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Sharing information at mediation

A DISCUSSION OF THE RULES THAT GOVERN THE SHARING OF INFORMATION AT PERSONAL-INJURY MEDIATION, INCLUDING THE BENEFITS AND RISKS

Mediation can be a tremendous opportunity for the parties to explore a path to resolution. Each side has a chance to assert its best arguments, listen to the other side, gather input from the mediator, and discuss potential alternatives to trial. While the process can be valuable, there are certain risks associated with sharing information at mediation. One of those risks is the risk that you do more harm to your case than good. For example, sometimes sharing information helps the other side better prepare for trial. Sometimes it leads to an effective change in trial strategy by your opponent. Or it might inspire a motion to exclude evidence that would otherwise not have been brought. Since there are both benefits and risks to sharing information at mediation, deciding what to share can pose a serious dilemma for the attorney.

This article discusses the rules that govern the sharing of information at mediation, the benefits and risks of doing so, and offers some guidance about how to make the right decisions in this very difficult stage of handling a personal injury case.

The basic rules

The rules that govern the use of information shared at mediation are found in three main sources: 1) ethical guidelines; 2) state and federal laws and rules; and 3) agreements between participants.

Ethical standards

As for ethical guidelines, California mediators are not subject to mandatory standards such as those applicable to attorneys or CPAs. In fact, California mediators are not licensed or regulated by the state. However, there are certain voluntary standards that almost every mediator follows. The ABA has adopted the "Model Standards of Conduct for Mediators," which are widely recognized. These standards include confidentiality requirements. Section A of Standard V of the Model Standards provides that: "A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law." Section B further provides that, "A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person." In other words, ethically, a mediator should never share information communicated to the mediator by a participant without express permission to do so.

Statutes and rules

Mediation confidentiality is also enforced through various statutes and rules. Evidence Code section 1119 (a) provides that, "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery . . ." Section (b) provides that, "No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation, is admissible or subject to discovery . . ." And section (c) states that, "All communications, negotiations, or settlement offers by and between participants in the course of a mediation or mediation consultation must remain confidential." In addition, section 703.5 disqualifies a mediator from testifying as a witness regarding any "statement" or "conduct" occurring "at or in conjunction with the mediation," and section 1121 provides that "[a] mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body."

California also has a general confidentiality provision related to settlement negotiations. Evidence Code section 1152(a) excludes evidence of settlement offers and "any conduct or statements made in negotiation thereof" *to prove liability against the offering party*.

Mediation confidentiality is enforced a bit differently in the federal system. There are no federal, mediation-specific statutes or rules. Instead, confidentiality is provided through Rule 408 of the Federal Rules of Evidence which deems inadmissible "a statement made during compromise negotiations" offered "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." The Rule is similar to California's Evidence Code section 1152. Note that the rule does not ban *discovery* of mediation communication. Nor does the rule exclude evidence of such communication in all circumstances; only when offered for certain identified purposes (i.e., to prove or disprove a claim or impeach a witness). In fact, Rule 408(b) expressly allows for the admission of settlement communication if offered for a reason other than those identified in Rule 408(a).

Confidentiality agreements

Participants at mediation may also be asked to sign a "confidentiality agreement" before the session begins. While the terms of these agreements are often redundant with other confidentiality rules, in some instances, the scope of confidentiality is expanded or modified. These agreements can also include additional restrictions such as an agreement not to record mediation communication or not to disclose information to third parties.

Use of shared information for other purposes

Confidentiality is enforced by prohibiting the *admission into evidence* of the mediation communication. But you

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should be aware that the rules do not prevent the use of shared information for other purposes. For example, if I share a life-care plan with opposing counsel detailing a number of future care modalities, nothing prevents opposing counsel from discussing those items with his or her expert after the mediation. If I share the identity of a potential witness, nothing prevents opposing counsel from subsequently interviewing or deposing the witness. If I share the source of potentially relevant evidence, such as the existence of records in the possession of a third party, the other side could certainly subpoena those records later on. In fact, no confidentiality statute or rule prevents a participant from disclosing mediation communication. You should never confuse admissibility restrictions with use restrictions. The rules prevent only one type of use (admitting the communication itself into evidence).

The "reserve setting" process

Before evaluating the sharing of information at mediation, it is important to take a step back and understand how insurance companies value cases. When a new claim comes in, an adjuster is required to set a "reserve" on the case. This is an estimate of the amount of money it will take to resolve the case (i.e., the "value"). The adjuster will look to the complaint and any information available at the time the claims file is opened (e.g., police reports, medical records, photographs, etc.) to set the reserve. You might get a call from an adjuster early on in the case inquiring about case details. They are not just pestering you. They are doing their job to establish an accurate reserve.

The reserve is important because it sets a boundary for what the insurance company will pay. Rarely will a case settle substantially above the reserve. Adjusters and their supervisors are evaluated in part on how accurately they set reserves, and on whether they can resolve a claim within the reserve. Many of you have encountered situations where an adjuster is stubbornly stuck at a certain number, even though, from a pure economic standpoint, the gap between that number and your demand is trivial. You have likely hit the reserve.

There are certain criteria that the insurance companies use to set reserves. Adjusters rely on claims handling manuals and software programs to value the case. To properly set reserves, the adjuster will want to know the venue, the age of your client, the number of potential plaintiffs (e.g., how many heirs there are in a wrongful death case), whether there are any other at-fault parties, whether there were any preexisting conditions, whether your client sought immediate medical attention, whether the client is still treating, what the past medical expenses are, plans for future care, any specific diagnoses, and loss of earnings to date, among other things. Generally speaking, permanent and residual losses will drive up the case value.

You should know that the reserve can be adjusted during the life of the case based on new information. However, this is not a terribly efficient process. The reserve is typically reviewed on a periodic basis. It does not adjust automatically as the case evolves. This is why it is so critical to get information to the insurance company as early as possible. Your goal should be to have the reserve set as high as possible from the get-go, and then constantly try to push it higher before you appear at mediation. Showing up with great arguments and evidence at the mediation is often too late to significantly shift the adjuster's authority. Insurers are just not as nimble as the plaintiff's side at mediation.

The pros and cons of sharing

Arguments for disclosure

There are several reasons that disclosing information with an opposing party at mediation can be to your advantage.

First, in a personal injury case, the defendant and/or defendant's insurance company will not pay money to compensate the plaintiff without seeing the evidence. This seems obvious, but unfortunately it is often lost. I can't tell you how many times I've seen plaintiff's counsel show up at mediation talking about evidence or potential damage models that the attorney does not want to share with the other side. Such information is totally useless if not shared with the other side. No insurance company, adjuster or defense lawyer is going to rely on your vague assurances about what to expect at trial.

Second, laying your cards on the table at mediation can help the other side connect the dots. As a plaintiff's lawyer, you have studied and evaluated your theories and the supporting evidence from the start. You know your case and where you plan to go. The defense attorney is not in your mind. He or she is often in the dark, at least until substantial discovery reveals your intentions. I am routinely amazed at the disconnect between the case plaintiff plans to present, and the case the defense thinks the plaintiff plans to present. This discrepancy is not a good thing at mediation.

Third, disclosing information can be a smart tactical move. Generally speaking, the other side is always trying to gauge plaintiff's true evaluation of the case and how committed you are to trying the case. Being transparent about your case can demonstrate confidence. It may convince the other side that you are eager to try the case (which can generate higher offers). In particular, when you show the other side that you've invested time and money in your case, you are saying that you are willing to go the distance.

Fourth, sharing information at mediation gives you an opportunity to hear what the other side has to say about it. You may decide, after hearing the response, to modify your trial strategy. You may decide to abandon a theory altogether. Better to learn the problems with your case in mediation than in the middle of trial.

Arguments against disclosure

There are also certain risks associated with disclosing information at mediation.

First, as discussed above, while the communication itself is not admissible,

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the information shared can be used by the other side to better prepare for trial. If, for example, you disclose that you have a safety expert who has conducted certain testing on a product, the other side will now likely consider retaining its own expert on that issue and conducting its own testing. If you tell the other side about witnesses who have yet to be disclosed, you should expect those witnesses to be interviewed or deposed. If you share a report, while the report itself is not admissible, you should expect the other side will now study that report (perhaps with the help of an expert) to eventually refute or challenge its content. Particularly for the defense (which is not bringing the case, but mostly reacting to your case), more information is generally better.

Second, you should expect that your opponent will use your mediation brief as a blueprint for future motions in limine. If there is evidence that is arguably inadmissible, you have now given your opponent a heads up to better brief and argue the issue before the start of trial.

Third, having the other side better understand your case is not always a good thing. Your opponent might feel emboldened once they learn your theory or evidence. Sharing information can also remove or alleviate concerns about being surprised at trial or uncertainty about how to defend the case, which can work against you. Frankly, sometimes it is better when the other side does not fully understand your case.

Decision-making

So, how do you balance these competing interests and concerns? There are a few steps you can take to improve your decision making.

First, identify your goal in participating in the mediation in the first place. For example, is your goal to get the case settled? Is your goal to set the stage for a settlement later on? Are you doing it to learn information from the other side? Or are you simply "checking the box" that you have formally explored settlement? The more committed you are to resolving the case at mediation, the greater incentive you have to share information.

Second, identify each item of information that you are considering sharing with the other side and analyze each item separately. Your decision-making relates to information the other side likely does not have; not all information. Also, you may decide to share some of this information but not all of it. This is not an all-or-nothing exercise.

Third, once you have decided what you will and will not share, develop a game plan to carry out your decisions. If you provide the mediator with information in writing that you do not want shared with the other side, be sure to make that clear to the mediator. Consider serving a brief on the other side with information you want to share, and a separate letter to the mediator containing information you want to remain private (though, as discussed below, you are unlikely to benefit in settlement from information you do not share). Remind the mediator at mediation not to share information you want kept private, especially if you discuss new information not already disclosed.

Communication in mediation often takes on a casual dynamic. This creates the risk of a misunderstanding (i.e., that the mediator assumes you want something disclosed when you do not). Always be clear about what you do and do not want shared.

Fourth, be prepared to change your mind. From time to time, participants are surprised by developments at mediation. You may have entered mediation not expecting to make much progress, only to find that the other side is willing to come much closer to your position than you expected. Sharing previously undisclosed theories, claims or evidence may help close the gap. One of the most important skills of a good litigator is the ability to adjust to changing circumstances. Don't be afraid to modify your plan if it makes sense to do so.

Conclusion

Deciding what information to share with the other side at mediation can be difficult. While you need to disclose information that supports your client's claims to get paid for those claims, you also don't want to jeopardize your case in the long run if the case does not settle. Knowing the rules that govern the sharing of information is important. Understanding the benefits and risks is also critical. Armed with this information, you can put together an effective game plan, willing to modify your plan if appropriate. There is no "right" answer when making these decisions. But following this basic approach can help ensure you make the best decisions possible.

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