Personal Injury Settlement Obstacles: Medical Liens, Child Support, CMS Reporting and More

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

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Impediments to Settlement

W. Bruce Barrickman, Esq.
IMPEDEMENTS TO SETTLEMENT

W. Bruce Barrickman, Esq.

Mediation is a great process for resolving personal injury and wrongful death claims, but there are several specific impediments and many general impediments to a successful resolution of claims. In this seminar, we will identify those impediments, deal with some of them in detail and bring others to your attention so you will be aware of those impediments and can become more familiar with how to address those impediments. The specific impediments we will address are:

1. Medicare Mandatory Insurer Reporting;
2. Medicare liens;
3. Medicaid liens;
4. Medical liens;
5. Apportionment, contribution and indemnity issues;
6. Child support liens;
7. Health insurance carriers rights of reimbursement and subrogation rights and ERISA plans;
8. Assignments to medical providers of proceeds of the settlement and/or verdict in a lawsuit; and
9. Lawsuit loans.

Some of the general impediments to resolution of any type of lawsuit or claim will also be discussed. Those impediments include:

1. Plaintiff reports significantly more specials at start of mediation;
2. Party has not provided important information or is not willing to reveal it;
3. One or both of the parties threaten to leave early in the mediation;

4. One of the parties is making unreasonable moves which potentially could end the mediation.

5. Claim by insured against their uninsured motorist carrier;

6. Plaintiff starts at higher number or defendant starts at lower number than pre-mediation;

7. Defendants have under-valued case;

8. Find out that true decision maker or significant influence not present; and

9. Spouse plaintiffs have different views of case;

**Mandatory Insurer Reporting and Liability Settlement Allocation Plans**

In recent years, due to mandatory insurer reporting requirements, insurance carriers have become much more concerned about Medicare issues. Mandatory insurer reporting requirements mandate that group health insurance carriers, liability insurance carriers, worker's compensation insurance carriers and self-insured and self-administered liability entities report to the Center for Medicare and Medicaid Services (CMS) claims any settlements that may affect Medicare's position as a secondary payer. Reporting is required when:

1. Plaintiff or Claimant is 65 years old or older;

2. Plaintiff or Claimant receives Medicare benefits;

3. Plaintiff or Claimant is reasonably anticipated to receive Medicare benefits within the next 30 months after settlement or verdict; and

4. Plaintiff or Claimant has end stage renal disease.
Some conditions or circumstances that should be considered in determining whether the settlement or verdict should be reported to CMS are:

1. Plaintiff or Claimant is 62 1/2 years old or older;
2. Plaintiff or Claimant has been receiving Social Security Disability benefits for two years or longer;
3. Plaintiff or Claimant is receiving Social Security Disability benefits but is not yet Medicare eligible;
4. Plaintiff or Claimant has applied for Social Security Disability benefits, has had the application for benefits denied or is appealing the denial of the application for benefits;
5. The settlement or verdict is greater than $25,000 and the Plaintiff or Claimant is Medicare eligible;
6. The total value of the settlement or verdict is greater than $250,000 and it is reasonably anticipated the Plaintiff or Claimant will be eligible for Medicare benefits within 30 months; and,
7. The injuries are such that it can be reasonably anticipated that the Plaintiff or Claimant will be Medicare eligible within 30 months.

If the entity that has the reporting requirement fails to properly report a settlement or verdict, it is subject to a fine of $1,000.00 per day per claim, so those entities have become intent on obtaining the necessary information to properly report a settlement or verdict, even in cases where there is little, or no, chance that the Plaintiff or Claimant is, or will be within 30 months, Medicare eligible. This has created impediments, delays in settlement negotiations, and the finalization of settlements.
In addition to the reporting issues, decisions must be made about whether arrangements have to be made to satisfy the Medicare secondary payer requirements. That topic is much too broad to be covered in this seminar, but secondary payer issues can be addressed with Claim Settlement Allocation, Liability Settlement Allocation and Liability Medicare Set-Aside plans. There are many qualified companies that can assist you in the development of these plans.

**Medicare Liens**

This impediment to settlement is so well-known, I will not discuss it in great detail. If the Plaintiff or Claimant has received Medicare benefits for the injuries received in the incident that is the subject matter of the lawsuit or claim, Medicare has a lien on the proceeds of any settlement and/or verdict, and that lien can be enforced against the injured party, the tortfeasor and the tortfeasor’s insurance carrier if the lien is not satisfied, compromised and/or resolved. It is absolutely essential that the injured party’s attorney, defense counsel and the insurance claims representative determine whether Medicare benefits have been paid and they are addressed.

**Medicaid Liens - O.C.G.A. § 49-4-149**

If you know or suspect that Plaintiff is receiving Medicaid benefits, you should determine whether there is an enforceable Medicaid lien. Medicaid liens are filed by the Department of Community Health (DCH). The lien is for payment of medical care and treatment provided to Medicaid recipients. The lien is on the proceeds of a settlement or verdict received from a third party tortfeasor or insurer. The DCH perfects the lien by complying with O.C.G.A §§ 44-14-470 through 44-14-473. The lien must be filed within one year from the last date of treatment for which Medicaid benefits were paid. The
DCH files the lien notice in the county where the Medicaid recipient resides and in Fulton County. A Medicaid lien does not affect the priority of attorney’s liens. The DCH is subrogated to the reasonable value of medical assistance provided after written notice of the lien. The subrogation right attaches when the services are provided. Subrogation action must be brought by DCH within one year of liability being finally determined. Final determination means that all of the claims arising out of the incident for which the Medicaid recipient received medical treatment have been resolved by settlement or trial.

Medical Liens O.C.G.A. - §§ 44-14-470-476

Often medical liens are not addressed or identified before a mediation. Resolution of all medical liens always becomes a condition of settlement, therefore if the liens are not addressed before the mediation, they can become a serious impediment to resolution of the case. Medical liens can be filed by hospitals, nursing homes, physicians, and traumatic burn care facilities. With respect to traumatic burn care facilities, the reasonable cost for the treatment must exceed $50,000. The lien is on the proceeds of any settlement or verdict received from a third party tortfeasor or insurer. Not less than 15 days before filing the lien, the medical care provider must provide written notice to the patient, third party tortfeasors and their insurers. The notice must be sent by first-class and certified mail or statutory overnight delivery, return receipt requested. The lien notices must be filed in the county where the medical services are provided and in the county where the patient resides. The lien notice must be filed within 75 days of discharge from the hospital, nursing home or traumatic burn facility. If the lien is being filed by a physician, the lien must be filed within 90 days of the first
treatment provided by the physician. Improper perfection of the lien invalidates the lien, except those who receive actual notice of the lien by reliable forms of delivery before settlement or verdict. The lien can be enforced against a tortfeasor or the insurer that has actual or constructive notice of the lien. The action to enforce the lien must be brought within one year of the final determination of liability as defined in the Medicaid lien section above.

**Right of Reimbursement – O.C.G.A. § 33-24-56.1**

A health insurance carrier that provides for reimbursement for benefits paid for medical treatment received as a result of injuries caused by a third party tortfeasor may recover from the injured party if the amount of the recovery exceeds the sum of all economic and noneconomic losses incurred as a result of the injury, exclusive of losses for which reimbursement may be sought under this code section. A declaratory judgment action can be filed for a court to determine whether the injured party has been fully compensated. The injured party must provide notice by first-class and certified mail or statutory overnight delivery, return receipt requested, to the benefits provider no less than 10 days before consummation of a settlement or trial. If the injured party provides the required notice to the benefits provider, the benefits provider can only assert reimbursement rights if it has provided notice by reliable methods to the injured party of its claim for reimbursement. If the 10 day notice is not provided by the injured party, the benefits provider is not subject to the prior notice requirement.

**ERISA Lien**

If the health insurance policy is covered by ERISA, the Georgia full compensation statute may not apply due to federal preemption. You must determine whether the
insurance policy is an insured health plan or is a self-funded health plan. If it is a self-funded health plan, the full compensation statute may not apply. The plan must specifically provide for reimbursement from settlement or verdict proceeds and comply with the specific-fund doctrine. Reimbursement is limited to the amount paid for injury related care. For the full compensation statute not to apply, the plan must specifically provide that the made whole doctrine does not apply. Depending upon the language of the plan, the injured party’s attorney’s fees may or may not be factored in.

**CHILD SUPPORT LIEN O.G.G.A. § 19-11-18**

Under the Child Support Recovery Act, an IV-D agency can acquire a lien for unpaid child support obligations. The lien applies to past due and accrued child support after the lien is perfected. Upon proper recordation or registration of the lien, the lien encumbers all tangible and intangible property, whether real or personal, and any interest in property, whether legal or equitable, belonging to the individual that owes child support (the obligor). The lien applies to any property interest owned by the obligor or acquired by the obligor after the child-support lien arises. Notice of the lien must be provided to the obligor by first-class mail at least once a year. If proper notice has been provided to the obligor and child-support remains unpaid, the IV-D agency can demand any person or entity in possession of property subject to the lien turn over possession of the property to the agency. The person or entity is only obligated to turn over sufficient property to pay the outstanding child support obligation. If the property is not turned over to the agency, the person or entity is subject to paying the amount of the property, up to the amount of the unpaid child support, plus costs and interest.
Assignment of Personal Injury Recovery

An injured party may assign to a medical care provider his or her rights to the proceeds that may be recovered as a result of any compromise, settlement, arbitration, mediation, litigation, award, judgment or verdict. Often times this is done when the injured party has no health insurance and is unable to pay for the medical care. If done properly, these assignments are valid and should not be ignored. In Santiago v. Safeway, 196 Ga. App. 480; 396 S.E.2d 506, the court found that the debtor, which was a first party insurance carrier, of the assignor, which was the injured party, who had notice of the assignment by the injured party to the medical provider, in this case a chiropractor, paid the debt to the assignor at its own peril. The court said that it is the established rule in the United States that an assignment for valuable consideration, with notice to the debtor, imposes on the debtor an equitable and moral obligation to pay the assignee. The long and short of this ruling was Safeway paid for the medical expenses twice. There is no reason why this case law would not equally apply to third party insurance carriers that have notice of the assignment.

Lawsuit Loans

There are times when injured parties with no health insurance coverage or with limited means, particularly when their injuries have resulted in an inability for them to work, need funds to pay for medical care and/or daily living expenses. There are many companies that provide loans to injured parties. To obtain the loan, the injured party assigns the proceeds of any recovery from a first party or third-party claim to the lending company. These loans often result in amounts owed that substantially impact the ability to settle the case.
APPORTIONMENT – EFFECT ON CONTRIBUTION AND INDEMNITY CLAIMS

For quite some time after the apportionment statute was passed, there was a great debate about whether contribution and indemnity were still alive and well in tort cases. After several court cases addressed this issue, it seemed to be the consensus that the apportionment statute did away with contribution and indemnity claims in tort actions. The case of *Zurich American v. Heard*, 321 Ga. App. 525; 740 S.E.2d 429 (2013) has brought those claims back into play in settlement negotiations.

The Court of Appeals effectively held that unless there is an adjudication on the merits of the percentage of fault of each at fault party, the non-settling at fault party can maintain a claim for contribution and/or indemnity against the settling at fault party. This case must be considered whenever you are trying to settle a case as one of the at fault parties in a multiple at fault party or non-party case. The case also has to be considered when making an offer of settlement in a multi-party case. Your client and the insurance client may still be better over settling the claims, but you must make sure they both understand the potential for a claim for contribution to be brought by the non-settling tortfeasors.

As an aside, if you are representing the defendant when there is an uninsured motorist carrier involved, you must take into consideration the uninsured motorist carrier would still have a claim for subrogation against your client.

ATTENDEE PARTICIPATION

We will open the floor to discussion about what should be done as the neutral or the attorney advocate when faced with the following circumstances:

1. Plaintiff reports significantly more specials at start of mediation;
2. Party has not provided important information or is not willing to reveal it;

3. One or both of the parties threaten to leave early in the mediation;

4. One of the parties is making unreasonable moves which potentially could end the mediation.

5. Claim by insured against their uninsured motorist carrier;

6. Plaintiff starts at higher number or defendant starts at lower number than pre-mediation;

7. Defendants have under-valued case;

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9. Spouse plaintiffs have different views of case.
W. Bruce Barrickman

W. Bruce Barrickman practices general civil litigation with specialization in the areas of Bad Faith, Commercial, Construction, Insurance Coverage, Personal Injury, Premises Liability, Professional Negligence, Trucking, and Wrongful Death. He is AV® Preeminent™ Peer Review Rated® by Martindale-Hubbell Law Directory and is a partner in the Atlanta law firm of Barrickman, Allred & Young, LLC.

Bruce has been a registered neutral with the Georgia Commission on Dispute Resolution since 1999. In 2002, he helped to found BAY Mediation & Arbitration Services, LLC. He is also a member of The National Academy of Distinguished Neutrals and The Georgia Academy of Mediators & Arbitrators.

Bruce has been a student and faculty member of the National Institute of Trial Advocacy training program and has taught at a number of Continuing Legal Education seminars approved by the State Bar of Georgia. He has also completed advanced ADR training at the Straus Institute for Dispute Resolution at Pepperdine University.

A native of Glasgow, Kentucky, Bruce earned a Bachelor of Arts degree in 1975 from the University of Kentucky. He graduated from the University of Kentucky School of Law in 1978. Before moving to Atlanta in 1988, he practiced law in Kentucky for almost ten years.

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May 10, 2018

CLAIMANT NAME:
INSURED NAME:
DATE OF ACCIDENT: 09/14/2016
CLAIM NUMBER: 621750

Dear:

The Centers for Medicare & Medicaid Services (CMS) is the federal agency that oversees the Medicare program. Many Medicare beneficiaries have other insurance in addition to their Medicare benefits. Sometimes, Medicare is supposed to pay after the other insurance. However, if certain other insurance delays payment, Medicare may make a "conditional payment" so as not to inconvenience the beneficiary, and recover after the other insurance pays.

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), a new federal law that became effective January 1, 2009, requires that liability insurers (including self-insurers), no-fault insurers, and workers' compensation plans report specific information about Medicare beneficiaries who have other insurance coverage. This reporting is to assist CMS and other insurance plans to properly coordinate payment of benefits among plans so that your claims are paid promptly and correctly.

We are asking you to answer the questions below so that we may comply with this law.

Please review this picture of the Medicare card to determine if you have, or have ever had, a similar Medicare card.
Section I

Are you presently, or have you ever been, enrolled in Medicare Part A or Part B? [ ] Yes [ ] No

If yes, please complete the following. If no, proceed to section II

Full Name: (Please print the name exactly as it appears on your SSN or Medicare card if available.)

Medicare Claim Number: ___________________________ Date of Birth (Mo/Day/Year) - -

Social Security Number: ___________________________ Sex [ ] Female [ ] Male

(If Medicare Claim Number is Unavailable)

Section II

I understand that the information requested is to assist the requesting insurance arrangement to accurately coordinate benefits with Medicare and to meet its mandatory reporting obligations under Medicare law.

__________________________________________________________
Claimant Name (Please Print) Claim Number

Name of Person Completing This Form If Claimant is Unable (Please Print)

__________________________________________________________
Signature of Person Completing This Form Date

If you have completed Sections I and II above, stop here. If you are refusing to provide the information requested in Sections I and II, proceed to Section III.

Section III

__________________________________________________________
Claimant Name (Please Print) Claim Number

For the reason(s) listed below, I have not provided the information requested. I understand that if I am a Medicare beneficiary and I do not provide the requested information, I may be violating obligations as a beneficiary to assist Medicare in coordinating benefits to pay my claims correctly and promptly.

Reason(s) for Refusal to Provide Requested Information:

__________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
**Medicare Information**

The parties intend to comply with the Medicare Secondary Payer Act (42 U.S.C. §1395y) and to protect Medicare’s interests, if any, in this settlement. The Releasor understands and agrees that as used herein, the term “Medicare” includes Medicare Part A (Hospital Insurance), Medicare Part B (Medical Insurance), Medicare Part C (Medicare Advantage Organizations) and Medicare Part D (Prescription Drug Insurance). Releasor has not been identified as Medicare recipient and the Releasor hereby expressly represents and warrants that Medicare has not made any payments to or on the Releasor’s behalf as a result of or in any way related to the injuries alleged in the Claim.

The Releasor acknowledges, however, that if Releasor received benefits that have or may have been paid by an insuring entity affording benefits payable for medical care and/or treatment, as further consideration and inducement for this settlement, Releasor agrees to defend, indemnify, protect and hold harmless Defendants from any and all liens, rights of subrogation, indemnification claims, contribution claims, defense claims, losses, liability, actions, damages, causes of action, judgments, costs and expenses, including attorneys’ fees, whatsoever made by or sustained by or arising from any person, corporation, partnership, state or federal government, governmental agency, hospital, or any other medical provider, health care provider, disability or insurance benefits providers, workers compensation carrier, Medicare, Medicaid, or any other entity arising in whole or in part out of the care and treatment, or in any way connected to the care and treatment, provided to the Releasor for the injury/injuries alleged in the Claim.

In addition to the Release and Discharge set forth above and in consideration of the payments set forth in this Agreement, the Releasor hereby waives any cause of action and/or Private Cause of Action under 42 US Code §1395y (b)(3)(A), and releases and forever discharges Defendants from any obligations, from any claim, known or unknown, arising out of the failure of Defendants to provide for a primary payment or appropriate reimbursement pursuant to 42 US Code §1395y (b)(3)(A).

The Releasor agrees to indemnify, defend and hold harmless Defendants for any claim, loss or payment Defendants may suffer, including judgments, verdicts, awards, penalties, attorney’s fees and costs, that arises out of the failure to pay any unpaid medical bills or future medical expenses, or to otherwise fail to protect Medicare’s interests under the MSP Act which exceed the amounts set forth in the final letters issued by these agencies. The Releasor agrees by this Agreement to waive any claims for damages, indemnification and/or contribution from any causes of action of any kind or nature, including but not limited to a private cause of action provided in the Medicare Secondary Payer (MSP) Act, 42 U.S.C. Section 1395y(b)(3)(A), in connection with or arising as a result of the medical care and treatment rendered to the Releasor regarding the injuries alleged in the Claim.

It is understood and agreed that CLAIMANT/PLAINTIFF will provide DEFENDANT/INSURER all of the information noted below and all information required for DEFENDANT/INSURER to properly report this claim to Medicare pursuant to 42 U.S.C.
1395y(b)(8). CLAIMANT/PLAINTIFF further agrees that DEFENDANT/INSURER will provide the information below and all information required under 42 U.S.C. 1395y(b)(8) to The Centers for Medicare and Medicaid Services pursuant to The Medicare, Medicaid and SCHIP Extension Act of 2007.

Full Name as it appears on your Social Security Card
________________________________________

Social Security Number
________________________________________

Address
________________________________________

Date of Birth
________________________________________

Medicare Health Insurance Claim Number (HICN)
________________________________________

Gender
________________________________________

[CLAIMANT/PLAINTIFF signature]
Medicare Information

The parties intend to comply with the Medicare Secondary Payer statute (42 U.S.C. §1395y) and to protect Medicare’s interests, if any, in this settlement. Releasor understands and agrees that as used herein, the term “Medicare” includes Medicare Part A (Hospital Insurance), Medicare Part B (Medical Insurance), Medicare Part C (Medicare Advantage Organizations) and Medicare Part D (Prescription Drug Insurance). Releasor(s) ____________ (COULD BE RELEASORS) has been identified as a Medicare beneficiary. Releasor(s) agree that an inquiry has been made with all interested Medicare plans to determine the amount of any claim related Medicare conditional payments that have been made by Medicare, if any, and the amount requiring repayment for all Medicare liens.

Releasors agree and understand that all settlement funds will be withheld and not distributed by Releasees to Releasor or Releasors counsel until all Medicare liens are identified and paid, or a letter confirming that there is no Medicare lien has been issued from each interested Medicare plan. Releasors specifically agree that the amount required to pay all claim related Medicare liens will be deducted from the settlement proceeds and that Releasees will make a direct repayment from the Releasors settlement proceeds to all interested Medicare plans to reimburse Medicare for all asserted lien amounts that require repayment.

Releasors further agree that Releasor will not request a disbursement of any settlement proceeds from Releasees, or file any motions requesting the payment of Releasors settlement proceeds until all Medicare liens have been identified and paid. Releasors and Releasors’ counsel also agree to waive any claim against Releasees for failure to distribute settlement funds in the time frame required by state or federal law and agree that the distribution of the settlement funds will only occur after Releasees receive the final lien amount/Final Demand Letter.

Releasors acknowledge and agree that any future medical costs for alleged Injury will not be submitted for payment to Medicare in contravention of the Medicare Secondary Payer statute. In the event that any future medical bills relating to care or treatment of injuries or conditions sustained by Releasor as a result of the Incident are submitted to Medicare, Releasor understands and agrees that Releasees shall not be responsible for any liens asserted by Medicare, or Medicare’s recovery agent relating to any injuries sustained in the Incident by Releasor.

In addition to the Release and Discharge set forth above, in consideration of the payments set forth in this Agreement, Releasor[s] hereby waive[s] Releasor[‘s’] 42 US Code §1395y (b)(3)(A) cause of action and/or Private Cause of Action, and releases and forever discharges Releasees from any obligations, from any claim, known or unknown, arising out of the failure of Releasees to provide for a primary payment or appropriate reimbursement pursuant to 42 US Code §1395y (b)(3)A).
Releasor[s] agree[s] to indemnify, defend and hold the Releasees harmless for any claim, loss or payment Releasees may suffer, including judgments, verdicts, awards, penalties, attorney’s fees and costs, that arises out of the failure to pay any unpaid medical bills or future medical expenses, or to otherwise fail to protect Medicare’s interests under the MSP Act. Releasor[s] agree[s] and by this Agreement waive[s] any claims for damages, indemnification and/or contribution from any causes of action of any kind or nature, including but not limited to a private cause of action provided in the Medicare Secondary Payer (MSP) Act, 42 U.S.C. Section 1395y(b)(3)(A), in connection with or arising as a result of the medical care and treatment rendered to Releasor[s] regarding the injury[ies] alleged in the Claim.
Mediation & the Truth about Settlement Values

By: W. Bruce Barrickman, Esq.
BAY Mediation & Arbitration Services

As a litigator for 33 years and a mediator and arbitrator for 12 years, it is my opinion, that it is absolutely essential that a lawyer, as an advocate for his client, obtain as much credible information as possible about the true settlement value of the case before the day of mediation. I suspect there will be a certain amount of skepticism out there about me writing an article concerning this topic in a publication produced by a settlement and jury verdict research company. I can assure you that I have not been paid for this article and have not had my arm twisted to write about this topic. Instead, I firmly believe that not having a true sense of the value of his or her case before walking into mediation is one of the biggest mistakes a lawyer can make.

Why is it so essential to have properly evaluated your case before mediation? Because your mediation strategy and the satisfaction of your client revolves around properly evaluating the case and determining how to best reach a resolution at mediation that reflects that true settlement value.

To arrive at a true settlement value, a lawyer must first look at his or her case with as neutral and impartial perspective as possible. How solid are the facts of the case? How well will your client and your witnesses be received by the jury? Is the pivotal law supportive of the facts and your position? Sugar coating any of these things will result in unreasonable expectations by your client and you and will lead to problems at the mediation.

Once you have personally analyzed the strength and weaknesses of your case, you should discuss the case with a fellow attorney, a co-worker, a family member and/or anyone else who can give you a neutral, impartial view of your case. Pick people who will not hesitate to tell you if you are dreaming, unreasonable or have missed something important in assessing your case. Again, it is important to have a valid, realistic and tested evaluation of your case if you want to be successful at mediation.

Once you have evaluated the case and talked with others about the case, you should, if at all possible, look at the settlement and jury verdict research information that is available. Try to find cases that are in the same county where your case will be tried, and if you cannot do this, pick counties that you know have similar jury compositions. Obviously, it would be misleading to look at DeKalb or Clayton County settlements or verdicts if your case is in Cobb or Paulding County. Certainly every case is different, but you can gain insight into the typical range of verdicts and settlements in a particular type venue by reviewing what results have been obtained in similar cases. Do not
unreasonably convince yourself into thinking that your client is going to make a better witness or your evidence will resonate with the jury more than the cases reported,

Once you have arrived at a reasonable range of the settlement value of your case, you must then meet with your client and make sure you both are on the same page. You must do your best to arrive at an agreement with your client about the value of the case and the strategy that you intend to follow at mediation in maximizing your recovery. Typically your client has not been involved in mediation before and will be anxious about what will occur and what to expect. There is nothing worse than going into a mediation with a client that has unreasonable expectations and has not been prepared for the arguments that will be presented by opposing counsel. The odds of settling a case at mediation are drastically reduced when parties have not been mentally and emotionally prepared ahead of time for what will occur.

Once you have properly evaluated the case, gotten your client on board and prepared for your opening presentation at mediation, you have done all you can do before the mediation to be in a position to have a successful outcome at mediation. If both sides have properly prepared for the mediation and have honestly and reasonably evaluated the case, typically the mediation will be much shorter and more cost effective. Even though it happens far too often, it typically does not benefit your client or the mediation process for either side to start negotiations unreasonably high or low. If both sides are properly prepared and have confidence in their evaluation of the case, you can avoid the time consuming and frustrating process of tiny and numerous moves that occur when the attorneys are afraid they are going to leave money on the table or pay too much.

If you have reasonably evaluated your case, you can make incremental moves that will logically bring you to the point of resolution without suddenly having to lose face by either dropping your demand or increasing your offer precipitously to avoid having the other side walk out. Having to do this adversely affects your credibility in future cases and future mediations. In addition, if you negotiate in a manner that allows you to be just a little above or a little below the true value of the case when you get to the “crunch point” of the negotiations, then you have a much better chance of either receiving a little more than the claims representative came to pay or paying a little less than what the plaintiff wanted.

I cannot emphasize enough that if the other side is being unreasonable or is erratic and illogical in the offers or demands they are making, that does not mean that you have to be equally as unreasonable in your responses. It is often better not to let the other side dictate your strategy. If you have properly evaluated your case, and your client and you feel comfortable in your position, you can continue to make logical, well thought out moves in your settlement negotiations and put the other side in a position of risk where
they have to realize they must change their tactics or lose the opportunity to settle the case for a reasonable amount of money.

If you go into a mediation well prepared, with your client agreeing on the value of the case and with a sound strategy on how you will proceed with negotiations, you have a much better chance of maximizing your recovery, confirming your credibility with the other side and having a satisfied client.

Good information is always helpful in arriving at a decision. Whether you settle your case before trial or the case goes to verdict, please consider providing the facts about the case, settlement negotiations, verdict information and jury comments to settlement and verdict reporting services and other attorneys, so there is as much information available as possible for attorneys, claims representatives and parties to utilize in making a good decision when preparing for settlement negotiations or trial.
I am sure you are wondering what is wrong with the author of this article. After all, what in the world does voir dire have to do with mediation? In fact, it has a lot to do with it.

Is your client or the opposing party a racial minority; a corporation; a female; an attractive female; a motorcyclist; a bicyclist; a truck driver; overweight; an apartment complex owner; a developer or fit into any other category where potential jury bias could come into play at trial? What kind of bias are we talking about? How are we going to address that potential bias in voir dire? To properly evaluate your case for mediation, you will need to objectively evaluate your ability and opportunity to identify and overcome those biases that could significantly affect the outcome of the trial of the case.

You must first determine what potential bias may come into play at trial. Studies reflect that bias comes in multiple forms. There are explicit biases, which are attitudes and stereotypes that are consciously assessable through introspection and endorsed as appropriate. If these biases are generally accepted in the community, a potential juror may freely acknowledge this bias when questioned about it in voir dire. If it is not generally accepted, the potential juror may very well not acknowledge this bias; particularly if just general questions are asked.¹

Studies reflect that many jurors when asked will say they have no particular bias against corporations, but if presented with this statement, “If a company could benefit financially by lying, it’s probable that it would do so”, more than 80% of the people polled answered yes.² Studies reflect jurors return larger verdicts against corporations
than even wealthy individual defendants. This is not necessarily because of the financial condition of the corporation, but because jurors believe a corporation should be held to a higher standard of care than an individual. How does this sync with most jurors denying they have any particular bias against corporations? When questioned on the telephone, 60% of persons polled will admit they do not believe in the tenet that persons charged with a crime should be presumed to be innocent. The majority of those people would not admit this when questioned in voir dire.

It is often difficult to ferret out potential jurors with an explicit bias. Depending upon what the presiding judge allows you to ask or do in voir dire, it may be impossible to identify jurors with an implicit bias that might affect the outcome of the case. Implicit biases are attitudes and stereotypes that are not consciously accessible through introspection; it is a subconscious bias for which the person having it is not even aware. General, and even specific, questions about this type bias will not illicit a positive response from the person. Even if the person recognizes through questioning he or she may have this bias, they may not acknowledge it because they may feel that it might reflect poorly on them; particularly if they are questioned in front of other potential jurors.

Even though the person is not aware of the bias, studies clearly reflect when placed in a situation where that bias comes into play, the subconscious will affect that person’s thought processes and ultimate decisions. Mental activities that are affected include perception, forming of impressions, processing of information, use of information and retrieval of information; obviously all of these play a significant role in how a juror reacts to the evidence presented and his or her deliberations in the jury room.
Studies have indicated that making potential jurors aware of the existence of implicit bias and its effects can help reduce the impact of this type of bias. Implicit Association Tests have been developed to help identify these hidden biases. Examples of this testing can be found at [https://implicit.harvard.edu/implicit/](https://implicit.harvard.edu/implicit/). The tests ask questions or have the person respond to certain visual stimuli that are designed to identify implicit biases. The studies have shown the ability to identify implicit bias is significantly better utilizing the tests as opposed to self-reporting. The tests can be administered in as little as 10 minutes.  

Over 6 million IATs have been administered, and the test results consistently show the majority of people prefer whites over blacks (if the test taker is White, Asian or Hispanic), young over old, light skinned over dark skinned, other peoples over Arab-Muslims, thin people over obese people and straight people over gay people. Social cognition research suggests that over eighty percent of American whites and Asians demonstrate at least unconscious bias in favor of whites compared to blacks. Additionally, mock juror studies reveal that this anti-black bias routinely influences verdicts and sentencing in cases in which a juror’s race differs from the defendant’s. As litigators, we are not surprised by these results. The key is identifying those people so they can be the subject of either a challenge for cause or a preemptory strike. Unfortunately, the legal basis that must be met for striking someone for cause is not very conducive to successively striking someone with an implicit bias.

There is a push in some areas to educate potential jurors about implicit bias and to administer IATs to potential jurors during their orientation before they are called to a courtroom to participate in voir dire. The primary use of these tests has been to
educate the potential juror on what unconscious biases he or she might have, how implicit bias may affect decision making and to provide additional information to the attorneys to assist in the voir dire process. Some courts have developed specific jury charges on implicit bias, the possible effect it can have on decision making and the need to try to avoid implicit bias playing a role in the jury’s deliberations. It is thought this may serve to assist each member of the jury panel serving as a check and balance on the potential biases of other jurors.¹²

I am not aware of any court system in the Atlanta area that administers these tests or even addresses the existence of implicit bias. Would your presiding judge be open to a motion to have the tests administered? Even if the judge would allow the testing, in all likelihood the cost and logistics of administering the testing would be the responsibility of the moving party. A decision would have to be made on whether the potential value of the case would justify the expense involved. In making this determination, it must be understood the best developed IAT’s do not always accurately identify the presence of implicit bias.

To try to identify implicit biases without Implicit Association Tests, you must be allowed to ask many more subtle questions that identify beliefs, actions, lifestyles, preferences, etc. The presiding judge would need to allow you to ask questions about club and organization affiliations, what the juror reads, what news they follow, their political party affiliation, what they do with their leisure time, what means of transportation they use, what radio stations they listen to and other similar type questions that might reveal hidden biases. For this to be most effective, each juror would need to be questioned individually, outside the presence of other jurors.
Considering the potential for both explicit and implicit biases to significantly affect the outcome of the trial when you are representing a client that comes within known biases, you must take this into consideration when preparing for mediation. Before mediation, ask yourself: What is the most likely composition of the potential jury panel based upon the venue of the case? What role will the efforts of tainting a potential juror about the need for tort reform play in jury deliberations? Is the case in State or Federal court? Will the presiding judge conduct most of the voir dire questioning? Will the presiding judge consider having Implicit Association Tests administered and education of the potential jurors about the existence and effect of implicit biases? Will the presiding judge allow you to question the potential jurors individually and in detail? Is the case large enough to justify spending the time and expense necessary to weed out the biased jurors if possible? Will you be able to identify the potential jurors which have a bias that could affect the outcome of the trial and remove them from the jury panel? How do you present your case in such a way to best address these known biases that will come into play even if you are as successful as you can be in eliminating biased jurors in voir dire?

An honest and objective assessment of these questions is essential in properly evaluating your case. It is also essential that you address these issues with your client before the mediation so the client can have a realistic perspective on the value of the case. Although at first glance, it would appear that the intricacies of voir dire are something to consider only if and when a mediation fails to resolve a dispute, in fact considering bias and the role it may play in your case at trial may very well determine whether a case settles at mediation or not.
It is beyond the scope of this article, but I recommend you read the article found at this link: http://www.jurybiasblog.com/2011/04/are-jurors-influenced-by-what-they-wish.html. It is an article on how juror’s perception of and reaction to evidence, including expert witness’ testimony, is influenced and shaped by what they wish to believe, and how you should frame your presentation and evidence at trial to account for this.


6 Kang et al., supra, p. 1132.


12 Robert, supra, pp. 847-860.
I have been practicing law for almost 39 years. Nineteen years ago, I started mediating part-time and now mediate the majority of the time. I can honestly say this does not make me an authority on anything, but this would probably be enough to get me past a Daubert challenge to my pontificating on my thoughts on opening sessions in mediations.

Obviously, as an attorney and as a mediator, I participate in opening sessions in mediation on a regular basis. As a mediator, I say in my opening comments that neither party is here to make the other party mad, but that both sides need to know from where the other side is coming so an informed decision about whether to settle or try the case can be made and so I can do my job as a mediator. In short, I lay it out that I am asking, as the mediator, for both sides to tell the other side the good, the bad and the uncertainties of the case. It is an open invitation for both sides to candidly, but constructively, lay out their positions.

Typically, plaintiff’s counsel goes into great detail about the fault issues, if any; the injuries plaintiff sustained; the extensive treatment plaintiff has received; the amount of medical expenses and lost wages; and why a significant amount of money is warranted. As a mediator, I have been seeing over the past few years more and more defense counsel respond to this information by saying they are sorry about the accident; are at the mediation in good faith; are here to try to get the case settled for a reasonable amount of money; and have come with an open mind.

Plaintiff’s counsel never has a problem with utilizing the opening session to try to sway the claims representative. They typically do not pull any punches and take the opportunity to shed the best light on their case. I understand a claims representative does not have the personal involvement in the case that a plaintiff has. I understand there is a concern about making the plaintiff angry and defensive. I understand there are times when you want to hold some, or many, of your cards to play them out as the mediation progresses. I understand there is some thought that plaintiff will accept things better coming from the mediator as opposed to the defense attorney. All of these things are legitimate issues to consider, but should they trump your only opportunity to speak unfiltered to plaintiff? You can even direct your comments to the mediator rather than the plaintiff, but you are still giving the plaintiff the opportunity to hear the defense’s views of the case.

As an attorney at mediation, I typically present my position to the plaintiff and plaintiff’s counsel in the opening session. If justified, I will use a power point presentation. A power point can be very effective in some cases, because plaintiff not
only hears, but sees, the information, inconsistencies, lack of physical damages to the vehicles and other hurdles with which they will be faced if the case goes to trial.

In opening session, I will talk about the things we are taking into consideration in evaluating the case; what questions and concerns we have about plaintiff’s case and position; what evidence we believe the jury will consider during trial and in jury deliberations; whether the venue is good or bad for the plaintiff and us; the time and expense involved in getting a case ready for trial and what hurdles each side must overcome in presenting their case to a jury. I do my best to present my comments in a constructive way. I tell them that they need to know from where we are coming, and that I feel I have a responsibility to let them know our position as opposed to having it come from the mediator. I do my best to present my comments while showing respect to the plaintiff’s position and what they have, or feel they have, gone through. I try my best to not appear to be talking down to them or to appear I am judging them as a person. I try to present everything as what I think a jury will be considering and thinking about in arriving at a verdict if the case goes to trial.

I sometimes hold some things back to use as the mediation moves forward, but I typically will reveal most, if not all, of my arguments before the end of the mediation. Currently, very few cases go to trial and the best time to settle a case is at mediation and trial by ambush is hard to do with discovery and pretrial orders being as extensive as they are now. I truly do attend a mediation with the thought that if things are handled properly by the attorneys, the claims representative and the mediator, the case can be settled for a reasonable amount of money.

Is this a tight rope walk? Yes. Could it backfire? Yes. Is this the approach that everyone should take? No. Is this an approach everyone should consider? Yes. Why do I say this? If you do it properly, no one can present your position like you can. Doing this forces you to prepare for the mediation, and plaintiff and plaintiff’s counsel will know you will be prepared for trial if it comes to that. If you do not lay these things out, you will spend a significant amount of time telling the mediator what needs to be conveyed to plaintiff. Also, if the mediator does not know from where you are coming, he or she cannot do her job. I always use a mediator that is recommended by plaintiff’s counsel. If I can convince the mediator about our position and give the mediator the information to support our position, that goes a long way to getting the case settled. I find if this is done properly, plaintiff may very well appreciate that you have shot straight with them and have taken the time to talk with them in an informative and non-demeaning manner.

As a mediator, I have seen this approach handled well. When it is not handled well, I end up spending a lengthy period of time trying to get plaintiff off the ceiling and to think about the case in an non-emotional way as possible. There is no cookie cutter way to handle a mediation or a trial. You must consider the case, consider the plaintiff and consider the emotional issues in the case. If you are going to lay your case out in opening session, you definitely need to have the mediator set it up that he or she is
asking all parties to lay their cards on the table. You also need to let plaintiff’s counsel know ahead of time that is what you intend to do, so he or she can discuss this with the client and prepare them for your comments. Hopefully, you are working with an attorney that knows it does neither side any good for their client to get angry. This makes it incumbent upon you to be constructive and non-confrontational in your comments, so plaintiff’s counsel does not feel like he or she has opened their client to being unfairly attacked.

I understand why many attorneys don’t say much in opening session. It is the safest approach and only you can decide what you feel comfortable doing and whether you can walk that fine line of telling the plaintiff what they need to hear without alienating them. You face these same issues when you are deciding how you are going to approach the trial of a case. All I can say is give it some thought, be aware of your abilities and limitations and be open to walking the tight rope. Done properly, it can be very effective and can go a long way to getting a case settled at mediation.

As a final thought, as a mediator and as an attorney, if there are good attorneys on both sides and a good mediator, and there are not significant client control issues with the plaintiff, I also talk about both sides getting to their “crunch point” in three or four moves. I find there is the same gap for the mediator to deal with whether there are fifteen moves or three moves. This approach can save a lot of time and money and can lead to smooth landings because both sides do not have to guess how many moves it is going to take to get to the “bottom line”. Obviously, if you do this, you need to think carefully and strategically about what your three or four incremental moves will be to get you to the crunch point. Unfortunately, this is really a topic for another article, because I do not have sufficient space to go into any detail about this approach.

I hope you will consider my suggestions the next time you are preparing a case for mediation. I have seen many cases successfully resolved because the lawyers and the mediator were not afraid to really discuss with the parties the pros and cons of the case. You may be surprised with how much better a mediation goes when you choose not to be safe.
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Is the Trend Toward Mediation A Flaw in the Legal System?

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For many years, plaintiff and defense attorneys settled most cases by negotiating between themselves, without their clients being present and without mediation. The fact that most cases are no longer settled in this manner is viewed by some attorneys as a flaw in the legal profession or in the legal system. Is this change bad and is it really a sign of some flaw? As a practicing attorney for 33 years and as a mediator for 12 years, I believe the answer to both questions is no.

The Way It Used to Be

At one time, many cases were filed shortly after plaintiff’s counsel received the case, and the claims representative would immediately forward the case to defense counsel to be defended. This method of handling cases has changed significantly on the part of both plaintiff’s counsel and insurance carriers. The plaintiffs’ bar has become much more proactive in providing to insurance carriers the necessary liability and damages information and documentation before filing a lawsuit, in an effort to obtain an early, less time consuming and less expensive settlement. The insurance companies have employed significant numbers of pre-suit claims adjusters to evaluate the information provided by plaintiffs’ counsel and to arrive at a settlement that avoids the time and expense of a lawsuit that has to be defended by defense counsel.

Today’s Reality

In reality, the vast majority of lawsuits are still settled without mediation, but the settlement negotiations now typically occur between plaintiffs’ counsel and pre-suit claims adjusters, rather than defense attorneys. Those cases that do not settle in this manner usually are more complex; have significant unclear liability, damages and/or legal issues; have issues of miscommunication between plaintiffs’ counsel and the pre-suit adjusters; and/or there are client control issues on one or both sides. These are the types of cases that are difficult to settle by settlement negotiations between plaintiff and defense counsel and are well suited for mediation.

What is it about the mediation process that makes it well suited for these types of cases? What needs to be taken into consideration when deciding whether to submit a case to mediation and in selecting the mediator? Mediation provides the opportunity for plaintiff, counsel for plaintiff and defendant and, ideally, the insurance claims representative to meet face-to-face for the first time to discuss the case and to get personal insight into the parties involved and what hurdles have to be overcome to get the case resolved. Mediation provides the opportunity for plaintiff’s counsel to make arguments directly to the claims representative either in person, by telephone or through a video connection. The mediation process provides the opportunity for defense counsel to present their case directly and unfiltered to plaintiff.
Preparing As Though the Case Is Going to Trial

Plaintiff and defense counsel must be prepared to take advantage of this opportunity to present their positions directly to the decision makers. This is an opportunity that will never present itself again, because if the case goes to trial, the ability to present unfettered positions will be significantly impacted by the presiding judge and the rules of civil procedure and evidence. Counsel should be prepared for this opportunity as well as they would be prepared for trial, because with the extremely high percentage of cases that settle before trial, this will be the best opportunity counsel has to “win” his client’s case.

The Advantage of Visual Aids

PowerPoint presentations, even in smaller cases, if properly done, can be very effective in presenting arguments in a way that can be heard, seen and understood by the other side. Care must be taken in preparing the PowerPoint presentation, but as a lawyer becomes more proficient in using PowerPoint, the time and effort in preparing the presentation becomes less and the impact of the presentation becomes greater. Preparing a PowerPoint presentation makes the attorney review the case in detail before mediation and allows the attorney to pare the case down to its most essential elements. It gives the attorney the opportunity to think of the most effective way to persuade the other side. This detailed and thorough preparation for mediation not only is the best way to get the case settled, but it also shows the other side that if the case does not settle, that attorney is prepared for trial and will be persuasive in his or her presentation and arguments to the jury.

Showing Concern for the Plaintiff

Mediation also provides the defense attorney and claims representative the opportunity to show plaintiff they are concerned about what happened to plaintiff, no matter the cause, are willing to consider the case with an open mind and are human beings and not just some uncaring corporate entity. It is essential that defense counsel and the claims representative approach this part of mediation with sincerity and credibility. If these efforts come across as insincere and contrived, there is no quicker way to significantly impede the ability to settle the case.

Picking the Right Mediator

Obviously, an essential element for a successful mediation is a knowledgeable, effective and efficient mediator. Even though a mediator cannot force any one at the mediation to do anything, a mediator can often play a significant role in guiding the parties to resolution. Neither side should take the choice of the mediator lightly. It is in your client’s and your best interest to have a mediator that opposing counsel respects and trusts. If opposing counsel respects and trusts the mediator, and you have been effective in convincing the mediator of the important elements of your position, it will be difficult for opposing counsel to disregard what the mediator has to say.
It is important for all sides that the mediator has experience in the type of case that is being mediated, and that the mediator can effectively and in a constructive manner get across to each side the hurdles that will have to be overcome and the factors that the jury will take into consideration in arriving at a verdict. You and your client may not like what the mediator has to say, but a mediator who does not provide a neutral, impartial perspective of the good, the bad and the ugly of your case is not doing their job and is not providing the services your client deserves and should expect. The importance of a quality mediator for your client and ethical obligations to zealously represent your clients without interference from others makes it essential that you put forth your best effort to agree upon and utilize the best mediator for the particular case.

**Giving the Plaintiff His “Day in Court”**

Another significant benefit from mediation is the plaintiff effectively gets his or her day in court without the stress, strain and risks of a trial. If the process works as it should and the mediator does a good job, the plaintiff should feel that she has been heard and should have a good understanding, even though she may not agree, of why the settlement was in a certain range. It is often easier for a plaintiff to understand and accept a mediated settlement which has been discussed thoroughly before settlement is reached as opposed to a jury verdict which has been decided upon behind closed doors.

**Conclusion**

As opposed to being an indication of a flaw in the profession or legal system, mediation is a beneficial progression in the settlement process and can often result in a better informed and more accepting client than when negotiations are carried out with no active involvement by the plaintiff.

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