The Mediation Submission

Your Pretrial Closing Argument

By Stacy D. Fulco

An effective mediation submission has certain characteristics and ensuring that your submission has them will place your submission to its best advantage.

The mediation submission is one of the biggest advantages that defense counsel has in a mediation. Why? Because plaintiffs' counsel often ignore the importance that a submission plays in the mediation process.

The submission is how we educate a mediator about our case. If written properly, a submission reads the same as your closing argument. When a mediation begins, a mediator should already know the facts, understand the liability arguments, and have a thorough summary of a plaintiff's situation, such as medical care and damages, and all from the defense perspective. Since a plaintiff's attorney likely only provided a mediator with a brief summary and a list of specials, he or she will probably start the mediation by giving an opening statement while you and the mediator are ready for deliberations.

The following is a step-by-step guide on how to write an effective mediation submission.

Privileged or Not

The first hurdle that defense attorneys must overcome before a single word is typed is whether a submission should be privileged, partially privileged, or produced to the other attorneys in the case. This decision affects the entire tone of a submission and determines what type of information will be shared.

The following are a few factors to consider when deciding if your submission should be privileged:

- Know your mediator. If possible, find out his or her preferences for submissions. This is not the deciding factor, but it is something to consider. If your mediator strongly favors production of submissions to each side, consider making just certain sections privileged rather than the entire submission.
- Are your liability arguments, damages arguments, or both likely to anger the plaintiff? If so, it may be useful to have the entire submission, or at least those sections of your submission, privileged. You do not want to start a mediation with the plaintiff feeling angry and aggressive toward you and your client.
- Do you have liability arguments that you want to keep under wraps until and if you must hold a trial? Strong liability arguments should definitely be shared in a submission because they could be the key to resolving a case. You want a mediator to have time to review and understand those arguments fully

■ Stacy D. Fulco is a member of Cremer Spina LLC. Her practice is focused on representing clients within the retail, restaurant, and hospitality industries. She specializes in the areas of premises litigation, security law, pharmacy claims, trucking litigation, product liability, property subrogation, contract review, and appellate law.

before a mediation begins. Rather than leave them out, just make that section or the submission privileged.

- Are you disputing that a plaintiff's injury was caused by a defendant? If so, consider producing the submission to the plaintiff. Fully explain your position and the basis for that position. This gives counsel time to review it and explain it to the plaintiff. It is not recommended that such a strong position be first mentioned to the plaintiff at the mediation sessions. In some cases, this type of surprise position could cause a mediation to come to an abrupt end.
- Do you have evidence that greatly discredits a plaintiff, his or her claim, or both? If so, producing a submission and clearly outlining the evidence may give the best result. A plaintiff's counsel will have sufficient time to understand the problems in his or her case and to explain the implication of the evidence to the plaintiff. This discussion is better had before a mediation begins than during a mediation session.
- Your goal is not to discredit a plaintiff's attorney. Almost always, you want a plaintiff to listen to his or her attorney and follow the attorney's advice. Therefore, any evidence or argument that you have that could make a plaintiff's attorney's job harder, perhaps by destroying his or her case, is probably better to share before the mediation begins so that the attorney can prepare him or herself and his or her client.
- Finally, be sure that you have a discussion with your client about this decision and that you both have agreed on how to proceed.

Once your decision is made regarding privilege, make it very clear to a mediator. If the entire submission document is privileged, the very top of your submission should read that it is privileged, for settlement purposes only, and not to be shared with the plaintiff or counsel, preferably using capitalized and bold letters. If only sections are privileged, put that same wording at the top of the privileged sections.

Overall Theme of a Submission

Now it is time to start writing. Think of your submission as a story. A mediator will know nothing about your case so start from the beginning and explain the case in a way that is interesting and engaging. Identify the key players and their roles. Set the scene, and whenever possible, provide photographs, video, or drawings so that a mediator can picture the events. If there are material facts in dispute, put those issues forward and give a mediator an understanding of the plaintiff's position. This way, you phrase the issues and your position in your words and not a plaintiff's.

When you write the liability analysis section, remember that your audience is either a retired judge or an attorney. Provide a persuasive argument with case cites and citations to evidence such as deposition transcripts, discovery answers, and video, among other things. Provide copies of everything, including case law, whenever possible. When a mediator is done reading your submission, he or she should have an idea about how he or she would rule if he or she was the fact finder in the case.

Lastly, if you have decided to keep a submission privileged, be open to sharing your concerns and any issues that you may have in the case with the mediator. This shows the mediator how well you know your case, and it allows you to provide arguments in response to those issues.

Sections of the Submission

A submission letter should start by stating the date and time of the mediation, along with the names and job titles of anyone who will attend in person or by phone for your client. Use headings so that the submission is easy to read and easy to navigate. A mediator should be able to refer back to individual sections easily during the mediation. Also, if exhibits are provided, be sure to use lettered or numbered tabs and have an index of the exhibits. You want to make it easy for a mediator to refer to your evidence at a moment's notice. This is especially true if you went the extra mile and highlighted the relevant sections of the case law, depositions, and other materials (also highly recommended).

Case Status and Procedural History

Begin by providing a brief summary of the case status, procedural history, and settlement negotiations. A mediator wants to know what discovery has been completed and what is still needed so that he or she understands where a case is in relation to a trial date. Provide any dates or deadlines that have been scheduled by a court. Also mention any motion practice along with the status of the motions and a summary of the court's rulings. Lastly, briefly summarize any previous settlement negotiations so that a mediator knows where to begin during the mediation. As a side note, do not tell a mediator how much your client is willing to pay or in what range you think a case should settle; that information should only be shared during mediation, once you and your client agree that the timing is correct.

Summary of Allegations

In certain cases, the next section should summarize allegations and have a copy of the complaint attached. Briefly outline the relevant allegations and the important issues because this allows a mediator to understand the facts better. If there were any summary judgment rulings, be sure that those are explained as well.

Summary of Facts

The next section is typically a summary of the facts. This is where you tell the story of a case. Usually a case has been pending for some time once it goes to mediation so you should have a few fact summaries in your file, whether from a report to the client or a motion for summary judgment. Do not recreate the wheel! Take your previous fact summaries and adapt them to the submission. Your time should be spent adapting the facts, not regurgitating them.

While adapting the facts, don't forget that this is a mediation submission, not a motion for summary judgment. In other words, take a few liberties and write the factual summary in a more persuasive way. If a plaintiff has testified and there were significant inconsistencies between the testimony and other evidence, outline those inconsistencies in the facts section. Use bullet points or a chart to make such inconsistencies very clear and attach all of the referenced evidence. This can be very useful for a mediator; he or she can show this to a plaintiff during a mediation if the plaintiff refuses to accept the problems with his or her case.

When a case involves very different points of view from witnesses, it can also

be helpful to put that testimony in a chart, or at least to break it up so that a mediator can easily understand the differing positions. If there is video showing an incident, include an entire section explaining the video because such evidence holds the most weight. If possible, provide still photographs from the video so that a mediator can use those during the mediation.

The length of this section greatly depends on not only the complexity of a case but also on whether the facts are highly disputed. If there is little dispute regarding the facts, keep this section short and sweet and spend more time on the sections where there are disputes. Even when there is a lot of evidence and testimony, the factual section should only be long enough to ensure that a mediator understands the story.

Liability Arguments

If liability is generally not in dispute, simply state that liability is not at issue "*as to the mediation only*." It is not recommended that you officially concede liability, especially if a submission is not privileged. Instead, use the concession to your benefit to show how reasonable the defendant is being regarding settlement discussions. If conceding liability is something that you are considering if you proceed to a trial, discuss that with the mediator because it is a good negotiating point and places more of the burden on the plaintiff.

In most cases, the liability section is a focus of a submission. As with the fact section, it is a good idea to start with a cut and paste of previously written liability assessments, and then adapt the arguments to the situation and your new audience.

If you cite case law, less is more in this situation. There is generally no need for a list of five cases that support one proposition. It is better to cite one case and to give a mediator only those cases worth reading. If a mediator is a retired judge, spend some time researching his or her opinions to see if any are worth citing.

If there are several liability arguments at issue, the use of subheadings is recommended. Explain a plaintiff's position and outline the evidence and the case law that proves the plaintiff wrong. For each issue, think of sound bites. You want to give a mediator sentences to highlight and use in his or her closed-door sessions with a plaintiff. Any evidence that you attach as support should be clearly marked and highlighted so that a mediator can hand it to a plaintiff. Not only does this help prove your argument, but it shows a plaintiff and his or her attorney that you are prepared and you know your case, and it gives the impression of a strong defense.

The last issue that should be addressed in the liability section—or possibly even in its own section—is anything that requires a legal opinion that will significantly affect the case. This may be evidentiary rulings or an anticipated motion for summary judgment. It could also be an anticipated motion *in limine*. Whatever the issue, take advantage of the retired judge you are paying by the hour.

If a submission is privileged, outline the legal issue in the submission. During your closed-door session with a mediator, if he or she has served as a judge, discuss the issue and ask for his or her opinion on how it would likely be handled by the trial judge. Depending on the answer, you may want his or her opinion to be discussed with the plaintiff. A mediator advising a plaintiff and his or her attorney that they are likely to lose on a very important legal issue in a case can provide great incentive to settle for less.

If the issues are really significant, think about using a retired appellate judge as the mediator because their opinions on legal rulings seem to hold even more weight. This strategy worked very well for me when I had evidence that a plaintiff was likely committing Social Security Disability fraud. There was no official finding on the matter, but we argued there were ways to put this in front of a jury. The plaintiff's counsel disagreed that the jury would have any clue about the fraud, but our mediator—a retired appellate court judge—explained how it was possible to have the evidence admitted. The case settled very quickly after that, and for a great price.

Summary of Plaintiff's Medical Care

When relevant, there are several ways that a plaintiff's medical care can be addressed in a mediation submission. If the focus of your defense is on liability and there is no dispute regarding the actual medical care, this section could be a few sentences. There is no reason to focus on it if it is irrelevant to your position.

If you have some minor issues with the medical care, such as possible over-treating or certain issues with a few appointments, focus only on those issues. Otherwise, just be sure that a mediator understands the claimed injury and provide a general summary of the medical care.

When a focus of a defense is that the injury is a preexisting condition, the alleged injury was not caused by the event, or that the plaintiff does not have the condition that he or she claims to have, this section must be thorough and in-depth. A mediator is not a doctor, so explain the medical terms and procedures at issue. Be sure that mediator can easily understand your points.

When preexisting conditions are relevant, give a one-paragraph explanation of the alleged injury, summarize the plaintiff's preexisting conditions and treatment for those conditions, and then focus on the post-incident medical care. Give dates, provider names, and a concise summary of the care. If the records are significant, attach them as an exhibit. Otherwise, be sure to have them readily available to hand to a mediator during the mediation conference.

Medical sections can get rather wordy, so focus on only summarizing the information that a mediator needs to understand your position. If there is evidence that contradicts the medical records, such as the plaintiff's own testimony, include notes or parentheses within the summary explaining the contradiction. A mediator needs to see the conflicts. It is very useful if a mediator can show a plaintiff his or her deposition testimony and how it completely contradicts what is written in the medical records. Give a mediator the highlighted records and testimony to make his or her job easier.

When a plaintiff alleges multiple injuries, consider creating a chart. A mediator must be able to comprehend the treatment quickly and have an easy reference point to use. A chart is a great way to give that information in a very user-friendly manner.

Finally, I am a strong believer that all medical treatment must be evaluated in a timeline fashion. The only way to have a true understanding of a plaintiff's medical history is to create a medical timeline. It allows someone to recognize quickly inconsistent information given to different

providers, issues with narcotic prescriptions, treatment with multiple physicians for the same condition, and many other factors that can greatly diminish a plaintiff's case. However, when such a timeline is available, do not give it to the mediator beforehand. Have it available during the mediation for easy reference, but do not risk making it discoverable.

Summary of Damages

If some or all of the damages are in dispute, be sure to include a section on damages that is clear and concise. Do not merely provide a list of specials. A mediator already has that list from a plaintiff, and it does nothing to make your argument. Numbers are key. Give a mediator something to take to a plaintiff to show what you dispute and why. If you cannot provide solid support for your position that certain damages are not related, a mediator is not likely to back you up on your argument.

What I recommend doing, though it can be a little time-consuming, is creating an in-depth analysis of medical bills in cases when you dispute certain injuries or care. Assume that a plaintiff claims that he or she injured his or her lower back, knee, and foot, and he or she has seen several medical providers over the years for these conditions. Now assume that you plan to argue that the lower back injury is a preexisting condition and the foot injury is merely a soft-tissue injury that did not require treatment, and you will concede (*for mediation purposes only*), that the knee is related. The best way to prove your position is with a chart. The first column would list each date of treatment, the provider, and a few words indicating the type of treatment. The next three columns are titled back, foot, and knee. List the bills under the appropriate column depending on what area of the body was treated on that date. At the bottom, total the three columns. Now a mediator has a piece of paper that he or she can hold onto, and show a plaintiff, that clearly shows the specials for each alleged injury.

I promise that a plaintiff's attorney will not take the time to conduct such an analysis. This means that your analysis will go undisputed. In fact, most times, a plaintiff's specials assessment includes bills for completely unrelated medical care. This chart is the best way to support any damages argument, and it is a real crowd pleaser. In fact, despite it taking extra time to prepare, my clients regularly make special requests that I include such a chart in my submissions.

As for other types of damages, those should be addressed if they are relevant. Often, plaintiffs love to make sweeping statements about lost wages and an inability to perform as usual, but when it comes to proving this claim, they offer nothing. A mediator will argue your point if there is no evidence of a lost wage claim because he or she knows the chances of it going to a jury are slim. The same goes with claims of disability or pain and suffering. Tell a mediator what evidence exists, or does not exist, to support these damages.

Lastly, do not forget about liens. Plaintiffs often do not want to address them, but when it comes to settlement negotiations, it is very important for a mediator to know if liens need to be repaid, or if all or most of the money would go directly into a plaintiff's pocket. Any good mediator uses that information to get a case settled.

Medical Opinions

If there are medical opinions that can be discussed, those can either be incorporated with the medical care discussion or given their own section. It is a good idea to put medical opinions in a separate section if expert reports have been produced, meaning that there are official opinions on the record. A mediator should also receive a copy of the reports.

This medical opinions section is a great way to summarize the medical aspects of a case and give a mediator a complete understanding of your defense position. Instead of writing in paragraph form, an outline, with each injury as the heading, may be more useful. Briefly outline the extent of each injury, the type of care required, the plaintiff's expert opinion on the injury, and your expert's opinions. Do not forget to write with a persuasive tone. This is meant to be your closing argument explaining why an injury and the care are not related to the incident or was not caused by your client.

Attached Exhibits

If you are able to give a mediator copies of relevant information, be sure to include an index of each exhibit and make each index easy for the mediator to use during a mediation. The best way to do this is with a spiral notebook. You do not want to give a mediator a privileged submission that is bound, and then include highlighted materials for him or her to use during a mediation. This forces a mediator to have your submission in front of a plaintiff. It is better for a mediator to have loose papers that can be removed from a binder and shown to a plaintiff.

It is not recommended that you officially concede liability, especially if a submission is not privileged.

When determining which materials to give a mediator, always keep in mind that only discoverable documents should be produced. As a general rule throughout the country, the mediation privilege operates to protect the confidentiality of communications, either written or oral, made during the course of a mediation. The privilege applies to a submission but not necessarily to the documents attached to the submission. Therefore, keep privileged materials in your possession and do not produce them to a mediator.

Social Media and Investigations

By the time that a case goes to mediation, some form of either formal or informal investigation of a plaintiff has likely been completed. If there is any relevant information found, be sure to share that in a mediation submission, or at least have it available during the mediation. If Facebook, LinkedIn, or Twitter posts indicate that a plaintiff was more active than he or she testified, print those pages and give them to a mediator. Also, show any surveillance or photographs of a plaintiff that support your defense.

Delivery of Submission

Think of this final recommendation as "once bitten, twice shy." Imagine spending all of your time and effort following the above suggestions and preparing the most effective mediation submission that

Closing, continued on page 70

Closing, from page 27
you have ever written. You put it in the mail five days early, just to be safe. All you need to do now is prepare a few last minute items and show up to the mediation, ready to work your magic.

Not so fast. When you arrive to the mediation, the mediator asks if you prepared a submission. Your palms immediately start to sweat as your client, who is of course sitting next to you, glares in anger. You calmly question the mediator, explaining that it was mailed weeks ago. Of course you know the answer before it is even spoken: "I never received it." Thank you U.S. Post Office.

If this has never happened to you, be thankful and make sure that it never does. If a submission is going to a local office, have it hand delivered and get a signed receipt. If hand delivery is not possible, send it overnight by Federal Express or some other reliable company with tracking and delivery confirmation. Then, be thankful every time you start a mediation and you see your submission sitting in front of a mediator.

Conclusion

Once a mediation is scheduled, the goal is to settle the case. It is a defense attorney's job to put on the best defense possible and that means preparing an effective mediation submission. This is where an defense attorney must shine. Think outside the box and find creative ways to prove your position. Happy mediating! FD