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Expert Analysis

Sealing the Deal in Mediation: Requiring Plaintiff to Appear in Person

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'Great. Mediation between all parties is confirmed for 10:00 AM 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 personal injury matters and other insurance-related disputes. We make the physical appearance of plaintiff mandatory. In our experience, the plaintiff's attendance can mean the difference between a swift resolution, and none. Below we explain why, both from the plaintiff's and defendant's perspectives.

In the context of personal injury, a primary reason for a plaintiff to be present at mediation is so all participants can assess how plaintiff may come across as a witness at trial. 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 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/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, five out of 10 on a pain scale. X-rays reveal no fractures; plaintiff is given Ibuprofen and advised to see her doctor. She retains an attorney. Then, at her follow-up appointment seven days later she reports left shoulder pain, cervical spine, and lumbar spine pain. Three months later, she undergoes arthroscopic surgery for a partial rotator cuff tear. Shortly thereafter,

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her lumbar spine improves, but her cervical spine pain lingers. After additional conservative 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 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. Furthermore, plaintiff had a prior lawsuit for neck injuries, and a sparse work history in the two years prior to the subject accident.

Defense counsel in this situation could easily evaluate 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 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 past (which defense counsel already noted). She also has a good sense of humor which could endear her to a jury. The examiner realizes that if a jury liked the plaintiff, she could be faced with a substantial verdict, exceeding the primary limits well into the excess layer (potentially exposing the carrier to a bad faith claim). Plaintiff's counsel is willing to settle the matter under the primary limits, but for far more than the examiner had planned. Defendant's initial evaluation of *just* a shoulder injury shifts, and now encompasses the cervical spine injury. The case settles under the primary limits, but for much more than the examiner's initial evaluation.

The above described scenario happens frequently. 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.

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But, 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 pre-designated 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, plaintiff's absence can actually become a greater obstacle to settlement because, what are they trying to hide? Or, why does plaintiff appear not to care, when everyone else is making efforts to be there? For weaker cases in particular, 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* they can establish themselves as a trusted authority, they can effectively temper the plaintiff's expectations, thereby facilitating a reasonable resolution. One technique often underutilized is the ability of the mediator to speak directly with a plaintiff and pointing out why the monies offered in settlement is a good result for plaintiff. The fact that the mediator is often a former judge, and therefore referred to by both plaintiff and defense counsel at the mediation as "Judge," can

provide additional strength to the recommendation made by the mediator directly to 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 his 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.

A less obvious reason for certain plaintiffs attending mediation has begun to emerge. Undocumented individuals who bring personal injury claims in the New York state court system are now under greater pressure to remain unseen in person. As recently reported this past August, 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. Robins, "In Courthouse Cat-and-Mouse, Stakes Are High: Deportation," New York Times (Aug. 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 he or she steps foot into the hallway. This has already begun happening; for these individuals, courthouses can become a place to avoid.

This development in federal law enforcement has created a rift between state judges and state and local law enforcement officials, and the federal government. DeGregory and Massarella, "New York Authorities Demand ICE Stop Hunting Immigrants in Courthouses," New York Post (Aug. 3, 2017). New York Attorney General Eric Schneiderman and Kings County District Attorney Eric Gonzalez recently held a joint press conference requesting that state courthouses be off-limits to all ICE officials in the interests of the fair administration of justice. ICE disagrees, as it sees its mandate to include stricter enforcement of existing immigration laws. Clearly, the positions are being staked out by each side. What is not clear is how, and when, a resolution will come about. While this process continues, so, too, are mediations in personal injury cases.

For undocumented individuals with personal injury lawsuits and their attorneys, these developments present a challenging new dilemma. Garcia Hernandez, "ICE's Courthouse Arrests Undercut Democracy," NY Times (Nov. 26, 2017). What if the case does not settle and the plaintiff is required to attend trial in court? If trial commences, the potential risk of being detained becomes greater the longer it takes. In these circumstances, attending mediation could become a safer option for resolving particular matters.

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 plaintiff appears genuine and sympathetic, an appearance can go a long way towards 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 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.