinion establishing coverage.

We then went against the excess carrier who raised many

defenses and put up a bitter fight. I took video depositions of key witnesses and caught them in fabrications that were astonishingly portrayed on the videos. In addition, other witnesses contradicted the excess carrier's claims personnel. We also established before the cameras that the claims representatives did not follow the excess claims guidelines of the company in investigating – or better said, not investigating – the loss.

Mediation was held before a magistrate judge. He ordered the case portrayed in no more than 5 double spaced pages (contrary to our usual 20-35 page presentation). He requested exhibits be kept to a minimum. He said nothing about videos. We submitted our "brief" and also prepared a 22-minute video of excerpts from the video depositions for what I call a "res ipsa" presentation, i.e. "the thing speaks for itself."

The judge was skeptical about the video, but entered the room and said we could play it. We provided a written timeline to all present, oriented my colleagues, our opposition and the judge to what was on the video, and then we played it. The judge took notes. Defense counsel and his client representative fixed on what was playing. Their only out was to beat us on the legal, i.e. coverage issues. They had already filed one motion for summary judgment, which was pending and threatened another. We considered the legal arguments to be threatening.

However, the "brief", a few exhibits and the videos carried the day, and we settled after about 5 hours of negotiations. The judge used our materials effectively. The short written presentation worked fine supplemented by the video.

My colleague in Indiana, David F. McNamar for McNamar

and Associates, was a great advocate for his clients and is the one responsible for the favorable Indiana Supreme Court opinion. My colleague, Kaitlyn Johnson, did a great job on the brief with Mr. McNamar's guidance and also they edited the video down to the short presentation.

So, less is better in this case. Using the combination of an efficient "brief" and a video, and simply letting the witnesses tell the story of what happened was an effective opening in the case. The judge took it from there to get a deal done. We got value in the case; thus, it was a good result for our clients.

Chapter 31
Smart Dispute Resolution

Is there such a thing as "smart" dispute resolution? You betcha there is! And here is why.

What is the goal in representing a client in a dispute: resolution of course, but the path towards the agreed upon end result is the issue. How do we – or did we – get there, and when we did was the end result acceptable? Was value received in the sense that the cost of proceeding down the path and the ultimate result done efficiently and effectively?

The key to "smart" dispute resolution, in my view, is proper litigation management. I define it as: **The effective planning, organization, delegation and supervision of litigated matters so as to gain the advantage crucial to achieving an acceptable and timely resolution of the dispute.**

That is, make a plan. As a sometimes expert witness in various aspects of civil litigation and insurance claims handling, I see cases run amuck with no real planning or oversight. It is reaction not action that takes place. There is no goal setting, no timeline, not thought given to how to obtain the critical information about the facts in the case. And often the law is not carefully researched to apply to the facts at hand.

So what constitutes "smart" dispute resolution? Good question, so now let's address the answer.

First, make that plan. Go over the case and get the facts down

and analyze what you know based on the legal rules. Force yourself to put everything available together in an outline and get a sense of what the case is about, what problems or issues present themselves, and what the client's needs are in representation in the dispute resolution process. Then communicate this to the client so the client is aware of the merits of the case and what needs to be done to get resolution.

Second, evaluate what needs to be done in the discovery process to get you to a point of being able to sense the end result if the case is tried. Here, my colleague, Michael Carborne, a San Francisco Mediator, comes to my rescue. He calls this "good discovery" or "that which is used for the intended purpose and that leads to a fair settlement." "Bad discovery is that which is used with the ulterior motive of wearing the other side down, hopefully forcing them to spend huge amounts of money or to capitulate to the settlement that the bad discoverer wants." ("Resolving It, Vol. 3, Issue No. 10, October 2012.)

I have described the process of well-timed discovery as progressing to a "plateau" at which point enough has been done to be able to a) evaluate the case, b) see what needs to be done, c) look at the costs of further proceeding, and d) evaluate the possible outcomes, so that a cost/benefit and risk/reward analysis can be done.

Chapter 32
The Perfect Mediation

After many years of participating in formal mediation sessions, and experienced "The Good, the Bad and the Ugly," – yes "ugly"[26], it occurs to me that for once I would like to participate in the (near) perfect mediation session. That desire is even more prominent on my "bucket list" after seeing abuses and reluctance of parties to participate in mediation in good faith. I am not usually a pessimist – I could not practice as a trial and appellate lawyer if I were. There has to be a "realistic" optimism about a client's case for us to be effective. But I have noticed these past few years – perhaps starting about the time the recession hit us in March 2009, if not before -- a change by which parties now approach suggestions to mediate and the participation in the process.

I am not alone. I talk to colleagues and mediators all the time. I have heard many comment on the fact that cases are harder to get to mediation than in past years, and, more important, the preparation is not there, or the "good faith" effort to try to resolve a case is not present. In a certain number of cases that are mediated, one or the other party lacks the ability to be part of the negotiation process or is simply going through the motions. I am not sure why. I hear complaints or see for myself this from both sides, plaintiffs

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[26] **"**The Good, the Bad and the Ugly" is a 1966 "spaghetti western" made released in Italy. ["Il buono, il brutto, il cattivo." *(original title).*] A bounty hunting scam joins two men in an uneasy alliance against a third in a race to find a fortune in gold buried in a remote cemetery. It starred Clint Eastwood, Eli Wallach, Lee Van Cleef.

and defendants.

In this day of high cost of litigation, counsel and their clients need to fully appreciate the positives of mediation at early stages or even mid-stages after the parties have seen enough to be able to measure the potential exposure, do a risk assessment, and come to grips with what the resolution value of a case is at the time the mediation takes place. I see unrealistic settlement positions, a failure to understand and participate in bargaining, a lack of preparation, and in some cases simply a complete lack of appreciation of the opportunities presented by the mediation process.

In my (near) perfect world here is what we might see (these points stress how lawyers and their clients should approach mediation):

1. There has to be a good faith interest in resolution. If there is not, politely decline. If the court directs the parties to mediate, then be honest if a party just wants a trial. But if you attend you must have a real interest in settlement.

2. The "check writer" and decision maker must be present. I insist that this be the case or I will not attend. I ask the mediator to confirm this. I fail to appreciate how mediation can be effective and there be good communication if this is not the case. And, the last thing I want to hear is that the key person, who was standing by the phone (!) left work at 5 p.m. eastern time, when I am in a mediation on the West Coast where it is only 2 p.m..

3. Lay out your case in full in a mediation brief that is exchanged. How can mediation be effective if one side conceals

its position from the other side? There can be no dialogue if this does not happen. Two page briefs from a party, or mediation statements I never see, allow me to just call off the mediation, and it is really galling to get them a day or two before the mediation.

4. The mediation statements are complete and submitted well in advance of the mediation. My rule is that I send the mediation briefs out to counsel and the mediator (email and/or hard copies) two weeks beforehand. Because I am usually representing a plaintiff, I need to be sure to get the mediation statement with my demand in time for the defendant(s) to evaluate my client's position. And it needs to be complete, a "mini" claims file with all supporting documentation. Last minute submissions of additional specials, and thousands of dollars of additional medical bills -- does not allow a defendant to review all the relevant information and seek authority so that settlement can be fully explored at the mediation. That won't happen if the statement is submitted 5 days before the mediation is to take place. Late and incomplete submissions understandably puts a defendant in a bind in its efforts to settle, and only delays the process. Also, if you email the mediation statement to opposing counsel, then it is easy to forward them on to a client or insurance carrier.

5. Prepare you client to make decisions. On the plaintiff's side, spend a few hours going over the details of the case, the cost of going forward, and the dollars and cents involved if it progresses further or is tried. What is the likely outcome and how much will it cost. Use the statistics of what happens if the parties walk away;

what are the chances of a better result[27]. Look at the economics of going forward and consider the present or time value of money from the plaintiff's side. What is the value of having cash now versus the "hope" of more cash later?

6. Be an active participant in the process: Be professional, meet and greet the other side and make sure all attending have met you and your client and exchanged greetings.

There is no reason to be angry, hostile, or defensive. Just be a good participant in the negotiation process and see if you can get the job done – closure for you and your client.

[27] See my article, "Research Confirms Negotiated Results Superior to Going to Trial," San Francisco Attorney (San
Francisco Bar Association, Spring 2009), which discusses the study by Dr. Randal Kaiser of Decision Set in Palo Alto, California, and which compares from both the plaintiff and defense side the statistical chances of doing better that what a settlement presents.

ETHICS AND DIPLOMACY FOR THE TRIAL ATTORNEY IN THE THEATER OF THE REAL[1]

by: Guy O. Kornblum, *Certified in Civil Trial Advocacy*, National Board of Trial Advocacy; Life Member, Multi-Million Dollar Advocates Forum; Charter Fellow. Litigation Counsel of America Trial Lawyers Honorary

Introduction

Trial attorneys are obliged to be *ethical* as that is our professional responsibility. We are obliged to be *diplomatic* because it is the proper conduct to show respect for the forum in which we are privileged to participate, and to promote efficiency and orderliness in the portrayal of contested matters.

There is nothing more satisfying than watching a skilled trial attorney work, laying foundations, examining with precision, maintaining control of the forum, carefully laying out a case consistent with the representations in opening statement, earning the respect of the court and jury, and arguing the case persuasively for a positive result for the client. It is particularly satisfying if the attorney achieving all of this is you!

Trial work is a grand game of "Mother, May I?"[2] It is done in what I refer to as *The Theater of the Real,* in which a real-world story is replayed for the jury. Done properly, the skilled trial attorney works under the oversight of the trial judge as conductor. A skilled trial lawyer knows how to use a courtroom presence so that the evidence, both testimonial and documentary, is developed in a logical, understandable fashion. This article is designed to outline the ethical obligations we have as trial attorneys, but also to supplement that with approaches which further

1. The views expressed in this article are mine. In some cases, my suggested approach may be more than the ethics rules require. In those cases, I am giving my opinion as to my recommended "best practices."

2. This is a child's game in which the players ask for permission to move forward to a designated "mother".

the principles of trial diplomacy. These principles flow from both the ethical rules but also our notions of propriety which also affect how we conduct ourselves as trial attorneys.[3]

Advertising

Despite the rules permitting advertising, most trial attorneys get their cases through either referrals or personal contact or reputation. Still, many of us see the need to advertise to "get the word out" about our services and availability. Most firms have websites for reference and verification of their firm's services. And, of course, many try to get us much visibility of their websites on social media. Whatever the goals, there are professional rules that apply to the process of publicizing a law practice.

The first rule is that whatever we say must be truthful. You must not overstate; you must not mislead or misstate. That is, if we are certified as Civil Trial Lawyer by the National Board of Trial Advocacy[4], we can state that in our advertisements or put that on our letterhead and business cards. However*, can* we state that it means that we have superior credentials, are exceptionally qualified, or have unquestioned credibility? No! That is not what certification means. We can explain to a client that we have made an extensive application, have provided judges and attorneys as references who have vouched for us, and have had an inquiry made about us by an independent board which has found us to meet the requirements for certification. However, any representations beyond that would be misleading. We certainly cannot say that certification guarantees results, or that judges or opposing counsel are going to give our presentations any more credibility or

3. The ethical rules are taken from the ABA Model Rules of Professional Conduct. However, I have also drawn on the provisions of the California Rules of Professional Conduct, and various State rules which I have identified. I have also used the Federal Rules of Civil Procedure, California's Code of Civil Procedure and some local rules from both Federal District and state trial courts for both reference and assistance in developing these views of how a trial attorney should be guided in the practice.

4. This is the certifying entity for Board qualified lawyers. https://www.nbtalawyers.org/

consideration simply because we are certified.

What about advertising our successes? Can we list our victories without talking about our defeats or the cases we have settled for less than we originally anticipated? Is it appropriate to provide a caveat before this list that not every case is won but we have had these results in the cases listed? In my view listing gross or individual results is "misleading". They do not tell the whole story. Was this the amount of a final judgment after post-trial motions and appeal? Was it collected or is it still just "on the books" and uncollected? The rules still seem in flux as to the limitations that apply.[5]

However, without full information, listing individual results can be misleading since this does not supply details sufficient for a person reading or seeing this information to make a judgment about the representation as a measure of competence. To reveal enough information would likely tread on the attorney-client privilege. It also should be inappropriate to portray them as "victories" or "great results" or characterize them in any way. That too, can be misleading. For example, a serious injury case may be settled for several million dollars, but the value may have been higher for any one of several reasons. Also, the "net" to the client is reduced by reimbursement to the lawyer of the costs advanced in contingency cases *and fees* (a percentage of the recovery), so the "gross" settlement number does not represent what the client received. So, advertising the gross settlement number can be misleading since it does not represent what the client received.[6]

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5. "The Truth About Trial Lawyer Ads," U.S. Chamber of Commerce, Institute for Legal Reform, March 30, 2022. https://instituteforlegalreform.com/blog/the-truth-about-trial-lawyer-ads/. See also ,C. Dreyer, "California Attorney Advertising Rules: What Lawyers Should Know," https://rankings.io/blog/california-attorney-advertising-rules.
6. J. McMorrow, "Ethical Attorney Advertising: Rules for Third-Party Websites, California Lawyers Association, https://calawyers.org/new-lawyers/ethical-attorney-advertising-rules-for-third-party-websites/ (focusing on a lawyer's listing on websites such as Avvo, Yelp, or Facebook). May 22, 2020. See also, F. Wilks and S. Hyams, "Ethically Speaking: A Primer on the Ethics of Legal Advertising," Orange County Bar Association, June 2018.

So, my view is the following:

- Individual case results should not be permitted since this can be misleading without a full understanding of the details of the case and the history of negotiation. To allow more would tread on the confidentiality of the case.
- Client testimonials should be limited to "real clients" and not actors. The client should only be permitted to confirm that they were a client and were satisfied (or perhaps modestly laudatory) with their results and relationship with the firm.
- Gross results of settlements or verdicts should not be permitted. A gross amount means nothing and does not relate to the competence of the firm or the quality of the legal services it provides. It also may not relate to the amount recovered, and more critical, for those checking a firm's credentials, what the client receives. It is a totally irrelevant figure.

While this approach might seem too restrictive, freewheeling lawyer advertising is not permitted since there are limits on how a lawyer may "advertise."[7]

We need to get back to "truth in advertising". What I suggest is a good start to

https://www.ocbar.org/All-News/News-View/ArticleId/2367/June-2018-Ethically-Speaking-A-Primer-on-the-Ethics-of-Legal-Advertising.

7. The "puffing privilege" as it applies to marketing exaggerated statements that reasonable buyers would not rely on, generally does *not* apply to lawyer advertising in California in the same way it does to other types of consumer products. Stricter ethical standards apply to lawyers: California's Rules of Professional Conduct, particularly Rule 7.1, prevent lawyers from making false or misleading communications about their services. This includes statements likely to mislead a reasonable person about a lawyer's services. Indeed, the public expects lawyers to provide truthful and accurate information about legal matters. Lawyers in California must adhere to strict ethical rules that prohibit false or misleading statements in their advertisements. The focus is on providing the public with truthful and accurate information about legal services.

reaching that goals of both truth and respectability. It is time to eliminate the ads allowing lawyers to "blow smoke" from the top of truck-trailers.[8]

Interviewing and Confirming Representation of the Client

The initial interview of the client means that there is a degree of interest in representation between the client and the attorney. The attorney has decisions to make: Do I try to confirm representation at that time? Do I want some time to research and investigate the prospective client's case before agreeing to represent this client? What are my obligations during this period? Must I protect the client's interests (for example, if a statute is about to run)? If so, how do I do that, and what is my obligation if I agree to advise or file a complaint on behalf of the client even though I am not certain I am going to take the case? How far can I go investigating the case, and what are my assurances the client is not going to go elsewhere to shop the case to obtain a lower fee?

These are the questions posed which need to be addressed.

First, unless you tell the client you are not interested and clearly reject the case (followed by a confirming letter), there can be obligations of representation even though no formal written Representation Agreement has been agreed to by the client and counsel. For example, if you obtain authorization for release of police reports or medical records and agree to investigate the case, you have the same obligations of representation as if you formally signed up the client. That is, at that point, you must assume the role of counsel as if you had specifically agreed to represent the client, provided the client agrees to you conducting your investigation, and has not engaged

8. Examples of misleading statements: "We guarantee victory" or "We win 100% of our cases" violate Rule 7.1. Even accurate statements about past successes can be misleading if they suggest guaranteed outcomes without considering specific case facts.

other counsel.[9] So understand what your obligations are under these circumstances. You should protect the client's interests if you agree to inquire into the matter further.

The best and safest practice is to treat this "potential" matter as a client matter but to advise the "potential client" in writing that you will investigate the matter but have not decided about representation. It needs to be clear that your decision to investigate the matter does not mean that you will represent the "potential client", and that you have not decided as to representation. During this period, you should protect the client's interests including as to any statute of limitations which may run or other time sensitive issue. Once a decision is made, if it is to decline the matter, you should clearly do so in writing and advise of any time goals that are involved. Otherwise, you should enter into a written fee agreement with the now client.

Bringing the Lawsuit

Once the attorney-client relationship has been created, an attorney must act with the utmost competence and diligence in bringing the lawsuit. In doing so, an attorney must ensure that the lawsuit filed is not frivolous, *i.e.*, the suit has support under existing law or can be supported by an argument for an extension, modification, or reversal of existing law.[10] Failure to do so subjects the attorney to discipline and may even lead to sanctions under FRCP 11 or the equivalent state rule.

Disclosures in Discovery

As with all other phases of litigation, discovery is rife with ethical issues. One principal issue deals with what information, if any, should or must be disclosed to the opposing side in a dispute. In this regard, several broad ethical standards apply. First, an attorney has an explicit

9. Before going forward, you should confirm that the client has not engaged another attorney to represent the client in the matter as to which you have been consulted.

10. Cal. Rules of Prof. Conduct R. 3-200; ABA Model Rules of Prof Conduct R. 3.1.

duty not to suppress any evidence he or she has a legal obligation to produce. Second, the attorney must make reasonable efforts to comply with a proper discovery request made by the opposing party.[11] Taken together, these two principles stand for the proposition that when an attorney receives a valid discovery request obliging him to produce evidence consistent with that request, he must do so. Failure to take such action subjects the attorney to discipline.

In general, a lawyer is under no obligation to produce evidence harmful to a client *absent* the appropriate discovery request or subpoena. For instance, if the request for documents or other information is broadly worded and otherwise lacks specificity, the legal obligation to produce the information may not be triggered, and the attorney would then be ethically obligated to *withhold* damaging information from the opposing side. *In Chayce Concrete, LLC v. Path Constr. Sw., LLC*, Chayce's request for documents was broad, but defendant Path delivered 7,000 documents while objecting to some requests. Three months later, Chayce raised issue to the objection. The court decided in part that the documents which may or may not have been damaging to Path were not required to be turned over because the initial request was overbroad/vague.[12]

Nonetheless, you should consider erring on the side of disclosure rather than being exposed to charges of unethically withholding information reasonably requested in discovery.

Taking and Defending Deposition

The deposition is a key tool in the trial attorney's kit for developing evidence, assessing

11. Model Rules of Prof. Conduct R. 3.4. The rules governing disclosure in discovery differ in Federal Court, where pretrial disclosure is often mandatory (*i.e.,* FRCP 26(a)), as well as in criminal cases, where prosecuting attorneys must disclose any and all exculpatory evidence to defense counsel, and defense counsel must disclose any and all instrumentalities of a crime in his or her possession to the prosecution. See generally, *Brady* v. *Maryland* (1963) 373 U.S. 83 and *People* v. *Meredith* (1981) 29 Cal.3d 682.

12. *Chayce Concrete, LLC v. Path Constr. Sw., LLC*, 559 P.3d 646, 650 (Ariz. Ct. App. 2024).

witness impression, and evaluating the case. Unfortunately, depositions have, in many instances, become mini battlefields where prolonged proceedings often distract from, rather than advance, the cause of bringing a case to resolution.

Depositions have rules. Too often they are taken in a too informal environment which invites a casual atmosphere and approach that is much too relaxed. In my view, they should proceed as if the testimony was being taken in open court. That is, in trial, an attorney is not permitted to a) interrupt the examination with objections designed to help the witness testify, b) make speeches at will, c) speak directly to opposing counsel in an effort to intimidate or distract the examining attorney from the line of questioning being pursued, and d) have conferences at will with a client or witness to discuss the response to a questions. Rather, there are constraints which are sometimes ignored by the attorney defending the deposition.

The following are the rules which should be followed by counsel in depositions. It is my experience that counsel defending a deposition often view their role as primarily a coach rather than one protecting the legal interests of a client. This means that they will use these tactics: (1) there is so much dialogue and colloquy that it is difficult to put a question and answer together, (2) objections are used unnecessarily and primarily to disrupt the flow of the questions, (3) objections and monologues are used to put words in a witness' mouth or to suggest answers, (4) objections are also used to suggest to a witness that the question should not be answered because the witness does not understand it.

If faced with these or similar tactics, examining counsel should make effort to work through any disruptive tactics to avoid having to continue the deposition, request assistance from the court, or have a magistrate or commissioner attend so that any issues can be handled right then and there. However, it is also examining counsel's duty to prepare a case competently, so if faced

with disruptive tactics that prevent counsel from doing so, then a lawyer has to choice but to deal with the problem.

One solution is for the deposition to be temporarily adjourned, and a telephone call made to the court, magistrate or commissioner to work out the issue or objectionable conduct. Several cases, including the ones cited below, have suggested this. This is particularly appropriate if the deposition was difficult in setting up because of travel, a personal appearance, or there were scheduling difficulties.[13]

A practice that is particularly bothersome is instructing a witness not to answer a question when the issue is other than the disclosure of a privilege, or of interrupting the deposition with witness conferences with his or her counsel. That is not permitted, as is discussed below.

Depositions: Case Law

Fortunately, there has been attention given to this topic by the courts in which abusive and unethical conduct has been brought to the attention of judges. One early case on this topic is *Hall* v. *Clifton Precision*[14], which addressed these areas. In *Hall*, plaintiff's counsel interrupted the deposition of his client to privately confer with the client and to review a document before the client answered the deposing attorney's questions. The deposition was thereafter adjourned and the parties went to the court to discuss the issue.[15] After hearing arguments and considering briefs from both sides, the court ruled that the plaintiff attorney's actions were not supported by statutory or case law. The court noted that "[a] deposition is meant to be a question-and-answer conversation between the deposing attorney and the witness. There is no proper need for the

13. Sanctions should be requested if court assistance is required in cases of discovery abuse.
14. *Hall* v. *Clifton Precision*, 150 F.R.D. 525 (E.D. Pa., 1993).
15. *Id.* at 526.

witness's own attorney to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers."[16]

Now, courts have issued local rules for deposition conduct.[17]

Depositions: The Rules that Have Emerged

Here are the rules for depositions that should be followed *as I see it*:

> **Rule 1**. Objections to evidence (i.e., questions) shall be stated concisely and in a non-argumentative and non-suggestive (i.e., without suggesting what the answer should be) manner.[18] That is, objections may not be used to *coach* a witness or suggest an answer to a witness.[19]
>
> **Rule 2**. A party may instruct a deponent not to answer only when necessary (i) to **preserve a privilege**, (ii) to **enforce a limitation** on evidence directed by the court, or (iii) to **present a motion** under paragraph (3) of Rule 30(d) of the Federal Rules of Civil Procedure should the examination be conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party.
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> **Rule 3**. Once the deposition begins, there can be no coaching of the witness through off-the-record conferencing during breaks or otherwise. It would be inappropriate for one counsel to meet with an independent witness while the deposition is proceeding.[20]

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16. *Id.* at 528.
17. *See Mitnor Corp. v. Club Condos.*, 339 F.R.D. 312, 320 (N.D. Fla. 2021); *See also Belenzon v. Paws Up Ranch*, LLC, No. CV 23-69-M-DWM, 2023 U.S. Dist. LEXIS 207939, at *4 (D. Mont. Nov. 20, 2023)
18. Fed. R. Civ. Proc. 30(d)(1).
19. See *Hall* v. *Clifton Precision*, *supra* note 14, at 530 (there can be no on-the-record witness coaching through suggestive objections).
20. To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask

Rule 4. If there are suspected attempts to coach the witness during breaks, inquiry by counsel conducting the deposition regarding what the witness was told by the attorney is not privileged.[21]

Rule 5. It is not appropriate for a witness to confer with his or her counsel about documents shown to the witness and about which inquiry is made at the deposition. If there are questions about the document from the witness, they should be directed to the questioning attorney, not to counsel representing the witness.[22]

Rule 6. A witness is entitled to a private conference with his or her attorney only if there is a question about a privilege and whether such should be asserted.[23]

Rule 7. It is not a proper objection for counsel to say: "I don't understand the question; therefore, the witness does not understand the question" [and should not answer or there be an instruction not to answer].[24] As a corollary to this rule, it is not proper for counsel for the witness to interrupt the questioning by asking after the question is asked, and before

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his or her attorney for the answer, and then parrot the attorney's response. . . . [T]he witness can ask the deposing attorney to clarify or further explain the question. *Hall* v. *Clifton Precision*; *supra*, 150 F.R.D. at 528-529.

These rules also apply during recesses. Once the deposition has begun, the preparation period is over and the deposing attorney is entitled to pursue the chosen line of inquiry without interjection counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. *Id*.

21. *Id.* at 529, n.7.
22. *Id*.
23. *Id.*
24. *Id.*

an answer is given: "Do you understand the question?" as if to suggest to the witness that he or she should say, "No" because there is some hidden flaw in the question or the witness needs to be coached with an answer. Questions regarding clarification should be generated by the witness not counsel, and only when that witness is the one with question because it is not understood by the witness.[25]

Motions and Briefs

An attorney owes a duty of candor to the court.[26] This duty exists at the time the complaint is initially filed and continues throughout the time motions and briefs are written and filed with the court. The attorney must not mislead the judge or judicial officer by making a false statement of fact or law, intentionally misquoting the language of a book, statute or decision, or citing authority that the attorney knows is invalid.[27]

The duty, in short, requires attorneys to be candid with the court about the law that is

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25. That is, *the witness* has a question *about the question*!

28. Cal. Rule Prof. Resp., Rule 3.3 (Candor Toward The Tribunal) is prohibits knowingly making a false statement of fact or law to a tribunal It prohibits *failure to correct* a false statement of material fact or law the lawyer previously made to the tribunal—and defines "tribunal" very broadly: a court; an arbitrator; an administrative law judge; an administrative body acting in an adjudicative capacity; a special master or other person to whom a court refers a matter, when the decision or recommendation of the person would bind the parties if the court approved it. The duty of candor during a settlement conference or mediation would fall within the scope of another rule (rule 4.1)—the prohibition against knowing false material statements to a third party when representing a client.

The rule mandates that if a lawyer, the lawyer's client, or a witness the lawyer called has offered material evidence that the lawyer comes to know is false, the lawyer "shall take *reasonable remedial measures*, including, if necessary, *disclosure to the tribunal*." The only exception: if the information the lawyer has learned is client confidential information protected by Business and Professions Code section 6068, subsection (e)(1)—duty to hold client confidences inviolate at every peril to himself or herself—and Rule1.6.

This obligation to take "reasonable remedial measures" lasts until the conclusion of the proceeding, which means until a final judgment in the proceeding has been affirmed on appeal or the time for review has passed, with the *caveat* that a prosecutor may have obligations that go beyond the scope of this rule, referring them to Rule 3.8(f) and (g)—special duties of prosecutors.

27. Today this would apply to utilizing the results of computer-based research or artificial intelligence sources without verifying the information obtained.

applicable to the case, even if the relevant law is *adverse* to the client's position and even if the opposing counsel has not cited it to support his or her own case. Although this requirement may seem at odds with attorney's duty of zealous representation, it is not, as the attorney need not accept the adverse law and is free to argue that it does not apply or the current cases is excepted from its application (provided there is reasonable support for the argument, and it is not sophistry).

Trying the Case

a. Statements and Representations to the Court

Much like the duty attached to the writing and filing of motions and briefs, an attorney must be candid in making representations to the court. Similarly, an attorney must refrain from making false statements to the court and must correct any previously made false statements. A statement or representation will be considered false if the attorney knows it to be false or where the attorney lacks a reasonable basis for his or her assertion.[28]

b. Stipulated Matters

Once a stipulation is reached, counsel and the client are bound by it. No witnesses are permitted to be examined regarding a fact that is contrary to the stipulation. Unless a party seeks relief from the stipulation for good cause, that stipulation is binding on the parties and their counsel and no argument can be made to the contrary.

c. Voir Dire

In federal court, the court will conduct most of the *voir dire*. Counsel may submit questions in writing, or the court may allow very limited examination by counsel. That normally occurs if there is a challenge for cause, and such may occur out of the presence of the other jurors.

28. Model Rules of Prof. Conduct R. 3.3.

In California, the Code of Civil Procedure sets for the limitations on counsel for *voir dire*:

> To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.
>
> The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed.
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> The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel.
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> In civil cases, the court may, upon stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a

judge's presence.[29]

d. Opening Statement

The opening statement is the time when the attorney presents the theme and theory of the case as it will develop through admissible evidence. This is when the case story is presented to the jury. The basic rule is that counsel should not argue the case, nor should he or she state facts without a good faith belief that they will be proved through admissible evidence.[30]

Accordingly, an attorney should neither refer to material that will not be supported by the admissible evidence nor make arguments as to what the evidence all means. Further, attorneys must not state personal opinions about the case during the opening statement.[31]

Here are the rules that generally apply to opening statements:

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29. Cal. Code Civ. Proc. ' 222.5. Cal. Rules of Court 228 provides:

> This rule applies to all civil jury trials. To select a fair and impartial jury, the trial judge shall examine the prospective jurors orally, or by written questionnaire, or by both methods. The Juror Questionnaire for Civil Cases (Judicial Council form MC-001) may be used. Upon completion of the initial examination, the trial judge shall permit counsel for each party who so requests to submit additional questions that the judge shall put to the jurors. Upon request of counsel, the trial judge shall permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of the additional questions or supplemental examination. shall be within reasonable limits prescribed by the trial judge in the judge=s sound discretion. The court may, upon stipulation by counsel for all parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

30. Model Rules Prof. Conduct R. 3.4(e).

31. Cal. Rules of Court 228 provides:

> This rule applies to all civil jury trials. To select a fair and impartial jury, the trial judge shall examine the prospective jurors orally, or by written questionnaire, or by both methods. The Juror Questionnaire for Civil Cases (Judicial Council form MC-001) may be used. Upon completion of the initial examination, the trial judge shall permit counsel for each party who so requests to submit additional questions that the judge shall put to the jurors. Upon request of counsel, the trial judge shall permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of the additional questions or supplemental examination shall be within reasonable limits prescribed by the trial judge in the judge=s sound discretion. The court may, upon stipulation by counsel for all parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

In civil cases, opening statements are limited to outlining the facts that will be presented as evidence and must avoid being argumentative or discussing the applicable law. Lawyers are restricted to stating what evidence they intend to present, not how the jury should interpret it.

In essence, the opening statement serves as a roadmap for the jury, providing them with a preview of the evidence to come without delving into interpretation or persuasion. Its purpose is to orient the jurors within the framework of expected testimony and exhibits, so they may better understand the sequence and context as the trial unfolds. The statement is to be delivered in a measured and objective tone, steering clear of advocacy and speculation, thereby maintaining the distinction between assertion and argument. So:

- Opening statements are for outlining facts, not for arguing about their significance or persuading the jury.
- Lawyers should not discuss the legal rules or principles that apply to the case.
- Attorneys cannot express their personal beliefs or opinions about the case.
- Evidence regarding a party's wealth or the existence of liability insurance is generally inadmissible and therefore prohibited in the opening statement.
- Discussions about prior settlement offers or negotiations are not permitted.
- The opening statement must be limited to evidence that the lawyer in good faith believes will be presented and admitted during the trial.

These limitations ensure that the opening statement serves its intended purpose: to provide a preview of the evidence and help the jury understand the structure of the case. By restricting

lawyers to outlining facts and prohibiting arguments, the courts aim to prevent the opening statement from becoming a tool for undue influence or persuasion before the evidence is presented.

e. Examining Witnesses.

In examining witnesses, an attorney should refrain from any line of questioning intended to embarrass or harass a witness if such has no bearing on the truthfulness of the testimony. Moreover, attorneys should be aware that a court will do whatever it can to protect a witness from undue harassment or embarrassment at the hands of the cross-examining attorney.[32]

The basic rules here are:

- Counsel should not argue with the witness.
- Sarcasm is not permitted.
- Questions should not be asked with misstate or mischaracterize the evidence or testimony of any witness, including the witness being examined.
- Counsel shall not approach the witness stand unless given permission by the court to do so, for example, when showing the witness an exhibit. That is, counsel cannot use physical intimidation in examining any witness.

In short, counsel's overall demeanor always should be professional, respectful and appropriate *even in the heat of an intense cross-examination*. Control over your approach is key, as it will lead to a more productive examination of even most hostile or adverse witnesses.

32. Cal. Evid. Code Section 765.

f. *Opposing Counsel*

Despite the contentiousness involved in litigation, attorneys must remain civil and dignified in their treatment of all participants, including opposing counsel. While an attorney is free to argue that opposing counsel's statements and arguments lack merit, the attorney must not become a schoolyard bully. Obviously, attorneys must not engage in or threaten physical force. They also should not engage in direct argument with one another. At all times, counsel should address the court and treat the forum with professionalism and respect. Arguments can become passionate and heated, but not personal.

Indeed, you should not address opposing counsel but only the court, the jury or witness. This focuses the process on the forum not the lawyers. Personal issues and asides are not part of the courtroom process.

g. Objections

No "speaking objections" are permitted. That is, the basis of the objection should be succinctly stated, such as "hearsay" or "lacks foundation," without including argument so that the court knows such has been made. The objection is preserved by making it succinctly. If argument is needed, there will be a "side bar" at which time counsel may explain, in *sotto voce*, the basis for the objection. All efforts should be made to prevent the jury from overhearing any argument or discussion on the matter.

If the court anticipates a lengthy argument over the objection, it may retire with counsel to chambers. And, it is best to have more arguments on more substantive objections reported by the court reporter for the record on appeal or for later use in the trial so a hearing out of the presence of the jury may be necessary.

g. Misconduct

While lawyers must remain diligent in their representation of their clients, they must refrain from acts of misconduct. With respect to trying a case, lawyers must not use chicanery or trickery as tools in their zealous representation of a client as such actions are grounds for discipline. For instance, misconduct is clear where a lawyer refers to inadmissible evidence, asserts his or her personal opinions or knowledge regarding the matter, or threatens a witness or opposing counsel with force or legal repercussions (such as threatening criminal prosecution).[33]

h. Argument

In closing argument, a lawyer's duty is to persuade the trier of fact by arguing his or her theory of the case as it appears through admitted evidence. It has been noted that a lawyer is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. The wide latitude given during argument, however, is not unlimited. Namely, the lawyer cannot reference any matter not supported by admissible evidence. For example, the lawyer must not argue facts that were ruled inadmissible or were not admitted, nor misstate testimony by a witness. Similarly, a lawyer may not use closing argument to expound upon his or her personal beliefs as to the veracity of a witness, the culpability of a defendant, or personal

33. If opposing counsel engages in misconduct, a prompt and timely objection must be made and an admonition that the jury disregard the statements of counsel should be made. *Love v. Wolf*, 226 Cal. App. 2d 378, 391 (1964). The court then must decide whether the conduct is not proper, and if so, should admonish the jury to disregard the statements. Another good case to read on the timeliness of objections to misconduct during trial is *Sabella v. Southern Pacific Co*., 70 Cal. 2d 311 (1969 (court upheld trial court's implied finding that misconduct was not prejudicial and where defense counsel did not request a jury admonition and objected to only one line of argument and only then after plaintiff's counsel followed the same line of argument unchallenged throughout the trial).

34. *People* v. *Hill*, 17 Cal.4th 800, 819 (1998) (internal citations omitted).

opinions regarding the justness of the cause.[34]

Sometimes, however, arguing over inappropriate statements serves to highlight the argument. Nonetheless, if the conduct is clearly below the line, an objection should be made and an admonition to the jury should be requested. While not always legally mandated in every situation, requesting an admonition to the jury when opposing counsel engages in misconduct is generally considered crucial and strategically important, especially if you intend to challenge the outcome of the trial based on that misconduct.[35]

A Final Comment

All in all, there are high expectations of a trial attorney. No doubt applying these high standards and adherence to the rules earn respect. Professionalism and sound and persuasive advocacy are also highly respected. Diplomacy, ethics and good manners equal effective advocacy. Adhering to the basic standards of professionalism improves the chance of prevailing for a client.[36] So, why would any lawyer not follow that standard?

34. See generally, Model Rule Prof. Conduct R. 3.4; see also, *Love v. Wolf*, supra n. 33, 226 Cal. App. 2d at 392.
35 See citations at ns. 33 and 34.
36. *See* the ABA's Model Rules of Professional Conduct, Rules 3.1 *et seq*. re the attorney's role as an advocate. See Cal. Rules of Prof. Conduct R. 5-100 *et seq*. re Advocacy and Representation.