



## 2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort  
501 E. Camino Real  
Boca Raton, FL 33432

### Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

#### Mediating High Severity Claims: Creative Approaches and Tactics for Successful Outcomes

##### **I. Understanding your adverse party and the key motivating factors for Plaintiffs.**

It is as important to try to understand the psychological and emotional factors that drive your plaintiff as it is to present your factual and legal defenses. Several factors need to be considered and evaluated. **Money** is probably the most important motivating factor driving the settlement. However, money may be only one of the factors and understanding the other factors may affect the plaintiff's attitude on how much money it will take. Some plaintiffs actually want to have their **Day in Court**. It may be for good or absurd reasons. Understanding when you have such a plaintiff may be critical to securing the settlement. Empathizing to a certain degree can go a long way toward softening their attitude.

**Punishment and Vindication** may also be a primary factor. Some plaintiffs will need to express their anger or grief at the defense. Allowing it may help the process, usually more often than not. In some circumstances, an apology is in order. Some plaintiffs want to put the entire event behind them and **Closure** may be the primary factor. This can be critical in settling cases that could put blame on other family members or reveal dirty laundry. **Fear of Losing** can also be a significant factor. Have you done an Offer of Judgment? Is there an attorney fee exposure to the other side? Does the plaintiff have "nothing to lose"? These are all important factors and how you utilize them in your arguments depends on your plaintiff.

##### **II. Animation of an accident.**

The importance of reviewing your attack and evidence at mediation is critical to ensuring that you don't embolden your opposition. Here the defense animation actually helped the plaintiff's case and resulted in a higher settlement.

### **III. Wrongful Death and gamut of tactics used by defense counsel.**

#### **The apology or soft, sympathetic approach.**

Oftentimes this approach can be effective when dealing with a plaintiff that seeks punishment, vindication or the day in court. However, it must be carefully used as it can also cause more harm than good. You must know your plaintiff in this situation. It is not recommended in a mediation if the same attorney did not take the plaintiff's deposition.

#### **The claims rep speaks directly to claimant.**

This approach can be effective when your plaintiff is primarily motivated by money because the adjuster is the decision maker. However, the adjuster is often viewed as unreasonable and uncaring so how and if the adjuster makes a statement regarding the case should be discussed before the mediation.

#### **Defense Counsel tries to relate to claimant.**

This is a rarely used strategy and applied with a plaintiff that may be seeking closure. The strategy can backfire, but in certain scenarios empathizing using your own personal experiences can make a plaintiff realize that everyone, including the jury, will have suffered personal losses.

### **IV. Questionable Surgeries and Treatment; tactics used under these cases.**

#### **The confrontational approach: threatening plaintiff with collection of fees, perjury and clear sarcasm on the issue of causation.**

This approach may be successfully used in situations where the plaintiff has the fear of losing, either because of weaknesses in the liability, causation or damages. The strategy also is effective when plaintiff's counsel has concerns with the strength and weaknesses of their case. However, the strategy should only be considered in these situations, i.e., very questionable liability or causation or damages.

#### **The indignant Claim Rep.**

Certain cases call for tough claim handling. These cases usually involved borderline fraudulent claims or excessive, unnecessary treatment. Know your opposition before you consider this approach.

#### **We try these cases.**

This is a useful strategy when you know your opposition does not try cases and for plaintiffs that seek closure or fear the risk of loss.

#### **Attacking the Plaintiff surgeon. We don't pay these doctors.**

This approach may be appropriate when handling very questionable treatment or high medical billing cases with plaintiff physicians that are known to work predominantly in this regard.

### **IV. Caucus Strategies and figuring out the bottom line.**

Pre-mediation due diligence is key. Call opposing counsel before the mediation and try to get some preliminary feedback on their demand. Reconnaissance is crucial. Discuss a mediation strategy with your client and adjuster. Most importantly, know your liens and Medicare eligible plaintiffs. The process to obtain the lien information could take up to 2 months.

Request a bracket for evaluation and dissecting the initial demand. Many initial demands might broadcast what the plaintiff wants, what the plaintiff will take and where the case should settle. The 40/33/18-22 theory. Can presenting a high low bracket tell you anything about your opposition's bottom line?

There are a gamut of tough negotiating tactics. Refusing to negotiate is a risky approach but it involves refusing to even make an offer until the plaintiff presents a reasonable demand. Consider this approach when the plaintiffs come to the mediation with an increased demand with nothing new to back it up. Good cop / bad cop can be used in certain situations where the attorney and adjuster play off each other to try to advance a log jam in negotiations.

Presenting unsubstantiated facts involves making a statement at mediation as if it were a provable fact, when it is really unsubstantiated or merely a hopeful opinion. Predicting the easy win approach may prove useful when you suspect your opposition knows their case is weak and they "have to" settle. A "feel out" approach involves attempting to get the plaintiff to reveal a bottom line with no intent on settling "today." Using a take it or leave it approach is a risky process wherein you present a true bottom line. This approach could either lead to settlement or result in an abrupt end to negotiations. Always consider factors that may increase your credibility in this situation. In certain cases, consider resolving the lien before the mediation. For example, in extra contractual or tender situations (with low limits), most lienholders will take pennies on the dollar.

### **Closing Remarks**

The claims professional and defense attorney should be properly prepared for mediation. Preparation is not only knowing the claim file but all of the players, their motivations, proper authority and those nasty liens, especially for Medicare eligible plaintiffs. It also means bringing ammunition with you to mediation including transcripts, pictures, surveillance tapes etc. Proper preparation will guide the way to the appropriate initial tactic. Employing a good mediator is key. Once the process has started, a good mediator will provide guidance. Be prepared to be flexible. Be prepared to be creative. If you have concerns before or after your mediation, speak to your mediator privately. If he knows what he is doing, the mediator is always going to want to make you look good in front of your client.