Sealing the Deal in Mediation

Requiring Plaintiff to Appear in Person

By Robert D. Lang and Andrew D. Harms

There are many good reasons for a plaintiff to attend a mediation, from both the plaintiff's and the defendant's perspective.

"Great. Mediation between all parties is confirmed for 10:00 a.m. on the 20th… by the way, you're bringing plaintiff, right?" Defense counsel typically ask plaintiff's counsel this question when arranging a mediation, both in casualty matters and other insurance-related disputes. We make the physical appearance of plaintiff mandatory. In our experience, the plaintiff's attendance can make all the difference between a swift resolution and no resolution. Below we explain why, both from the plaintiff's and the defendant's perspectives.

The Defendant's Perspective

In the context of personal injury, a primary reason for a plaintiff to be present at mediation is so that all participants can assess how the plaintiff may come across as a witness at trial. How will a jury likely size up plaintiff? Does the plaintiff wear the back brace and carry a cane as claimed in the bill of particulars? Does the plaintiff communicate clearly, either directly or through a translator? Is he or she likeable and sympathetic? These questions naturally run through an attorney's mind when evaluating a case, and defense counsel often report these details in their reports. But the claims examiner or supervisor who controls the defendant's purse sees plaintiff for the first time at mediation. Only then does the supervisor or examiner contextualize defense counsel's reports and integrate his or her "in-person" judgments to the information already at hand. This is where, arguably, the informed case evaluation begins to occur.

Take the hypothetical where a pedestrian is struck in the left shoulder by falling debris at an adjacent construction site. She makes complaints of minor shoulder pain at the scene, but can move freely after 10 minutes and thereafter returns home. Later that evening, she drives to a hospital and complains of irritating shoulder pain, 5 out of 10 on a pain scale. X-Rays reveal no fractures; the plaintiff is given ibuprofen and is advised to see her doctor. She retains an attorney. Then, at her follow-up appointment seven days later she reports left shoulder, cervical spine, and lumbar spine pain. Three months later, she undergoes arthroscopic surgery for a partial rotator cuff tear. Shortly thereafter, her lumbar spine improves, but her cervical spine pain lingers. After additional conser-

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vative treatment, she ultimately undergoes a cervical spine discectomy and single-level fusion surgery. Thereafter she claims to be totally disabled.

During discovery, defense counsel sees that the plaintiff's MRI reports reveal long-standing degenerative disc disease; she also had consulted with a spinal surgeon about neck pain shortly before the date of loss.

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Furthermore, the plaintiff had a prior lawsuit for neck injuries, and had not worked for two years prior to the subject accident. The defendant's expert orthopedist and radiologist both opine that the neck injuries are preexisting and have no causal connection to this accident.

Defense counsel in this situation could easily evaluate the plaintiff's left shoulder injuries as authentic, but disregard the claims for cervical and spine injury. Plaintiff's counsel would take the position that both injuries were caused (or aggravated) by the incident and therefore value the case much higher than the defendants. One already sees the impasse arising between the parties about the claimed cervical spine injuries.

Then the plaintiff appears at the mediation; she is well dressed, her physical limitations from the fusion surgery appear genuine, and she comes across as honest and transparent about her preexisting injuries (which defense counsel already noted). She also has a good sense of humor, which could endear her to a jury. The examiner recognizes plaintiff's personal qualities and begins incorporating these factors into her evaluation. For example, she has to consider that if a jury believed the plaintiff, she could be faced with a verdict that exceeds her current valuation and potentially extends into the excess layer. Plaintiff's counsel is willing to settle the matter under the primary limits, but for more than the examiner had planned. The case does not settle at mediation, but after the examiner reports these details to her claims manager, defendant's initial evaluation of *just* a shoulder injury shifts to account for the possibility that a jury would believe plaintiff's claim for aggravation of the preexisting cervical spine injury. One week later, the case settles under the primary limits but for more than the examiner's initial authority.

The above described scenario sometimes happens. Defense counsel and the examiner's opportunity to observe the plaintiff in an informal setting made the difference because they came to appreciate the risk that would accompany a trial.

The Plaintiff's Perspective

Of course, make no mistake; the plaintiff's appearance at mediation cuts both ways. If plaintiff comes across poorly to defense counsel and an examiner during mediation, it may solidify their position that settlement should only be reached within a predesignated amount. Why, then, would a plaintiff's counsel bring their client to a mediation if it would hinder a resolution on more favorable terms? Well, it certainly *could* be a strategy worth employing, but with more and more supervisors and examiners expecting the plaintiff to attend mediation, the plaintiff's absence can actually become a greater obstacle to settlement because—what is he or she trying to hide? Or, why does the plaintiff appear not to care, when everyone else is making efforts to be there? For weaker cases in particular, the plaintiff's attendance allows for a plaintiff and their counsel to consider their expectations outside of a vacuum, and perhaps walk away with something better than a potential defense, or de minimus, verdict.

There are other motives for a plaintiff to attend mediation. For example, our adversaries frequently tell us their client has unreasonable expectations. We believe it when we hear it because it happens all too often. The well-situated mediator can be of great use here because *if* the mediator can establish him- or herself as a trusted authority, the mediator can effectively temper the plaintiff's expectations, thereby facilitating a reasonable resolution. One often-underutilized technique is the ability of the mediator to speak directly with a plaintiff and point out why the amount offered in settlement would be a good result for plaintiff. The fact that the mediator is often a former judge, and therefore referred to by both plaintiff's and defense counsel at the mediation as "judge," can provide additional strength to the recommendation made by the mediator directly to the plaintiff to accept a settlement offered by the defense.

Additionally, an absent plaintiff who communicates via telephone during mediation does not interact with the other parties, and may feel less compunction about backing out of a tentative agreement. Or, perhaps the absent plaintiff has a relative—or a friend—who, contrary to their attorney's advice, tells plaintiff that he or she should hold out for more money. These are just some of the unpredictable variables that plaintiff's counsel can control more easily if their client attends mediation in person.

ICE

A less obvious reason for certain plaintiffs attending mediation has begun to emerge. Undocumented individuals who bring personal injury claims in state court systems across the country are now under greater pressure to remain unseen in person. The Federal Department of Homeland Security, Immigration and Customs Enforcement unit (known as "ICE") has begun assigning plainclothes agents to both civil and criminal state courthouses where undocumented individuals are required to appear for ongoing matters. *See* Robins, *In Courthouse Cat-and-Mouse, Stakes Are High: Deportation*, New York Times (August 4, 2017). ICE asserts that it is empowered to detain undocumented individuals in common areas of a state courthouse, outside of a courtroom. Thus, when a criminal or civil hearing is completed, the undocumented individual can be detained the moment that he or she steps foot into the hallway. For example, according to the Immigrant Defense Project figures, ICE arrested 130 individuals in New York state courthouses in 2017; this

compared to 11 in the prior year. *See* Denney, *Amid Spike in Courthouse Immigration Arrests, ICE Issues Formal Policy,* New York Law Journal (February 2, 2018). Thus, for undocumented individuals, courthouses can become a place to avoid.

This development in federal law enforcement has opened a rift between state judges and state and local law enforcement officials, and the federal government. *See* DeGregory and Massarella, *New York Authorities Demand ICE Stop Hunting Immigrants in Courthouses,* New York Post (August 3, 2017). In New York, Attorney-General Eric Schneiderman and Kings County District Attorney Eric Gonzalez held a joint press conference in August 2017 requesting that state courthouses be off-limits to all ICE officials in the interests of the fair administration of justice. *See also* New York AG Eric Schneiderman and Acting Brooklyn DA Eric Gonzalez Call for ICE to End Immigration Enforcement Raids in State Courts, *available at* https://ag.ny.gov.

On January 31, 2018, ICE issued a policy directive stating that it will enter courthouses only to arrest specific targets such as convicted criminals, gang members, "public safety threats," and immigrants who have been previously deported or ordered to leave. ICE Directive Number 110721, *available at* https://www.ice.gov. Family, friends, and witnesses will not be subject to arrest in courthouses by ICE—except in "special circumstances." While the directive provides some parameters for ICE's courthouse operations, it also provides ICE agents considerable discretion. Judges, law enforcement officials, attorneys, and advocates are all monitoring how the directive will be applied, but courthouse arrests of individuals who fall into the gray areas of the ICE's policy are ongoing. *See* Robbins, *In a 'Sanctuary City,' Immigrants Are Still At Risk*, New York Times (February 27, 2018). While this process continues, so, too, do mediations in personal injury cases.

For undocumented individuals with personal injury lawsuits and their attorneys, these developments present a challenging new dilemma. What if the case does not settle and the plaintiff is required to attend trial in court? If trial commences, are there circumstances where ICE would exercise its discretionary authority upon a plaintiff or any witnesses? In those situations, attending mediation could become a safer option for resolving particular matters.

Summarizing

As noted above, there are many good reasons for a plaintiff to attend mediation. Simply put, the plaintiff's appearance makes a significant impact towards reaching fair and reasonable resolution. While an appearance could hurt the plaintiff in the eyes of defense counsel and a supervisor or examiner, it is worth remembering that no case settles without plaintiff's consent, and by appearing, plaintiff loses nothing before those who matter the most: the jury. On the other hand, where a plaintiff appears genuine and sympathetic, an appearance can go a long way towards supporting or enhancing the value of his or her case. For undocumented individuals with personal injury lawsuits, plaintiff's attendance at mediation potentially becomes even more important for reaching the safest route to recovery. In most cases, it is better for the defense evaluation if the plaintiff, who stands to be paid if the case is settled, appears in person at the mediation. This strategy leads to more cases being settled, which is the goal of alternative dispute resolution. FD